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(Ms) Olga Nakajo
CERD Secretariat
Treaties and Commission Branch
Office of the High Commissioner for Human Rights
United Nations Office in Geneva
Room 1-020, Palais Wilson
CH-1211 Geneva 10

DELIVERED BY E-MAIL: onakajo@ohchr.org

Dear Madam Olga:

RE: CONSIDERATION OF STATE REPORTS: CANADA

We greatly appreciate the Committee requesting further information and restating concerns that other UN Committees have voiced vis-à-vis Canada during the last reporting period. This report is directly in response to these questions stated by the committee and because as indigenous peoples from Canada we continue to face human rights violations and discrimination because Canada's policies still aim at "Non-recognition and Extinguishment" of our inherent rights and Aboriginal Title. We especially want to address the following question:

Please comment on the concern expressed by the CESCR in its concluding observations that the new approaches adopted by the State party to the issue of the Aboriginal rights on land and resource ownership do not differ much from the previously taken extinguishment and surrender approach. Please indicate whether the State party has completed its study of other approaches based on recognition and coexistence of rights.

The UN Committee on Economic Social and Cultural Rights (CESCR) inscribed these concerns in their concluding observations of Canada in 2006, after it had heard from Canadian officials and after it had specifically requested information, similar to the above

request, namely:

The State party indicates that, since 1998, it has withdrawn the requirement for an express reference to extinguishment of Aboriginal rights and title either in a comprehensive claim agreement or in the settlement legislation ratifying the agreement. According to the Special Rapporteur of the Commission on Human Rights on the situation of human rights and fundamental freedoms of indigenous people, however, 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."

The federal government in this case, although they made submissions, trying to limit the Aboriginal right to self-determination, did not provide specific information how they implemented the right to self-determination and as already stated in the INET shadow report then, the description of the federal land rights policies, could not alleviate the concerns of the committee or indigenous peoples since they still resulted in de facto extinguishment and no alternative approaches to enable co-existence amongst indigenous peoples and settler population were presented since no such policies are currently in existence. Leading the CESCR to conclude, that:

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."

The CESCR had just 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 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.

These concerns in return had also been reiterated 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, INET submitted shadow reports to all the above committees, including the last CERD hearing on Canada in 2002, and we welcome the continued involvement and follow-up of the respective UN Committees and Human Rights Bodies. The concluding observations document a record of racial discrimination and human rights violations against indigenous peoples in

Canada. We 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. In 1997 in the Delgamuukw Decision the Supreme Court of Canada unanimously recognized Aboriginal Title, as the inherent 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 cede and surrender of Title over their traditional territories. This policy has not changed since 1997 or replaced by new approaches that focus on recognition of Aboriginal Title and co-existence, as recommended by a number of UN bodies. The Comprehensive Land Claims Policy is also the policy underlying the British Columbia Treaty 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 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 Land Claims Policy, but have been flatly rejected. They are left with no other venue than to take their concerns international.

INET has made a number of submissions to the Committees on the Elimination of Racial Discrimination, on Human Rights, and on Economic, Social and Cultural Rights, all including information about discrimination and human rights violations against indigenous peoples in British Columbia. Most recently we have made a submission to the UN Special Rapporteur on the on the situation of human rights and fundamental freedoms of indigenous people. The Special Rapporteur came on an informal visit to Canada in 2003 partly hosted by INET and on an official visit in 2004. He returned in October 2006 to assess the implementation of his and other human rights bodies' recommendations and to find more information on why Canada opposed adoption of the UN Declaration on the Rights of Indigenous Peoples. As the Committee will recall the Special Rapporteur 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" and the different UN Committees in turn had shared this concern. INET prepared a comprehensive report

detailing the clauses of concern, especially on extinguishment, in a number of agreements currently being prepared under the British Columbia Treaty Process. The report also explains how Canada's human rights violating policies on indigenous rights are the reason why they oppose the adoption by the UN General Assembly of the UN Declaration on Indigenous Peoples as already agreed upon by the UN Human Rights Council in July 2006. We enclose a copy of this report as it contains a comprehensive answer to a number of the questions, especially in regards to extinguishment, posed by the Committee.

Sincerely,

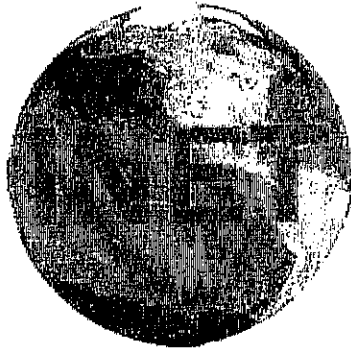


Arthur Manuel,
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Atch.

cc Mr. Rodolfo Stavenhagen, UN Special Rapporteur on fundamental freedoms
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Indigenous peoples and organizations



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REPORT on CANADA'S SELF-GOVERNMENT + LAND RIGHTS POLICIES at the ROOT OF CANADA'S OPPOSITION TO THE UN DRAFT DECLARATION ON INDIGENOUS RIGHTS

**Includes a Status Report and Analysis of the Canada
Land Claims Policy and the British Columbia Treaty
Process**

**SUBMITTED TO: Mr. Rodolfo Stavenhagen, UN Special Rapporteur
on the Situation of human rights and fundamental
freedoms of indigenous peoples**

**SUBMITTED BY: Arthur Manuel, Spokesman, Indigenous Network on
Economies and Trade (INET)**

DATE: October 1, 2006

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I. CANADA'S POLICIES UNDERMINE INTERNATIONAL MINIMUM STANDARDS

The following report will provide background on Canada's policies on land rights and self-government which the federal government claims as the reason why they cannot sign on the UN Draft Declaration on the rights of indigenous peoples. It is true the maximum that Canada is ready to negotiate in new agreements dealing with both land rights and self-government do not meet the minimum standard set out in the UN Draft Declaration. The policies prescribe a large number of exclusions and limitations as to issues that can even be discussed. The mandate of the federal negotiators is severely limited and restricted. All these limitations, and especially the requirement to extinguish Aboriginal Title violate international human rights standards and do not meet the minimum standards enshrined in the UN Draft Declaration on Indigenous Peoples. In addition the Nisga'a Agreement from the late 1990s serves as a blueprint for all current negotiations under the British Columbia Treaty Process. To date no agreements have been signed under this process, but a number of nations have reached the Agreement in Principle stage when the members have to vote on the framework. In the past the people have voted down Agreements in Principle because they do not agree with the fundamental principles enshrined in the negotiation process. Currently we are seeing a new push to get Agreements in Principles sold and approved. British Columbia and the media have been really playing up the fact that Tsawwassen First Nation is about to proceed to vote on the Tsawwassen treaty settlement agreement. Therefore this report will review the Tsawwassen First Nation Agreement-in-Principle (AiP). The Tsawwassen AiP in turn will be compared to the Nisga'a Final Agreement and other AiPs currently under debate.

It is important to understand the Nisga'a Final Agreement and the AiPs in light of the concluding observations of a number of UN Human Right bodies who condemned Canada's extinguishment policy. Their observations support those indigenous peoples who have deliberately decided not to negotiate with Canada under the current terms and instead to uphold the principle of self-determination and their land rights as provided for in the UN Draft Declaration on Indigenous Peoples. First Nations in Canada need to be very careful about negotiating and not negotiating has to be considered as an alternative. It is not negative or irresponsible if you decide not to negotiate with someone whose policy is to extinguish your very existence as peoples and steal your very resources from under your feet. On the contrary it is totally irresponsible to force indigenous peoples to negotiate under a policy that will lead to the extinguishment of your existence. This is what the international community is saying in the concluding observations of various UN human rights bodies on indigenous rights violations in Canada and also in the UN Draft Declaration that aims at upholding principles which are key to our indigenous existence.

It is very difficult to understand the level of frustration indigenous peoples in Canada experience when they see the devastation of their traditional territories and have no mechanism available to address their concerns. It is clear that there are basically only two ways to resolve outstanding Aboriginal Title issues. You either resolve them through going to Court or by negotiating under the existing Comprehensive Claims Policy. The real crux of the problem is that if Indigenous peoples do continue to use their land they will lose it.

II. CANADIAN SELF-GOVERNMENT VERSUS SELF-DETERMINATION

One of the main reasons why the Canadian government currently opposes the UN Draft Declaration is the recognition of the right of indigenous peoples to self-determination. Although this right has already been guaranteed to all peoples in the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, Canada has historically opposed the application of this international right to indigenous peoples and had pushed for the limitation of this right in the Draft Declaration on the Rights of Indigenous Peoples. On the national level the government of Canada has articulated the maximum they are ready to negotiate in its policy on the "inherent right to self-government" and it clearly does not meet the minimum standard articulated in the UN Draft Declaration on the Rights of Indigenous Peoples especially the right to self-determination. In the last decade we have seen an increased debate about legal pluralism, especially Latin American countries have inscribed the principle in their constitutions. Every little limitation or restriction, such as making indigenous jurisdiction subject to international human rights standards or the national constitution, will lead to a big debate. Canada on the other hand unilaterally introduced a policy and so many exclusions and limitations that the only model they will accept is one of delegated authority that puts indigenous authority under provincial or federal control.

This will become evident in the following review of the modern agreements and agreements in principle currently negotiated under the British Columbia Treaty Process that all have to accept all kinds of exclusions and limitations as a pre-condition of even entering into the negotiations. The following listing shows which issues are even negotiable, or so to say what is on the table, what possibly can be put on the table and what has been categorically excluded. The following categories coupled with the non-recognition of Aboriginal Title and the land selection policy excludes fundamental matters regarding the national economy. These issues must be addressed if we are going seriously change the conditions indigenous peoples are experiencing. There is a real need to analyze and understand that the fundamental principles or the lack of fundamental principles that will make negotiations an ineffective exercise because no agreement can be reached.

A. Exclusions

The federal government has left off the table the matters that are the core of the indigenous right to self-determination and are essentially important if Aboriginal Title is recognized and a system of coexistence has to be established. Indigenous peoples do own their traditional territories in British Columbia and it is this ownership that is important in engaging in any discussion with regards to our lands and resources and benefiting from our natural wealth and resources. Otherwise we will be considered as being mere immigrants to our traditional territories and the land being owned by the Canadian and provincial governments. This is how Canada has been organized up to now and has resulted in our peoples being marginalized and impoverished.

If treaty negotiations are to be based upon a level balancing field they cannot be structured on the "Colonial Doctrines of Discovery" but be based upon recognition of Aboriginal Title as recognized by the Supreme Court of Canada in the Delgamuukw Case in 1997. The Supreme Court of Canada by recognizing Aboriginal Title basically repudiated that "Terra Nullius" is the basis of the British Columbia economy. This means that the province should have reviewed and amended all land based legislation with the provision that the provincial government had to take Aboriginal Title into account in all decision regarding our Traditional Territories. This has not been done, instead the Canadian and provincial governments continue to pursue the BCTC modified rights model as settlement policy. This is wrong especially in view of the limits, restrictions and neo-colonial approach they are implementing in our communities.

Here are some of the items that are not on the table for the federal government:

"There are a number of subject matters where there are **no compelling reasons for Aboriginal governments or institutions to exercise law-making authority.** These subject matters cannot be characterized as either integral to Aboriginal cultures, or internal to Aboriginal groups. They can be grouped under two headings: (i) powers related to Canadian sovereignty, defence and external relations; and (ii) other national interest powers. In these areas, it is essential that the federal government retain its law-making authority.

Subject matters in this category would include:

(i) Powers Related to Canadian Sovereignty, Defence and External Relations

- international/diplomatic relations and foreign policy
- national defence and security
- security of national borders
- international treaty-making
- immigration, naturalization and aliens
- international trade, including tariffs and import/export controls

(ii) Other National Interest Powers

- management and regulation of the national economy, including:
 - regulation of the national business framework, fiscal and monetary policy
 - a central bank and the banking system
 - bankruptcy and insolvency
 - trade and competition policy
 - intellectual property
 - incorporation of federal corporations
 - currency

- maintenance of national law and order and substantive criminal law, including:
 - offences and penalties under the Criminal Code and other criminal laws
 - emergencies and the "peace, order and good government" power
- protection of the health and safety of all Canadians
- federal undertakings and other powers, including:
 - broadcasting and telecommunications
 - aeronautics
 - navigation and shipping
 - maintenance of national transportation systems
 - postal service
 - census and statistics"

While law-making power in these areas will not be the subject of negotiations, the Government is prepared to consider administrative arrangements where it might be feasible and appropriate.

B. What Is ON THE TABLE

The following sets of federal governments policies that are reflected in the Agreements in Principle that have been comparatively listed above.

“Under the federal approach, the central objective of negotiations will be to reach agreements on self-government as opposed to legal definitions of the inherent right. The Government realizes that Aboriginal governments and institutions will require the jurisdiction or authority to act in a number of areas in order to give practical effect to the inherent right of self-government. Broadly stated, the Government views the scope of Aboriginal jurisdiction or authority as likely extending to matters that are **internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution**. Under this approach, the range of matters that the federal government would see as subjects for negotiation could include all, some, or parts of the following:

- establishment of governing structures, internal constitutions, elections, leadership selection processes
- membership
- marriage
- adoption and child welfare
- Aboriginal language, culture and religion
- education
- health
- social services
- administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type

normally created by local or regional governments for contravention of their laws

- policing
- property rights, including succession and estates
- land management, including: zoning; service fees; land tenure and access; and expropriation of Aboriginal land by Aboriginal governments for their own public purposes
- natural resources management
- agriculture
- hunting, fishing and trapping on Aboriginal lands
- taxation in respect of direct taxes and property taxes of members
- transfer and management of monies and group assets
- management of public works and infrastructure
- housing
- local transportation
- licensing, regulation and operation of businesses located on Aboriginal lands

In some of these areas, detailed arrangements will be required to ensure harmonization of laws, while in others, a more general recognition of Aboriginal jurisdiction or authority may be sufficient.”¹

C. Negotiable Issues

There are a number of other areas that may go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group. To the extent that the federal government has jurisdiction in these areas, it is prepared to negotiate some measure of Aboriginal jurisdiction or authority. In these areas, laws and regulations tend to have impacts that go beyond individual communities. Therefore, primary law-making authority would remain with the federal or provincial governments, as the case may be, and their laws would prevail in the event of a conflict with Aboriginal laws. Subject matters in this category would include:

- divorce
- labour/training
- administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions which might include certain criminal laws
- penitentiaries and parole
- environmental protection, assessment and pollution prevention
- fisheries co-management
- migratory birds co-management
- gaming
- emergency preparedness

¹ Indian and Northern Affairs Canada, Federal Policy Guide, Aboriginal Self-government, The Government of Canada's Approach to Implementation of the inherent Right and the Negotiation of Aboriginal Self-government, Catalogue No. R32-155/1-1995, ISBN 0-662-61952

III. INTERNATIONAL DEBATE ON EXTINGUISHMENT

A. United Nations: Stop Extinguishment

The United Nations Committee on Economic, Social and Cultural Rights stated in their concluding observations in 1998 that Canada had to stop the extinguishment of Aboriginal rights and title.

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.²

Canada failed to follow up on this concluding observation and then had to again address the issue in its following periodic reports to the respective UN Committees.

B. United Nations on the Modified Rights Model and Non-Assertion Model

Canada responded to the earlier criticism by pitching their “modified rights model” and the “non-assertion model”. It highlighted this approach in its Fifth Periodic Report to the Committee responsible for the International Covenant on Civil and Political Rights in 2004.

185. In the past, the Government of Canada required Aboriginal groups to “cede, release and surrender” their undefined aboriginal rights in exchange for a set of defined treaty rights. This approach requires Aboriginal groups to give up all their Aboriginal rights, which many groups consider to be unacceptable by today’s standards.³

186. In recent years, new approaches to achieving certainty have been developed as a result of comprehensive land claims negotiations. These include the “modified rights model” pioneered in the Nisga’a negotiations, and the “non-assertion model”. Under the modified rights model, aboriginal rights are not released, but are modified into the rights articulated and defined in the treaty. Under the non-assertion model, Aboriginal rights are not released, and the Aboriginal group agrees to exercise only those rights articulated and defined in the treaty and to assert no other Aboriginal rights.”⁴

² Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada 10/12/98, E/C.12/1/Add.32 (Concluding Observations/Comments) Principal subjects of concern

³ International covenant on civil and political rights, General, CCPR/C/CAN/2004/5, 18 November 2004, Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, Fifth periodic report, Canada, [27 October 2004]

⁴ *supra*

In turn, the Committee on Economic, Social and Cultural Rights asked Canada in May 2005 that in land claims agreements certain clauses that asked Aboriginal peoples to release certain rights was merely another kind of extinguishment.

“6. The State party indicates that, since 1998, it has withdrawn the requirement for an express reference to extinguishment of Aboriginal rights and title either in a comprehensive claim agreement or in the settlement legislation ratifying the agreement. According to the Special Rapporteur of the Commission on Human Rights on the situation of human rights and fundamental freedoms of indigenous people, however, 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”. Please comment (report, para. 108; concluding observations, para. 18).”⁵

Canada continued to maintain the validity of their current model and in turn the Committee expressed concerns in its Concluding Observations.

C. United Nations: Modified Rights Model Is Extinguishment

The Committee on Economic, Social and Cultural Rights in their concluding observations in 2006 felt that the modified rights model and the non-assertion model did not differ from extinguishment and surrender approach.

“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.”⁶

It is also very important to note that the Committee also regretted the fact that Canada did not provide any “detailed information on other approaches based on recognition and coexistence of rights”. This is regrettable but is to be expected as long as Canada can continue to have indigenous peoples negotiate under the existing extinguishment policy. Only through stopping negotiating will Canada have to change its policy.

⁵ Committee on Economic, Social and Cultural Rights, Pre-sessional working group, 16-20 May 2005, Implementation of the International Covenant on Economic, Social and Cultural Rights, List of issues to be taken in connection with the consideration of the fourth periodic report of CANADA concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights (E/C.12/4/Add.15)

⁶ Economic and Social Council, Future E/C.12/CAN/CO/5, Committee on Economic, Social and Cultural Rights, Thirty-sixth session, 1-19 May 2006, Advanced Unedited Version, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights, CANADA

D. Canadian Government Position

The federal government is committed to the existing policy despite the fact that considerable effort was spent trying to request that policies recognition and coexistence of rights be considered. It should be noted that no agreements have been reached under the existing Comprehensive Claims Policy through the British Columbia Treaty Process.

“On July 4, 2000, I wrote to Mr. Phil Fontaine, former National Chief of the Assembly of First Nations (AFN), to advise him that, in my view, the Comprehensive Claims Policy is sufficiently flexible to accommodate the concerns of First Nations. Accordingly, a major review of the policy at the national level is not contemplated at this time. I also noted that the negotiation process at each of the tables across the country - where the unique circumstances of each claim can be taken into account - is the best way to resolve outstanding issues of Aboriginal rights and title.”⁷

Aboriginal peoples from across Canada felt that after the *Delgamuukw* decision in 1997 recognized Aboriginal Title as our inherent land rights, it would have been very important to review the Comprehensive Claims to reflect that Aboriginal Title was judicially recognized this and to develop a new policy based on recognition and coexistence of Crown and Aboriginal Title. The Minister repudiated this idea and the present government has not demonstrated any substantive effort to change this position. Giving those nations, such as the members of the Interior Alliance who are not in the BC Treaty Process no option to ensure the protection of their rights through a negotiation process.

“The *Delgamuukw* decision, of the Supreme Court of Canada, did not award Aboriginal title to any First Nation in Canada. Instead, it established a legal test for proving Aboriginal title on a case-by-case basis. I would note that the tripartite BCTC process is consistent with one of the main recommendations in the *Delgamuukw* decision, namely, that negotiation is the preferred way to effect a reconciliation of the interests of Aboriginal and non-Aboriginal Canadians and to achieve certainty with respect to the use and ownership of lands and resources. From my perspective, it is regrettable that the Interior Alliance has chosen to distance itself from the BCTC process in spite of repeated overtures from federal and provincial leaders and their senior officials.”⁸

In fact the Canadian and British Columbia governments are committed to the modified rights model and have made it the only model for negotiations in British Columbia. Most recently the British Columbia government has started a public relations campaign known as the “New Relationship” but it is just an extension of the ongoing BC Treaty Process because it does not contemplate any substantive changes to the land rights policy.

“With respect to the issue of certainty, the Comprehensive Claims Policy of 1986 calls for a ‘cede, release and surrender’ (extinguishment) approach for achieving this objective. Since then, federal policy on acceptable techniques for achieving certainty has evolved, the most current example being the modified rights approach agreed to in the Nisga'a Final Agreement, which came into effect in May 2000. I am

⁷ Letter from The Honourable Robert D. Nault, P.C., M.P. Minister of Indian Affairs to Chief Arthur Manuel, Chair Interior Alliance, December 22, 2000

⁸ *Supra*

pleased to note that First Nation leaders involved in the BCTC process played a key role in the development and acceptance of the April 2000 tripartite *Statement on Certainty Principles for Treaty Negotiations in British Columbia*. Canada is prepared to consider other approaches to certainty that are consistent with this set of principles.⁹

The first modern land selection agreement in British Columbia was signed with Nisga'a in 1998. This agreement extinguished the Nisga'a collective Aboriginal Title to their traditional territory. In addition the Nisga'a conceded their tax exempt status.

685. A historical treaty between the Nisga'a First Nation and the governments of British Columbia and Canada was signed on 4 August 1998. This was the first treaty to be signed in the province since 1899. The Nisga'a Final Agreement sets aside approximately 2000 square kilometres of land in the Nass River Valley in northern British Columbia where the Nisga'a people now own surface and subsurface resources and have a share of Nass River salmon stocks and Nass area wildlife harvests. The Final Agreement provides a financial transfer of \$190 million, payable over 15 years, as well as \$21.5 million in other financial benefits. The *Criminal Code*, the *Canadian Charter of Rights and Freedoms* and other federal and provincial laws of general application continue to apply. In addition, the Final Agreement specifies that personal tax exemptions under the *Indian Act* will be phased out.¹⁰

The Nisga'a also agreed to terminate their Indian Reserves and have converted both these lands and their settlement lands into fee simple status. Fee simple is the largest estate known under the British Columbia Land Title System. Nisga'a lands are now accessible to any person including non-Nisga'a persons and institutions.

686. Under the Nisga'a Final Agreement, the specified lands will be owned by the Nisga'a as fee simple property, including forest resources, subsurface resources and gravel. The Nisga'a will be able to sell or lease parcels of land.¹¹

It must be made clear that the Nisga'a Final Agreement is the precedent being used by federal and provincial negotiators under the BCTC. This will be demonstrated by comparing the key clauses of the Nisga'a Final Agreement and the other Agreements in Principle that are being concluded by some of the treaty negotiating tables.

⁹ Supra

¹⁰ International covenant on civil and political rights, General, CCPR/C/CAN/2004/5, 18 November 2004, Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, Fifth periodic report, Canada, [27 October 2004]

¹¹ Supra

IV. CANADIAN PRESSURE TACTICS

A. Predetermined Negotiations

It is clear from the consequences of the Nisga'a Final Agreement and the Agreements in Principle examined in this report that the federal Comprehensive Claims Policy is the guiding force behind the British Columbia Treaty Process (BCTC). The Nisga'a Final Agreement outlines what the substantive objective of the federal and provincial governments in regard to Aboriginal Land Claims. The repetition of some of the provisions from the Nisga'a Final Agreement in the Agreement in Principle of the Tsawwassen, Yale, Lheidli T'enneh, Yekooche, Sliammon and Maa-nulth treaty tables demonstrates that current treaty negotiations are bound by a pre-determined model and most of the provisions are non-negotiable. It really puts into question the ongoing treaty negotiations that spend millions of dollars and many years supposedly negotiating when the outcome is already pre-determined.

When the Nisga'a Final Agreement was signed many indigenous leaders said that the Nisga'a Final Agreement must not become a template or blue-print. The following comparisons will show that the Nisga'a Final Agreement is the precedent that the federal and British Columbia treaty negotiators are mandated to force the BCTC treaty tables to accept. It is important to highlight that although treaty tables negotiate independently they are faced with a concerted effort to get all the treaty tables to arrive at the very same position and actually in some cases the very same wording as the Nisga'a Final Agreement.

It would seem that the federal and provincial governments are not really negotiating but merely selling the Nisga'a Final Agreement to the indigenous negotiators. Unless the federal government comes up with a new Comprehensive Claims Policy based upon recognition and coexistence then the Nisga'a Final Agreement will tie the hands of the federal and provincial government negotiators. This is extremely dangerous from an international perspective because the United Nations Human Right Bodies have decided that the modified rights model is another form of extinguishment and is not acceptable. And the modified rights model is what is being forced on indigenous peoples negotiating at the table now.

The underlying question is: What is the purpose of negotiating if you do not agree with the Nisga'a Final Agreement. But this question is complicated because of the negotiation loan fund program administrated under the BCTC. The Terms and Conditions of the loan fund make it next to impossible to walk away from the treaty negotiation table without suffering serious financial costs.

B. Loan Funding

The British Columbia government in their Summary Financial Statements Province of British Columbia for the Fiscal Year Ended, March 31, 2006 that:

“Treaty negotiations between the province, Canada and First Nations commenced in 1994. The province anticipates these negotiations will result in modern-day treaties defining the boundaries and nature of First Nations treaty settlement lands. As of March 31, 2006, there were 47 treaty tables in various stages of negotiation, representing two-thirds of the aboriginal people in British Columbia.”¹²

These statements clearly indicate that the provincial government endorses the “modified rights model” or “land selection process”. The amount of treaty lands to be allocated is also directly linked to a formula that allocate land on a per capita basis and never exceed 5 per cent of the overall traditional territory. In addition the British Columbia government reports to the commercial and investment sectors that indigenous peoples have agreed to the extinguishment model or land selection model through accepting their own land back through provincial Crown land allocations:

“Two Agreements in Principle (AIPs) were signed in 2005/06, (Yekooche and Yale) to add to the AIPs already signed. It is expected the capital transfer components in all AIPs will be entirely provided by Canada. The current commitments of provincial Crown land for all Final Agreement tables are as follows:

- (i) In-SHUCK- ch, 13,208 hectares
- (ii) Lheidli T'enneh, 3,463 hectares
- (iii) Maa-nulth, 22,003 hectares
- (iv) Sechelt, 933 hectares
- (v) Sliammon, 6,357 hectares
- (vi) Tsawwassen, 427 hectares
- (vii) Yale, 915 hectares
- (viii) Yekooche, 5,960 hectares”¹³

These reports clearly indicate that the British Columbia government is not even contemplating solutions that involve recognition and coexistence models of settling outstanding Aboriginal Title issues. It is clear that British Columbia does have legitimate contingent liabilities to indigenous peoples but instead of sharing decision making power and benefits for our natural wealth and resources British Columbia wants to cling to our economic assets at our expense.

In fact the British Columbia also reports in their Summary Financial Statements that First Nations borrow money to negotiate under the British Columbia Treaty Process:

¹² Notes to Consolidated Summary Financial Statements Province of British Columbia for the Fiscal Year Ended March 31, 2006, 25 Contingencies and Contractual Obligations, Aboriginal Land Claims, page 62

¹³ Supra, page 63

“Eighty per cent of funding for First Nations negotiation costs is in the form of loans from Canada and is repayable from treaty settlements. The province has committed to reimburse Canada 50% of any negotiation support loans that default along with 50% of the interest accrued. The earliest date at which the loans are expected to become due is 2011 and the amount of any provincial liability is not determinable at this time”.¹⁴

The Canadian government also reports in their Public Accounts that Canada has contingent liabilities regarding Indigenous Comprehensive Land Claims:

*“Comprehensive land claims: There are currently 77 (78 in 2004) comprehensive land claims under negotiation, accepted for negotiation or under review. A liability of \$3,700 million (\$3,700 million in 2004) is estimated for claims that have progressed to a point where quantification is possible. The remaining claims are still in the early stage of negotiations and cannot yet be quantified.”*¹⁵

These contingent liabilities have been converted into financial liabilities on the part of indigenous peoples who have borrowed money to negotiate and become almost “adhesions” to the Nisga’a Final Agreement. Canada reports in their Public Accounts Loans, Investments and Advances that Canada has made loans to the indigenous peoples in British Columbia with the following terms and conditions:

Loans have been made to First Nations in British Columbia, to support their participation in the British Columbia Treaty Commission process related to the research, development and negotiation of treaties. The terms and conditions of the loans are as follows:

- (a) loans made before an agreement-in-principle for the settlement of a treaty is reached are non-interest bear-Mg;
- (b) loans made after the date on which an agreement-in-principle for the settlement of a treaty has been reached, bear interest at a rate equal to the rate established by the Minister of Finance in respect of borrowings for equivalent terms by Crown corporations; and,
- (c) loans are due and payable by the First Nations and will pay the loan on the earliest of the following dates:
 - (i) date on which the treaty is settled;
 - (ii) twelfth anniversary of the first loan advance to the First Nations under the earliest First Nations funding agreement;
 - (iii) seventh anniversary after the signing of an agreement-in-principal, or;
 - (iv) date the federal minister demands payment of the loans due to an event of default under this agreement or under any First Nations' funding agreement.”¹⁶

¹⁴ Supra, page 63

¹⁵ Public Accounts of Canada 2005, Volume 1, Government of Canada, Prepared by the Receiver General of Canada, 14 Contingent Liabilities, page 2.26

¹⁶

This loan process is a clever way of reversing Canada's contingent liabilities to indigenous peoples through creating interest and non-interest bearing loans. Canada and British Columbia pursue a business-as-usual plan without any regard to Aboriginal Title and if indigenous peoples want to deal with their Aboriginal Rights they need borrow money and to negotiate under the BCTC. The federal and provincial governments in this respect are using the poverty of our peoples to put us in a very vulnerable negotiating position. The Terms and Conditions put pressure on the indigenous peoples to settle because the loan agreements are time sensitive. In essence they are borrowing money from their children and grandchildren because the money they borrow comes off the top of any settlement they make.

The interest and the Terms and Conditions regarding the charging of interest to the loans indigenous peoples are getting really give Canada and British Columbia an unfair advantage of indigenous peoples. In fact this whole business-as-usual and loan negotiation scheme is very unfair because it takes advantage of the poverty indigenous peoples.

“The interest-bearing and non-interest bearing portions of the loans outstanding at year end are \$48,777,175 and \$260,491,579 respectively. The rate is 5.185 percent per annum for the interest-bearing portion.”¹⁷

The BC Financial Statements reported in several years that they did not expect any agreements for years into the future. I suggest the reason for this comment is because the know no one agrees the Nisga'a Final Agreement is a satisfactory precedent. Canada reports in its Public Accounts and Financial Statements that the Aboriginal nations participating in the British Columbia Treaty Process are borrowing money to negotiate which will in turn be deducted from their treaty settlements. Loan funding is used as a pressure tactic especially when it comes to adding interest to the loan almost forcing the respective Aboriginal peoples into a treaty settlement.

¹⁷ Public Accounts of Canada 2005, Volume 1, Summary Report and Financial Statements, 14 Contingent Liabilities, iv Claims and pending and threatened litigation, Comprehensive Claims Policy, page 2.26

V. COMPARISON OF THE CURRENT AGREEMENTS

Despite the Canadian and BC government saying they have 47 negotiating treaty tables it is obvious that all tables negotiate the same kind of "modified rights agreement" the Nisga'a settled with. This comparative analysis will start off with this modification provision of the different land claims agreements. This analysis has to be viewed in the light of the CESCRC finding that the modification model actually constitutes extinguishment. It will also point to all the exclusions that limit the right to self-determination.

A. Comparative Chart of Key Matters for Extinguishment of Aboriginal Rights:

	Nisga'a Final Agreement (Sq Km)	Tsaw- wassen AiP (Hectare)	Yale AiP (Hect are)	Lheidi T'enneh AiP (Hectare)	Yekooche AiP (Hectare)	Sliam- mon AiP (Hectare)	Maa- nulth Aip (Hectare)
Application of the Constitution Of Canada	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Application of Federal & Provincial Laws	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Restriction of Section 35 Rights	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Extinguishment through modification	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Extinguishment through Release	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Application of Provincial Law	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Extinguishment through the Land Selection Process	1,932	365	915.2	3,154	5,960	5,121	20,900
Termination Indian Reserves	62	Yes	223.8	666	379.8	1907	Yes
Aboriginal Title Converted to Fee Simple Interest	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Elimination of Indian Act Section 87 Exemption	Yes	Yes	Yes	Yes	Yes	Yes	Yes

B. Application of the Constitution of Canada

Recognition of Aboriginal Title¹⁸ and protection Aboriginal Rights under the Canadian Constitution 1982¹⁹ creates a framework where Canada could recognize and create a system of coexistence, but federal and provincial negotiators close that opportunity under this provision. Recognition of Aboriginal Rights could open the door to sharing and coexistence where there is an equal distribution of power between Aboriginal Peoples, Canada and British Columbia. The following provision in the Nisga'a Agreement and duplicated in subsequent AiPs prevents this opportunity from being realized.

Nisga'a Final Agreement

8. This Agreement does not alter the Constitution of Canada, including:
- a) the distribution of powers between Canada and British Columbia;
 - b) the identity of the Nisga'a Nation as an aboriginal people of Canada within the meaning of the *Constitution Act, 1982*; and
 - c) sections 25 and 35 of the *Constitution Act, 1982*.²⁰

Tsawwassen AiP

19. The Final Agreement will not alter the Constitution of Canada, including:
- a) the distribution of powers between Canada and British Columbia;
 - b) the identity of Tsawwassen People as aboriginal people of Canada within the meaning of the *Constitution Act, 1982*; and
 - c) sections 25 and 35 of the *Constitution Act, 1982*.²¹

Yale AiP

9. The Final Agreement will not alter the Constitution of Canada, including:
- a) the distribution of powers between Canada and British Columbia;
 - b) the identity of Yale First Nation as aboriginal people of Canada within the meaning of the *Constitution Act, 1982*; and
 - c) sections 25 and 35 of the *Constitution Act, 1982*.²²

¹⁸ *Delgamuukw v. Canada*, SCC

¹⁹ *Constitution Act 1982*, section 32 (1)

²⁰ Nisga'a Final Agreement, Initialed, August 4, 1998, Chapter 2, General Provisions, *Constitution of Canada*

²¹ Tsawwassen First Nation Draft Agreement in Principle, July 9, 2003, Chapter 2, General Provisions, *Constitution of Canada*

²² Yale First Nation Agreement in Principle, March 9, 2006, Chapter 2, General Provisions, *Constitution of Canada*

Lheidli T'enneh AiP

12. The Final Agreement will not alter the Constitution of Canada, including:
- a) the distribution of powers between Canada and British Columbia;
 - b) the identity of Lheidli T'enneh as aboriginal people of Canada within the meaning of the Constitution Act, 1982; and
 - c) sections 25 and 35 of the Constitution Act, 1982.²³

Yekooche AiP

10. The Final Agreement will not alter the Constitution of Canada, including:
- a) the distribution of powers between Canada and British Columbia;
 - b) the identity of Yekooche First Nation as aboriginal people of Canada within the meaning of the *Constitution Act, 1982*; and
 - c) sections 25 and 35 of the *Constitution Act, 1982*.²⁴

Sliammon AiP

10. Neither the Final Agreement nor the Governance Agreement will alter the Constitution of Canada, including:
- a) the distribution of powers between Canada and British Columbia;
 - b) the identity of Sliammon as aboriginal people of Canada within the meaning of the *Constitution Act, 1982*; and
 - c) sections 25 and 35 of the *Constitution Act, 1982*.²⁵

Maa-nulth AiP

6. Neither the Final Agreement nor the Self-Government Agreement will alter the Constitution of Canada, including:
- a) the distribution of powers between Canada and British Columbia;
 - b) the identity of Maa-nulth First Nations as aboriginal people of Canada within the meaning of the *Constitution Act, 1982*; and
 - c) sections 25 and 35 of the *Constitution Act, 1982*.²⁶

²³ Lheidli T'enneh AiP, July 26, 2003, General Provisions, Constitution of Canada

²⁴ Yekooche AiP, General Provisions, Constitution of Canada

²⁵ Sliammon AiP, Chapter 2, General Provisions, Constitution of Canada,

²⁶ Maa-nulth AiP, Chapter 2, General Provisions, Constitution of Canada

C. Application of Federal and Provincial Laws

The mutually exclusive application of federal and provincial powers regarding access and enjoyment of benefits from our traditional territories has been the cause of our poverty as indigenous peoples. It is clear that the federal and provincial governments want to entrench provincial and federal control in the modern day treaties. This provision is essential to the land selection policy and deeply undermines the right of indigenous peoples to self-determination.

Nisga'a Final Agreement

13. Federal and provincial laws apply to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, Nisga'a citizens, Nisga'a Lands, and Nisga'a Fee Simple Lands, but:
- a) in the event of an inconsistency or conflict between this Agreement and the provisions of any federal or provincial law, this Agreement will prevail to the extent of the inconsistency or conflict; and
 - b) in the event of an inconsistency or conflict between settlement legislation and the provisions of any other federal or provincial law, the settlement legislation will prevail to the extent of the inconsistency or conflict.²⁷

Tsawwassen Draft AiP

20. The Final Agreement will provide that Federal Law, Provincial Law and Tsawwassen Law will apply to Tsawwassen First Nation, Tsawwassen Government, Tsawwassen Public Institutions, Tsawwassen Members, Tsawwassen Lands and Tsawwassen First Nation assets.

Yale AiP

14. Federal and Provincial Law will apply to Yale First Nation, Yale First Nation Government, Yale First Nation Public Institutions, Yale First Nation Members, and Yale First Nation Land.
15. Any licence, permit or other authorization to be issued by Canada or British Columbia under the Final Agreement will be issued under Federal or Provincial Law and will not be part of the Final Agreement, but the Final Agreement will prevail to the extent of any Conflict with the licence, permit or other authorization.
16. The Final Agreement will confirm that federal settlement legislation enacted to bring into effect the Final Agreement will prevail over other Federal Law to the extent of any Conflict, and provincial settlement legislation enacted to bring into effect the Final Agreement will prevail over other Provincial Law to the extent of any Conflict.²⁸

²⁷ *Supra*, Application of Federal and Provincial Law

²⁸ Yale AiP, Chapter 2, General Provisions, Application of Federal and Provincial Law

Lheidli T'enneh AiP

18. The Final Agreement will provide that federal and provincial Laws apply to Lheidli T'enneh, the Lheidli T'enneh Government, Lheidli T'enneh Public Institutions, Lheidli T'enneh Citizens and Lheidli T'enneh Lands.
19. Unless otherwise provided in the Final Agreement, Lheidli T'enneh Laws will not apply to Canada or British Columbia.
20. The Final Agreement will provide that if there is an inconsistency or a Conflict between the Final Agreement and the provisions of any federal or provincial Law, the Final Agreement will prevail to the extent of the inconsistency or Conflict.
21. The Final Agreement will provide that if there is an inconsistency or a Conflict between federal settlement legislation and the provisions of any other federal Law, the federal settlement legislation will prevail to the extent of the inconsistency or Conflict.
22. The Final Agreement will provide that if there is an inconsistency or a Conflict between provincial settlement legislation and the provisions of any provincial Law, the provincial settlement legislation will prevail to the extent of the inconsistency or Conflict.²⁹

Yekooche AiP

14. Federal and Provincial Law will apply to Yekooche First Nation, Yekooche First Nation Government, Yekooche First Nation Public Institutions, Yekooche First Nation Citizens and Yekooche First Nation Lands.
17. The Final Agreement will prevail to the extent of any Conflict with a Federal or Provincial Law.³⁰

Sliammon AiP

18. Notwithstanding any other rule of priority in the Final Agreement or the Governance Agreement, Federal and Provincial Laws will prevail over Sliammon Laws to the extent of any Conflict involving a provision of a Sliammon Law that:
 - a) has a double aspect on, or an incidental impact on, any area of federal or provincial legislative jurisdiction for which Sliammon does not have any law-making authority set out in the Final Agreement or the Governance Agreement; or
 - b) has a double aspect on, or an incidental impact on, any other Sliammon law-making authority set out in the Final Agreement or the Governance Agreement for which Federal and Provincial Laws prevail.³¹

²⁹ Lheidli T'enneh AiP, July 26, 2003, General Provisions, Application of Federal and Provincial Laws

³⁰ Yekooche AiP, General Provisions, Application of Federal and Provincial Law

³¹ Sliammon AiP, Chapter 2, General Provisions, Relationship of Laws

Maa-nulth AiP

14. Federal and Provincial Laws will apply to Maa-nulth First Nations, Maa-nulth First Nation Citizens, Maa-nulth First Nation Public Institutions, Maa-nulth First Nation Governments, Maa-nulth First Nation Lands and Other Maa-nulth First Nation Lands.
15. The Final Agreement will confirm that federal settlement legislation enacted to bring into effect the Final Agreement will prevail over other Federal Laws to the extent of any Conflict, and provincial settlement legislation enacted to bring into effect the Final Agreement will prevail over other Provincial Laws to the extent of any Conflict.
16. The Self-Government Agreement will confirm that federal legislation enacted to bring into effect the Self-Government Agreement will prevail over other Federal Laws to the extent of any Conflict, and provincial legislation enacted to bring into effect the Self-Government Agreement will prevail over other Provincial Laws to the extent of any Conflict.
17. The Final Agreement will prevail to the extent of any Conflict with a Federal or Provincial Law.
18. The Self-Government Agreement will prevail to the extent of any Conflict with a Federal or Provincial Law.³²

All these agreements entrench non-indigenous access to indigenous territories. The agreements unilaterally secure federal and provincial powers, but there is no recognition of equal inherent powers of Aboriginal peoples. Not even the application of indigenous laws will be universal, but rather it will be limited by the application of provincial and federal laws which in turn now don't even have to be checked for constitutional validity vis-à-vis indigenous rights.

³² Maa-nulth AiP, Chapter 2, General Provisions, Application of Federal and Provincial Laws

D. Restriction of Section 35 Rights

Section 35 Rights provide indigenous peoples in Canada the opportunity to reconcile Aboriginal Rights with the powers exercised by the federal and provincial governments in a peaceful and responsible manner. The following provisions restrict and exhaustively extinguish any life in Aboriginal Rights.

Nisga'a Final Agreement

23. This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed, and those rights are:
- a) the aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada;
 - b) the jurisdictions, authorities, and rights of Nisga'a Government; and the other Nisga'a section 35 rights.³³

Tsawwassen Draft AiP

42. The Final Agreement will comprehensively set out Tsawwassen First Nation's section 35 land rights, section 35 self-government land rights relating to matters set out in the Final Agreement, and other section 35 rights relating to matters set out in the Final Agreement.³⁴

Yale AiP

35. The Final Agreement will comprehensively set out Yale First Nation's section 35 land rights, section 35 self-government land rights relating to matters set out in the Final Agreement, and other section 35 rights relating to matters set out in the Final Agreement.³⁵

Lheidli T'enneh AiP

35. The Final Agreement will comprehensively set out Lheidli T'enneh's section 35 Land Rights and other section 35 rights relating to matters set out in the Final Agreement.³⁶

³³ Nisga'a Final Agreement, Chapter 2, General Provisions, Nisga'a Section 35 Rights

³⁴ Tsawwassen First Nation Draft Agreement in Principle, July 9, 2003, Chapter 2, General Provisions, Certainty

³⁵ Chapter 2, General Provisions, Certainty

³⁶ Lheidli T'enneh AiP, July 26, 2003, Certainty

Yekooche AiP

33. The Final Agreement will comprehensively set out Yekooche First Nation's section 35 land rights, section 35 self-government land rights relating to matters set out in the Final Agreement, and other section 35 rights relating to matters set out in the Final Agreement.³⁷

Sliammon AiP

35. The Final Agreement will comprehensively set out Sliammon's section 35 land rights, section 35 self-government land rights relating to matters set out in the Final Agreement, and other section 35 rights relating to matters set out in the Final Agreement.³⁸

Maa-nulth AiP

34. The Final Agreement will comprehensively set out each of the Maa-nulth First Nations' Section 35 land rights, Section 35 self-government land rights related to matters set out in the Final Agreement, and other Section 35 rights related to matters set out in the Final Agreement.³⁹

³⁷ Yekooche AiP, General Provisions, Certainty

³⁸ Sliammon AiP, Chapter 2, General Provisions, Certainty

³⁹ Maa-nulth AiP, Chapter 2, General Provisions, Certainty

E. Extinguishment through Modification

Modification or the Modified Rights Model has been given attention by some of the United Nations Human Rights Bodies but it is not the only provision that extinguishes Aboriginal Title and Rights but is part of larger strategic plan of Canada and British Columbia. The Modified Rights Model restricts Aboriginal Title and Rights to mean only what is contained in the modern day treaty document. If a matter is not contained in the modern day treaty agreement it will not be considered as a part of Aboriginal Title or Right from the effective date of the Treaty. The Modified Rights Model is just an underhanded way of extinguishing Aboriginal Title. This model prevents the progressive development of Aboriginal Rights and the Ethical and Natural Evolution of Aboriginal societies. It effectively prohibits dynamic traditional indigenous processes of developing their laws and developing control over their territories through their original governments.

Nisga'a Final Agreement

"24. Notwithstanding the common law, as a result of this Agreement and the settlement legislation, the aboriginal rights, including the aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, **are modified, and continue as modified, as set out in this Agreement.**"⁴⁰

Tsawwassen Draft First Nation AiP

43. **The Final Agreement will modify any:**

- a) **Aboriginal Land Right;**
- b) **Aboriginal Self-Government Land Right relating to a matter set out in the Final Agreement; and**
- c) **other aboriginal right relating to a matter set out in the Final Agreement, that Tsawwassen First Nation may have, into the rights set out in the Final Agreement.**⁴¹

Yale First Nation AiP

36. **The Final Agreement will modify any:**

- a) **Aboriginal Land Right;**
- b) **Aboriginal Self-Government Land Right relating to a matter set out in the Final Agreement; and**
- c) **other aboriginal right relating to a matter set out in the Final Agreement, that Yale First Nation may have, into the rights set out in the Final AiP.**⁴²

⁴⁰ Nisga'a Final Agreement, Chapter 2, General Provisions, Modification, Canada, British Columbia, Nisga'a Nation, 27 April 1999, emphasis added

⁴¹ Tsawwassen First Nation Draft Agreement in Principle, Chapter 2, General Provisions, Certainty, Canada, Tsawwassen First Nation, British Columbia, July 9, 2003, emphasis added

⁴² Yale First Nation Agreement-in-Principle, Canada, Yale First Nation, British Columbia, March 9, 2006, emphasis added

Lheidli T'enneh AiP

36. The **Final Agreement will modify Lheidli T'enneh's aboriginal Land Rights**, and other aboriginal rights that relate to matters set out in the Final Agreement, **into the rights set out in the Final Agreement.**⁴³

Yekooche First Nation AiP

34. The **Final Agreement will modify any:**

- a) **Aboriginal Land Right;**
- b) **Aboriginal Self-Government Land Right** relating to a matter set out in the Final Agreement; and
- c) **other aboriginal right** relating to a matter set out in the Final Agreement, that Yekooche First Nation may have, **into the rights set out in the Final Agreement.**⁴⁴

Sliammon AiP

35. The **Final Agreement will modify any:**

- a) **Aboriginal Land Right;**
- b) **Aboriginal Self-Government Land Right** relating to a matter set out in the Final Agreement; and
- c) **other aboriginal right** relating to a matter set out in the Final Agreement, that Sliammon may have, **into the rights set out in the Final Agreement.**⁴⁵

Maa-nulth First Nation AiP

35. **As regards each Maa-nulth First Nation, the Final Agreement will modify:**

- a) **Aboriginal Land Rights,**
- b) **Aboriginal Self-Government Land Rights** related to matters set out in the Final Agreement, and
- c) **any other aboriginal rights** related to matters set out in the Final Agreement, that such Maa-nulth First Nation may have, **into the rights set out in the Final Agreement.**⁴⁶

⁴³ Lheidli T'enneh AiP, July 26, 2003, Certainty, emphasis added

⁴⁴ Yekooche First Nation Agreement-in-Principle, Canada, Yekooche First Nation, British Columbia, August 22, 2005, emphasis added

⁴⁵ Sliammon First Nation, Agreement-in-Principle, Canada, Sliammon First Nation, British Columbia, June 6, 2003, emphasis added

⁴⁶ Maa-nulth First Nation, Agreement-in-Principle, Canada, Maa-nulth First Nation, October 3, 2003, emphasis added

F. Extinguishment by Release

Under the Release provisions the indigenous nations give Canada, British Columbia and others a release from any liability for the travesties of justice and human rights violations that occurred and caused such devastating problems for indigenous peoples. Indigenous peoples have been prevented through law and policy from earning a living off their traditional lands. They were also forced to Indian Residential schools which has caused tremendous damage to all indigenous families. It is wrong to treat these terrible events so casually and to allow Canada and British Columbia from liabilities from the most serious human rights violations, including genocide, assimilation and cultural degradation. These modern treaties will prevent possible redress for such human atrocities and perpetuate their terrible consequences into the future.

Nisga'a Final Agreement

26. If, despite this Agreement and the settlement legislation, the Nisga'a Nation has an aboriginal right, including aboriginal title, in Canada, that is other than, or different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement, **the Nisga'a Nation releases that aboriginal right to Canada** to the extent that the aboriginal right is other than, or different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement.
27. **The Nisga'a Nation releases Canada, British Columbia and all other persons** from all claims, demands, actions, or proceedings, of whatever kind, and whether known or unknown, that the Nisga'a Nation ever had, now has or may have in the future, relating to or arising from any act, or omission, before the effective date that may have affected or infringed any aboriginal rights, including Aboriginal Title, in Canada of the Nisga'a Nation.⁴⁷

Tsawwassen Draft AiP

44. **Tsawwassen First Nation will release Canada and British Columbia** from all claims in relation to past infringements of any aboriginal rights of Tsawwassen First Nation, which infringement occurred before the Effective Date.⁴⁸

Yale AiP

40. Yale First Nation will release Canada and British Columbia from all claims in relation to past infringements of any aboriginal rights, including aboriginal title, of Yale First Nation, which infringement occurred before the Effective Date.⁴⁹

⁴⁷ Nisga'a Final Agreement, Chapter 2, General Provisions, Release

⁴⁸ Tsawwassen Agreement-in-Principle, Chapter 2, General Provisions, Certainty, July 9, 2003

⁴⁹ Yale AiP, Chapter 2, General Provisions, Certainty

Lheidli T'enneh AiP

37. Lheidli T'enneh will release Canada and British Columbia from all claims in relation to past infringements of any aboriginal rights of Lheidli T'enneh, which infringement occurred before the Effective Date.⁵⁰

Yekooche AiP

38. Yekooche First Nation will release Canada and British Columbia from all claims in relation to past infringements of any aboriginal rights, including aboriginal title, of Yekooche First Nation, which infringement occurred before the Effective Date.⁵¹

Sliammon AiP

39. Sliammon will release Canada and British Columbia from all claims in relation to past infringements of any aboriginal rights of Sliammon, which infringement occurred before the Effective Date.⁵²

Maa-nulth AiP

39. Each Maa-nulth First Nation will release Canada and British Columbia from all claims in relation to past infringements of any aboriginal rights, including aboriginal title, of that Maa-nulth First Nation, which infringement occurred before the Effective Date.⁵³

⁵⁰ Lheidli T'enneh AiP, July 26, 2003, General Provisions, Certainty

⁵¹ Yekooche AiP, General Provisions, Certainty

⁵² Sliammon AiP, Chapter 2, General Provisions, Certainty

⁵³ Maa-nulth AiP, Chapter 2, General Provisions, Certainty

G. Application of Provincial Law

One of the ways that indigenous peoples have been able to protect our culture and way of life as indigenous peoples was not to be under the law making power of the provincial government. In Aboriginal Rights litigation the Province of British Columbia has consistently taken the position that indigenous peoples are subject to provincial law. It was the federal nature of Indian law that kept us free from provincial government domination. The following provisions will very clearly meet the wishes of the provincial government need to be in control of indigenous peoples.

Nisga'a Final Agreement

26. Canada will recommend to Parliament that federal settlement legislation include a provision that, to the extent that a law of British Columbia does not apply of its own force to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, or Nisga'a citizens, that law of British Columbia will, subject to the federal settlement legislation and any other Act of Parliament, apply in accordance with this Agreement to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, or Nisga'a citizens, as the case may be.⁵⁴

Tsawwassen AiP

21. The Final Agreement will provide that Canada will recommend to Parliament that federal settlement legislation include a provision that, to the extent that a valid law of British Columbia does not apply of its own force to Tsawwassen First Nation, Tsawwassen Government, Tsawwassen Lands, Tsawwassen Public Institutions, or Tsawwassen Members, that law of British Columbia will, subject to the federal settlement legislation and any other Act of Parliament, **apply in accordance with the Final Agreement** to Tsawwassen First Nation, Tsawwassen Government, Tsawwassen Lands, Tsawwassen Public Institutions, or Tsawwassen Members, as the case may be.⁵⁵

Yale AiP

20. Canada will recommend to Parliament that federal settlement legislation include a provision that, to the extent that a Provincial Law does not apply of its own force to Yale First Nation, Yale First Nation Government, Yale First Nation Public Institutions, Yale First Nation Members, or Yale First Nation Land, that Provincial Law will, subject to the federal settlement legislation and any other Act of Parliament, apply in accordance with the Final Agreement to Yale First Nation, Yale First Nation Government, Yale First Nation Public Institutions, Yale First Nation Members, and Yale First Nation Land, as the case may be.⁵⁶

⁵⁴ Nisga'a Final Agreement, Chapter 2, General Provisions, Provincial Law

⁵⁵ Tsawwassen Draft AiP, Chapter 2, General Provisions, Application and Relationship of Federal Law, Provincial Law and Tsawwassen Law

⁵⁶ Yale AiP, Chapter 2, General Provisions, Relations of Laws

Lheidli T'enneh AiP

43. The Final Agreement will provide that Canada will recommend to Parliament that federal settlement legislation include a provision that, to the extent that a Law of British Columbia does not apply of its own force to Lheidli T'enneh, the Lheidli T'enneh Government, Lheidli T'enneh Public Institution, Lheidli T'enneh Lands or Lheidli T'enneh Citizens, that Law of British Columbia, subject to the federal settlement legislation, any other Act of Parliament and the Final Agreement, will apply to Lheidli T'enneh, the Lheidli T'enneh Government, Lheidli T'enneh Public Institution, Lheidli T'enneh Lands or Lheidli T'enneh Citizens, as the case may be.⁵⁷

Yekooche AiP

20. Canada will recommend to Parliament that federal settlement legislation include a provision that, to the extent that a law of British Columbia does not apply of its own force to Yekooche First Nation, Yekooche First Nation Government, Yekooche First Nation Public Institutions, Yekooche First Nation Citizens and Yekooche First Nation Lands, that law of British Columbia will, subject to the federal settlement legislation and any other Act of Parliament, apply in accordance with the Final Agreement to Yekooche First Nation, Yekooche First Nation Government, Yekooche First Nation Public Institutions, Yekooche First Nation Citizens, and Yekooche First Nation Lands, as the case may be.⁵⁸

Sliammon AiP

19. Canada will recommend to Parliament that federal settlement legislation include a provision that, to the extent that a law of British Columbia does not apply of its own force to Sliammon, Sliammon Government, Sliammon Lands, Sliammon Public Institutions or Sliammon Members, that law of British Columbia will, subject to the federal settlement legislation and any other Act of Parliament, apply in accordance with the Final Agreement and the Governance Agreement to Sliammon, Sliammon Government, Sliammon Lands, Sliammon Public Institutions and Sliammon Members, as the case may be.⁵⁹

Maa-nulth AiP

20. Canada will recommend to Parliament that federal settlement legislation enacted to bring into effect the Final Agreement make Provincial Laws apply to Maa-nulth First Nations, Maa-nulth First Nation Governments, Maa-nulth First Nation Public Institutions, Maa-nulth First Nation Citizens, Maa-nulth First Nation Lands and Other Maa-nulth First Nation Lands if those Provincial Laws do not apply of their own force.⁶⁰

⁵⁷ Lheidli T'enneh AiP, General Provisions, Provincial Law

⁵⁸ Yekooche AiP, General Provisions, Relationship of Laws

⁵⁹ Sliammon AiP, Chapter 2, General Provisions, Relationship of Laws

⁶⁰ Maa-nulth AiP, Chapter 2, General Provisions, Relationship of Laws

H. Extinguishment through Land Selection

The land selection aspect of these agreements proves that Aboriginal Title will be extinguished and turned into so-called provincial crown land. The Land Selection Process is what has been happening to indigenous peoples throughout North America. It is the process where settler or foreign populations force indigenous peoples to choose small pieces of their traditional territories as Indian Reserves and allocate the rest of the indigenous peoples' territories to national and provincial/state governments for the purposes of settlement and economic development. In most cases the settlers become wealthy through this process and indigenous peoples normally were impoverished and economically marginalized.

The Land Selection Process should be replaced with a system that is based upon recognition and coexistence between indigenous peoples and settler populations. This could be done through recognizing that indigenous peoples do have an underlying title in all their traditional territories and indigenous peoples share in ongoing decisions regarding access and benefit sharing from all their traditional territories and resources. The Supreme Court of Canada has held that the Columbia government has not extinguished Aboriginal Title, even when it granted "fee simple title" to settlers. Aboriginal Title just like Crown title is an underlying or radical title which continues to exist even if estates are granted and in turn entitles the holder of Aboriginal Title to property tax benefits.

This does not mean however that Aboriginal Title cannot also benefit from tax plus other decision making authority if Aboriginal Title is recognized by the federal and provincial governments. In fact this is what indigenous peoples have been insisting on for centuries but have been ignored by the federal and provincial governments. The federal and provincial governments through these Land Selection provisions want to entrench this process in British Columbia, one of the last places in North America where this exploitive and colonial system could be stopped. Historically speaking we have always been fighting to repatriate our proprietary rights based on recognition, coexistence and self-determination.

Nisga'a Final Agreement

2. On the effective date, Nisga'a Lands comprise 1,992 square kilometres, more or less, of land in the lower Nass Valley, consisting of:
 - a. **1,930 square kilometres**, more or less; and
 - b. **62 square kilometres**, more or less, of lands identified as former Nisga'a Indian reserves in Appendix A-4, and which cease to be Indian reserves on the effective date.⁶¹

⁶¹ Nisga'a Final Agreement, Chapter 3, Lands, Nisga'a Lands

Tsawwassen AiP

2. Tsawwassen Lands will consist of:
 - a. the Tsawwassen Reserve; and
 - b. approximately 365 hectares of provincial Crown lands, which will cease to be Crown lands on the Effective Date, including Subsurface Resources.⁶²

Yale AiP

1. On the Effective Date, Yale First Nation Land will consist of the lands set out in Appendix A-1 to A-3 and will comprise approximately 1139.05 hectares as follows:
 - a) approximately 223.8 hectares of former Yale Indian Reserve lands, including Subsurface and Mineral Resources, identified in Appendix A-1;
 - b) approximately 660.31 hectares of provincial Crown land, including Subsurface and Mineral Resources, identified in Appendix A-2;
 - c) approximately 254.94 hectares of provincial Crown land, excluding Subsurface and Mineral Resources, identified in Appendix A-3.⁶³

Lheidli T'enneh AiP

1. Pursuant to this Agreement the overall land package will consist of the lands set out in Appendix A and will comprise approximately 4027 hectares as follows:
 - a. Lheidli T'enneh Lands amounting to 3820 hectares including:
 - i. Indian Reserves identified in Appendix A-1a;
 - ii. federal Crown land identified in Appendix A-1b; and
 - iii. provincial Crown land identified in Appendices A-1c through A-1j;and
 - b. Lheidli T'enneh private fee simple lands amounting to 207 hectares including:
 - i. the Indian Reserve identified in Appendix A-2a; and
 - ii. provincial Crown lands identified in Appendices A-2b and A-2c.⁶⁴

Yekooche AiP

1. On the Effective Date, Yekooche First Nation Lands will consist of the lands set out in Appendix B and will comprise approximately 6,340 hectares including:
 - a. Approximately 379.8 hectares of existing Yekooche First Nation Indian Reserve lands identified in Appendix B-1 and including, subject to

⁶² Tsawwassen First Nation Draft Agreement in Principle, Chapter 3, Lands, Tsawwassen Land, July 9, 2003

⁶³ Yale AiP, Chapter 4, Lands, General

⁶⁴ Lheidli T'enneh AiP, Lands, General

- paragraph 22, Submerged Lands identified in Appendix B-3; and
- b. approximately 5,960 hectares of Crown land identified in Appendix B-2, but not including Provincial Roads, Crown Corridors and those existing lands held in fee simple as described in Appendix J, and all other Submerged Lands.⁶⁵

Sliammon AiP

1. On the Effective Date, Sliammon Lands will consist of:
- a) approximately 1,907 hectares of existing Sliammon Indian Reserves;
 - b) approximately 5121 hectares of Crown land,
- as depicted in Appendices A-1, A-2a and 2-b and described in Appendix A-3, including Subsurface Resources referred to in paragraph 6, but not including Submerged Lands, Provincial Roads, Crown Corridors and those existing lands held in fee simple as described in Appendix A-3.
2. Between Agreement-in-Principle and Final Agreement, the Parties will negotiate up to an additional 879 hectares to be added to Sliammon Lands in paragraph 1(b).⁶⁶

Maa-nulth AiP

1. On the Effective Date, the Maa-nulth First Nation Lands of each Maa-nulth First Nation will consist of:
- a) Huu-ay-aht First Nations,
 - i) existing Huu-ay-aht First Nations Indian Reserves, and
 - ii) up to 6,500 hectares of additional lands;
 - b) Ka: 'yu: 'k't'h'/ Che:k'tles7et'h' Nation,
 - i) existing Ka: 'yu: 'k't'h'/ Che:k'tles7et'h' Nation Indian Reserves,
 - ii) up to 4,000 hectares of additional lands for Ka: 'yu: 'k't'h', and
 - iii) up to 1,600 hectares of additional lands for Che:k'tles7et'h';
 - c) Toquaht Nation,
 - i) existing Toquaht Nation Indian Reserves, and
 - ii) up to 1,300 hectares of additional lands;
 - d) Uchucklesaht Tribe,
 - i) existing Uchucklesaht Tribe Indian Reserves, and
 - ii) up to 2,600 hectares of additional lands; and
 - e) Ucluelet First Nation,
 - i) existing Ucluelet First Nation Indian Reserves, and
 - ii) up to 4,900 hectares of additional lands, within the area set out in its respective Sub-appendix A1 through A5.⁶⁷

⁶⁵ Yekooche AiP, Lands, General

⁶⁶ Sliammon AiP, Chapter 3, Lands, Sliammon Lands

⁶⁷ Maa-nulth AiP, Chapter 3, Lands

I. Termination of Indian Reserves

Indigenous peoples have an ambivalent relationship with Indian Reserves. On the one hand they are local “villages” but they are also “reserves” that were created so settlers could exploit the rest of the traditional territories for their economic benefit. Indian Reserves were not created under treaty like other Indian Reserves in Canada but more like “concentration camps”. We are forced to live these concentration camps despite the fact that we have legal interest in our judicially recognized and constitutionally protected Aboriginal Title Territories. The federal government in 1969 under the White Paper on Indian Affairs wanted to abolish Indian Reserves. The following provisions finally deliver this 1969 White Paper objective and makes Indian Reserve Lands subject to provincial land law.

Nisga’a Final Agreement

10. There are no “lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for the Nisga’a Nation, and there are no “reserves” as defined in the *Indian Act* for the use and benefit of a Nisga’a Village, or an Indian band referred to in the *Indian Act* Transition Chapter, and, for greater certainty, Nisga’a Lands and Nisga’a Fee Simple Lands are not “lands reserved for the Indians” within the meaning of the *Constitution Act, 1867*, and are not “reserves” as defined in the *Indian Act*.⁶⁸

Tsawwassen AiP

20. After the Effective Date, there will be no “Lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for Tsawwassen First Nation, and there will be no “reserves” as defined in the *Indian Act* for Tsawwassen First Nation.⁶⁹

Yale AiP

12. After the Effective Date, there will be no “Lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for Yale First Nation, and there will be no “reserves” as defined in the *Indian Act* for Yale First Nation.⁷⁰

Lheidli T’enneh AiP

14. The Final Agreement will provide that there are no “lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for Lheidli T’enneh, and that there are no “reserves” as defined in the *Indian Act* for the use and benefit of Lheidli T’enneh, and, for greater certainty, that Lheidli T’enneh Lands are not “lands

⁶⁸ Nisga’a Final Agreement, Chapter 2, General Provisions, Constitution of Canada

⁶⁹ Tsawwassen AiP, Chapter 2, General Provisions, Constitution of Canada

⁷⁰ Yale AiP, Chapter 2, General Provisions, Character of Yale First Nation Land

reserved for the Indians” within the meaning of the Constitution Act, 1867, and are not “reserves” as defined in the Indian Act.⁷¹

Yekooche AiP

12. After the Effective Date, there will be no “lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for Yekooche First Nation, and there will be no “reserves” as defined in the *Indian Act* for Yekooche First Nation.⁷²
13. Before the Final Agreement, the Parties will deal with issues related to the registration of interests on Yekooche First Nation Lands, including:
 - a. registration of interests existing immediately before the Final Agreement and recognized under the *Indian Act*;⁷³

Sliammon AiP

14. After the Effective Date, there will be no lands reserved for the Indians within the meaning of the *Constitution Act, 1867* for Sliammon and there will be no reserves as defined in the *Indian Act* for Sliammon.⁷⁴

Maa-nulth AiP

12. After the Effective Date, there will be no “lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for Maa-nulth First Nations and there will be no “reserves” as defined in the *Indian Act* for Maa-nulth First Nations.⁷⁵

⁷¹ Lheidli T'enneh AiP, General Provisions, Constitution of Canada

⁷² Yekooche AiP, General Provisions, Character of Yekooche First Nation Lands

⁷³ Yekooche AiP, Lands, General, Land Title

⁷⁴ Sliammon AiP, Chapter 2, General Provisions, Character of Lands

⁷⁵ Maa-nulth AiP, Chapter 2, General Provisions, Character of Maa-nulth First Nation Lands and other Maa-nulth First Nation Lands

J. Aboriginal Title converted to Fee Simple

Fee Simple interests in land are the largest estate known in BC Land Law. This is different from Indian Reserve Land which is inalienable and held by the federal Crown in a fiduciary relationship with indigenous peoples. Provincial land and future treaty lands are subject to taxation and can be bought and sold in the open land market in British Columbia. This means that the different settlement lands will be governed like local or regional municipal governments. The land will always stay inside the settlement area but can be owned by indigenous or non-indigenous persons without any distinction. Each settlement group will be extinguishing their "Collective Aboriginal Title" under the "Land Selection Policy" for "Provincial Government Fee Simple Title".

Nisga'a Final Agreement

25. For greater certainty, the aboriginal title of the Nisga'a Nation anywhere that it existed in Canada before the effective date is modified and continues as the estates in **fee simple** to those areas identified in this Agreement as Nisga'a Lands or Nisga'a Fee Simple Lands.⁷⁶

Tsawwassen Draft AiP

6. On the Effective Date, subject to clauses 7 and 11, Tsawwassen First Nation will own Tsawwassen Lands in **fee simple**, being the largest estate known in law. This estate will not be subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under Federal or Provincial Law. No estate or interest in Tsawwassen Lands will be expropriated except as permitted by and in accordance with the Final Agreement.⁷⁷

Yale AiP

3. On the Effective Date, Yale First Nation will own Yale First Nation Land in fee simple, and subject to paragraphs 7 and 10, Yale First Nation fee simple ownership of Yale First Nation Land will not be subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under Federal or Provincial Law.⁷⁸

Lheidli T'enneh AiP

10. On the Effective Date, Lheidli T'enneh will own Lheidli T'enneh Lands in fee simple subject to the continuation of interests existing on the Effective Date as set out in Appendix C.

⁷⁶ Nisga'a Final Agreement, Chapter 2, General Provisions, Modification, Canada, Nisga'a Nation British Columbia, 27 April 1999, emphasis added

⁷⁷ Nisga'a Final Agreement, Chapter 3, Lands, Ownership and Tenure, July 9, 2003

⁷⁸ Yale AiP, Chapter 4, Lands, General

Yekooche AiP

3. On the Effective Date, subject to paragraphs 1 and 8 Yekooche First Nation will own Yekooche First Nation Lands in fee simple, and Yekooche First Nation fee simple ownership of Yekooche First Nation Lands will not be subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under Federal or Provincial Law.⁷⁹

Sliammon AiP

9. On the Effective Date, Sliammon will own Sliammon Lands in fee simple, and subject to paragraph 4, Sliammon fee simple ownership of Sliammon Lands will not be subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under Federal or Provincial Law.⁸⁰

Maa-nulth AiP

3. On the Effective Date, each Maa-nulth First Nation will own its Maa-nulth First Nation Lands in fee simple, and subject to paragraph 6, Maa-nulth First Nation fee simple ownership of Maa-nulth First Nation Lands will not be subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under Federal or Provincial Law.⁸¹

⁷⁹ Yekooche AiP, Lands, General

⁸⁰ Sliammon AiP, Chapter 3, Lands, Sliammon Lands

⁸¹ Maa-nulth AiP, Chapter 3, Lands

K. Elimination of Section 87 Exemption

Section 87 of the Indian Act provides tax exemption for Indian people. This provision was meant to protect Indian property and contained a silent recognition of the special status of Indian people. It has been a long-term stated objective of the federal government to phase out his aspect of Indian Rights in any land claims negotiations.

Section 87 reads as follows:

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
 - (b) the personal property of an Indian or a band situated on a reserve.
- (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.
- (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.⁸²

This provision brings indigenous peoples increasingly under the control of the federal and provincial government. Tax exemption is a basic mechanism to ensure that we would not be alienated from our lands because of our inability to pay property or real property taxes. Removing this tax exemption will make lands under fee simple extremely vulnerable to being lost through tax actions against indigenous fee simple land owners. Indigenous peoples have been marginalized economically and most members do not have finances or the educational background to understand the implication of not paying taxes.

Nisga'a Final Agreement

6. Section 87 of the *Indian Act* will have no application to Nisga'a citizens:

- a. in respect of transaction taxes, only as of the first day of the first month that starts after the eighth anniversary of the effective date;
- b. in respect of all other taxes, only as of the first day of the first calendar year that starts on or after the twelfth anniversary of the effective date.⁸³

⁸² Canada Statutes, Indian Act, R.S., c. I-6, s. 87; 1980-81-82-83, c. 47, s. 25.

⁸³ Nisga'a Final Agreement, Chapter 16, Taxation, Section 87 Exemption

Tsawwassen Draft AiP

5. Before the Final Agreement, the Parties agree to negotiate transitional tax measures to address the fact that section 87 of the *Indian Act* will no longer apply after the Effective Date. These transitional tax measures will be negotiated in a way that provides a reasonably comparable effect to transitional tax measures in other land claim or self-government agreements in principle, or in other land claim or self government final agreements negotiated with other aboriginal groups in British Columbia.⁸⁴

Yale AiP

7. Before the Final Agreement, the Parties agree to negotiate transitional tax measures to address the fact that section 87 of the *Indian Act* will no longer apply after the Effective Date. These transitional tax measures will be negotiated in a way that provides a reasonably comparable effect to transitional tax measures in other land claim or self-government agreements in principle, or in other land claim or self-government final agreements negotiated with other aboriginal groups in British Columbia.⁸⁵

Lheidli T'enneh AiP

7. Prior to the Final Agreement, the Parties agree to negotiate transitional tax measures to address the fact that section 87 of the Indian Act will no longer apply after the Effective Date.
8. These transitional tax measures will be negotiated in a way that provides a reasonably comparable effect to transitional tax measures in other land claim or self-government agreements-in-principle, or in other land claim or self-government final agreements negotiated with other aboriginal groups in British Columbia.⁸⁶

Yekooche AiP

8. Before the Final Agreement, the Parties agree to negotiate transitional tax measures to address the fact that section 87 of the *Indian Act* will no longer apply after the Effective Date. These transitional tax measures will be negotiated in a way that provides a reasonably comparable effect to transitional tax measures in other land claim or self-government agreements in principle, or in other land claim or self government final agreements negotiated with other aboriginal groups in British Columbia.⁸⁷

⁸⁴ Tsawwassen First Nation Draft Agreement in Principle, July 9, 2003, Chapter 16, Taxation, Indian Act Section 87 Exemption

⁸⁵ Yale AiP, Chapter 17, Taxation, Indian Act Transition

⁸⁶ Lheidli T'enneh AiP, Taxation, Indian Act Transition

⁸⁷ Yekooche AiP, Taxation, Indian Act Transition

Sliammon AiP

8. Prior to the Final Agreement, the Parties will negotiate transitional tax measures to address the fact that section 87 of the *Indian Act* will no longer apply after the Effective Date.
9. These transitional tax measures will be negotiated in a way that provides a reasonably comparable effect to transitional tax measures in other land claim or self-government agreements-in-principle, or in other land claim or self-government final agreements negotiated with other aboriginal groups in British Columbia.⁸⁸

Maa-nulth AiP

6. Prior to the Final Agreement, the Parties agree to negotiate transitional tax measures to address the fact that section 87 of the *Indian Act* will no longer apply after the Effective Date.
7. These transitional tax measures will be negotiated in a way that provides a reasonably comparable effect to transitional tax measures in other land claim or self-government agreements-in-principle, or other land claim or self-government agreements negotiated with other aboriginal groups in British Columbia.⁸⁹

⁸⁸ Sliammon AiP, Chapter 17, Taxation, Indian Act Section 87 Exemption

⁸⁹ Maa-nulth AiP, Chapter 14, Indian Act Transition, Indian Act Section 87 Exemption

VI. NEED FOR INTERNATIONAL INVOLVEMENT

The above agreements and the listed provisions encapsulate the limitations that the federal and provincial governments want to impose on indigenous rights and why they do not support the UN Draft Declaration on the Rights of Indigenous Peoples. The Minister for Indian Affairs, Jim Prentice, particularly referred to the right of self-determination and land rights as the reasons why Canada could not accept the Draft Declaration on Indigenous Peoples because it went way beyond the scope of their national policies on the respective issues. What Minister Prentice failed to mention is that their current policies violate Section 35 of the Canadian Constitution and fail to implement Supreme Court of Canada Decisions that have recognized important indigenous rights. Hopefully the comparison also helps understand the level of frustration of indigenous peoples in Canada who want to defend and maintain their indigenous rights and continue to experience the devastation of their traditional territories and have no mechanism available to address their concerns. Inside of Canada there are basically only two ways to resolve outstanding Aboriginal Title issues. You either resolve them through going to Court or by negotiating under the existing Comprehensive Claims Policy. The real crux of the problem is that if Indigenous peoples do continue to use their land they will lose it. Sleeping on your rights is an argument that the governments have used against our peoples in past litigation.

During the first visit of the UN Special Rapporteur on Indigenous Issues a number of visits were organized with indigenous peoples who have struggled to maintain their indigenous rights. Their concerns fall squarely into the mandate of the Special Rapporteur to do with the situation of human rights and fundamental freedoms of indigenous peoples. The communities visited ranged from the Secwepemc people who oppose the expansion of Sun Peaks Ski Resort at Skwelk'wek'welt and the St'at'imc People who oppose the construction of the Cayoosh Creek Ski Resort in the West, all the way across Canada to the Maritimes where the Mik'maq people want to maintain their right to fish and use their lands and waters. An update on the struggles of these indigenous peoples to maintain their indigenous rights is contained in their recent shadow report to the UN Human Rights Committee in 2006 when Canada had to report on its implementation on the International Covenant on Civil and Political Rights. Their collective report containing important background information and specific information on the respective indigenous peoples is contained as an annex to this report.

These indigenous peoples really believe in their rights and they need international support. They appreciated the visit of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples as a representative of the United Nations to their traditional territories and they are committed to work from the local to the national and international level to ensure the protection of their rights and to make Canada conform with internationally recognized principles and indigenous rights. The Declaration on the Rights of Indigenous Peoples will constitute an important international minimum standard and the government of Canada should not only sign on to it, it should also be required to ensure that its policies meet this minimum standard.

VII. Recommendations

The Special Rapporteur:

- Recommends to Canada to sign on to the UN Draft Declaration on the Rights of Indigenous Peoples as an international minimum standard and implement it at the national level
- Recommends that Canada remove the exclusions and limitations from its policy on self-government to bring it into accordance with the internationally recognized indigenous right to self-determination
- Recommends to Canada to review the Comprehensive Claims Policy on Indian Land Claims on the basis of the recognition of indigenous land rights and that any such review include indigenous peoples, especially those not negotiating under the existing policy.
- Recommends that Canada broaden the scope of negotiations to recognize Aboriginal Title and create a system of coexistence. Recognition of Aboriginal Title is a key aspect of reducing and eliminating poverty amongst indigenous peoples and must not be sidelined when talking about efforts to reduce and eliminate poverty amongst our peoples.
- Advises other Human Rights Bodies that Canada is still very committed to extinguishing Aboriginal land rights in Canada through the "Modified Rights Model" and is using the Nisga'a Final Agreement as a template.
- Advise the international community that the proprietary rights of indigenous peoples are a key aspect of valuating and recognizing our Human Rights of indigenous peoples.
- Advise Human Rights Bodies to continue questioning Canada on providing evidence about how the Canadian government is deliberately changing from the Modified Rights Model to other kinds of policies that will recognize and create systems that will allow coexistence between Aboriginal Title and other proprietary interest in Canada, so indigenous peoples Human Rights regarding our proprietary interests are not violated.

