FIRST NATIONS SUMMIT

January 30, 2012

United Nations Committee on the Elimination of Racial Discrimination
c/o CERD Secretariat
8-14 Avenue de la Paix
CH-1211 Geneva 10,
Switzerland

Attention: Gabriella Habtom, Human Rights Officer, CERD Secretariat
Email: ghabtom@ohchr.org

Dear Ms. Habtom,

Re: The Government of Canada's 19th and 20th Reports on the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination to be considered at its 80th session, February 13 to March 9, 2012 (CERD/C/80/1)

Please find attached a shadow report prepared by the First Nations Summit regarding Canada's 19th and 20th reports, which will be considered by CERD at its 80th session, February 13 to March 9, 2012. We respectfully request that you distribute this electronic submission to all CERD members in advance of the session. In addition, by way of post, the First Nations Summit will provide twenty (20) paper copies of this submission for your distribution to all CERD members in advance of the session.

Should you have any questions about this submission or require additional information, please do not hesitate to contact Colin Braker at the First Nations Summit office via e-mail to cbraker@fns.bc.ca or by phone at 604-926-9903.

Respectfully submitted,
FIRST NATIONS SUMMIT

Grand Chief Edward John | Chief Douglas White III Kwulasultun | Dan Smith

cc. Chedra Bullock, CERD Administrative Assistant
Email: cbullock@ohchr.org

FIRST NATIONS SUMMIT

FIRST NATIONS SUMMIT
SUBMISSION TO CERD – 80th SESSION
FEBRUARY 13 - MARCH 9, 2012

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EXECUTIVE SUMMARY

This shadow report has been prepared by the First Nations Summit for consideration by the United Nations' Committee on the Elimination of Racial Discrimination in its review of Canada at its 80th session. This shadow report focuses on selected key issues that have been raised in Canada's 19th and 20th reports on the International Convention on the Elimination of All Forms of Racial Discrimination.

The primary mandate of the First Nations Summit is to establish and support a constructive resolution process on land, resource and governance issues through good faith treaty negotiations. In addition, the First Nations Summit engages in advocacy regarding the ongoing political, social, cultural and economic issues facing First Nations in BC and works to develop viable and practical political and policy solutions to these issues. Ultimately, the efforts of the First Nations Summit are directed at advocating for and supporting the survival, dignity, and well-being of First Nations in BC.

To date, Canada has been selective in choosing which human rights it will respect and protect and has been generally unwilling to acknowledge Indigenous peoples' rights as human rights. Moreover, Canada has failed to fulfill its human rights obligations and commitments regarding Indigenous peoples. Its qualified adoption of the United Nations Declaration on the Rights of Indigenous Peoples undermines its credibility as a former Member of the Human Rights Council. Domestically, Canada and the Province of British Columbia continue to deny the constitutionally-protected title and rights of First Nations in litigation and in modern treaty negotiations.

The First Nations Summit respectfully encourages the Committee, in its review of Canada, to call upon Canada to recognize, affirm and respect the rights of First Nations in British Columbia to their lands, territories and resources, and to fulfill its international and domestic legal obligations in this regard. In particular, the First Nations Summit recommends that Canada:

1. Promote and fully implement UNDRIP;

2. Use UNDRIP as the framework for assessing Canada's fulfilment of its obligations regarding the human rights of Indigenous peoples;

3. Uphold the honour of the Crown by:

    - recognizing, respecting and implementing Aboriginal title and rights to First Nations' lands, territories and resources;
    - taking action to fully implement historic and modern treaties; and
    - fulfilling its obligations to First Nations under domestic and international law;

4. Engage in good faith treaty negotiations with First Nations in BC to settle the still outstanding land question and to reconcile pre-existing Aboriginal sovereignty with the assertion of Crown sovereignty;

5. Jointly review and revise, in collaboration with First Nations, its comprehensive claims policy and other related policies to be consistent with and reflective of current domestic and international law, international conventions and the spirit and intent of historic and modern treaties;

6. Enable First Nations to have access to and benefit from their lands, territories and resources to support self-sufficiency and self-determination, through revenue sharing and other joint initiatives;

7. Engage with First Nations on a government-to-government basis and develop joint decision-making mechanisms that recognize First Nations' right to participate in decision making and their authority over their lands, territories and resources;

8. Cease pursuing its adversarial strategy of "rights-denial" in litigation and negotiations;

9. Abandon inflexible mandates in treaty negotiations and develop mandates that respond to and are reflective of the diversity of First Nations in BC, with the goal of achieving workable treaties that help to sustain First Nations as peoples; and

10. Provide First Nations with sufficient access to financial assistance in the form of contributions (rather than loans) to participate effectively in treaty negotiations, and forgive First Nations loan debts as it has done for some third world countries.

The First Nations Summit submission regarding the Government of Canada's Nineteenth and Twentieth Reports on the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination to be considered at its 80th session, February 13 – March 9, 2012 (CERD/C/80/1)

I. CONTEXT FOR UNDERSTANDING FIRST NATIONS□CROWN RELATIONS

1. This report has been prepared by the First Nations Summit and focuses on selected key issues that have been raised in Canada's 19th and 20th reports on the International Convention on the Elimination of All Forms of Racial Discrimination.

2. First Nations' history in British Columbia ("BC") and our historic dealings with the federal and provincial governments provide a critical context for understanding the existing First Nations-Crown relationship. This relationship is coloured by recurring patterns of Crown conduct that persist through to the present and cannot be ignored.

3. Unlike other parts of Canada, colonial authorities signed very few treaties with the First Nations in what is now known as BC. Instead, traditional territories were treated as *terra nullius,*[1] and taken without the consent of, or compensation to, First Nations. In the 1858 *Act to Provide for the Government of British Columbia*, the British Parliament referred to these lands as the "certain wild and unoccupied Territories on the North-West Coast of North America … to be named British Columbia."[2] Governor James Douglas issued a series of Proclamations and Ordinances unilaterally taking lands that now make up the Province of BC. In particular, on February 14, 1859, James Douglas (the first Governor of BC) proclaimed that "[a]ll the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee",[3] disregarding the rights of First Nations to their lands, territories and resources, including the waters and seas.[4] These lands were taken without the knowledge, consent or agreement of First Nations. Numerous decisions of the Supreme Court of Canada ("SCC") have since confirmed that these lands were indeed "occupied" by peoples with distinctive societies and cultures.

4. The colonial mindset or approach to policy and legislative development continues today. Moreover, it appears to permeate into modern-day government agreements with First Nations and finds its ways into domestic common law.

5. First Nations in BC were unilaterally dispossessed and denied the benefit of their traditional relationship to their lands, territories and resources because they could not

[1] A Latin expression meaning "land belonging to no one ..."

[2] *An Act to Provide for the Government of British Columbia, 1858* (U.K.), 21 & 22 Vic, c 99.

[3] Governor James Douglas, *Proclamation*, (14 February 1859).

[4] References to "lands, territories and resources" throughout this submission, include waters and seas, where appropriate.

rely on the legal force of their Aboriginal title and rights in order to safeguard their most basic rights and interests as Aboriginal peoples. In many cases, this remains the *status quo*. Although recognition and protection is afforded to Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, this important section of the constitution continues to be the subject of extensive litigation in the Canadian courts.

6. Much of the battle between First Nations and the Crown revolves around a number of key issues including:

    - recognition of Aboriginal title and rights, treaty rights and the inherent right of self-government;
    - amending Crown legislation and policy to support revenue sharing from resources on First Nations lands; and
    - establishing new fiscal relationships that would afford First Nations the opportunity to help their members access basic programs and services.

    In BC, First Nations have repeatedly been forced to resort to the courts to protect their land and resource interests in their respective traditional territories, which are continuously being alienated by the Crown to third party interests without first properly and meaningfully engaging the First Nations, as required by Canadian domestic common law.

7. The SCC has stated that negotiation, rather than litigation, is the preferred method for achieving reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.[5] Once First Nations find themselves back in negotiations, the Crown resumes its strategy of denial, and Crown negotiators routinely ignore key legal principles established by the Courts. In fact, the Crown attempts to pre-determine the outcome of negotiations by insisting that any resolution fit within its existing unilaterally developed negotiation policies and mandates, which are largely designed to preserve its own interests and the *status quo*. Since 1993, many First Nations have entered into modern treaty negotiations with Canada and BC. Currently, 60 negotiation tables (representing 110 of the 198 First Nations in BC) are at various stages of negotiations. However, modern-day treaty negotiations have yet to achieve reconciliation for most First Nations due to the unreasonable negotiating mandates of Canada and BC. First Nations with historic treaties (e.g. Douglas Treaties and Treaty 8), as well as modern treaties (e.g. Nisga'a, Tsawwassen and Maa-nulth), have raised serious concerns about the full and proper implementation of their treaties.

8. It is difficult for First Nations people to accept or even understand the troubling pattern of Crown conduct. At the very core of this conduct is the continued "denial" by the federal and provincial Crown of the very existence of Aboriginal peoples and their rights, except where these are proven in a court or recognized in negotiated agreements. In many respects, this amounts to a "contingent rights" approach to the

[5] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras. 1338 and 1357.

section 35 Aboriginal rights guaranteed in *Constitution Act, 1982*. First Nations continue to see this approach in court pleadings filed by Crown lawyers and in the written and oral arguments that they submit in litigation regarding Aboriginal rights.

9. The Crown's historic attitude towards First Nations, which persists in more subtle forms today, is clearly revealed in the June 2008 apology issued by Prime Minister Harper to survivors (or "former students", as referred to in the document) of Indian residential schools in BC and across Canada. In particular, the apology acknowledges:

> Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, 'to kill the Indian in the child.'

It is important to note that this apology was only agreed to after protracted litigation and appeals to the SCC throughout which the Canadian government denied it had any responsibilities to the survivors.

10. Canada holds itself out internationally as a defender of human rights, yet consistently refuses to recognize Indigenous rights as human rights. Moreover, Canada has failed to fulfill its human rights obligations and commitments regarding Indigenous peoples. In this regard, its qualified adoption of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") undermines its credibility on the international stage as a former Member of the Human Rights Council ("HRC").

11. The Crown's historic conduct and subsequent acts, including its legislation, regulations and policies, reflect a systemic pattern of discrimination. Although less overt than it once was, racism and discrimination have been subtly embedded in Crown legislation, regulations and policies of key institutions and governing bodies. These prevailing governmental attitudes in turn permeate the social fabric of the nation and impact on all aspects of First Nations lives. This begs the following question – if the Crown in its official capacity continues to discriminate systemically, how then are Canadians and Canadian institutions to think or act towards Aboriginal peoples and the issues they raise?

12. While courts do not question the validity of Canada's title and sovereignty, Canada constantly puts First Nations to proof and forces them into lengthy, expensive litigation to defend their inherent rights. In fact, the Committee on the Elimination of Racial Discrimination ("CERD") has expressed concern that "claims of Aboriginal land rights are being settled primarily through litigation, at a disproportionate cost for the Aboriginal communities concerned due to the strongly adversarial positions taken

by the federal and provincial governments".[6] Canada and BC have failed to take steps to address these concerns. For example, Canada and BC have taken "strongly adversarial positions" against the Tsilhqot'in Nation, which is seeking to protect its rights in response to forestry activities in its traditional territory. The *Tsilhqot'in Nation v. British Columbia* trial was one of the longest civil trials in the history of Canada, lasting 339 days over five years, at enormous financial and human cost. This case has since been appealed to the BC Court of Appeal and the parties have been awaiting a decision for over a year.

13. In summary and by way of context, despite its domestic and international obligations, Canada continues to deny the title and rights of First Nations instead of advancing reconciliation based on recognition of these rights.[7]

II. INTRODUCTION

(Comments regarding paragraph 4 of Canada's report)

14. At paragraph 4 of its report, Canada notes that, "the views of approximately 85 non-governmental organizations were sought with respect to the issues to be covered in this report. Organizations were also encouraged to forward the correspondence to other interested organizations. No comments were received from any of the organizations." The First Nations Summit notes that its views regarding the issues canvassed in Canada's report were not sought by Canada, its representatives or by any other organization.

III. ARTICLE 2: LEGISLATIVE, ADMINISTRATIVE, JUDICIAL OR OTHER MEASURES

Gender-based violence & Training for law enforcement and intelligence services

(Comments regarding paragraphs 44-59 of Canada's report)

15. Far too often, First Nations people, both as victims and accused individuals, encounter systemic racism and discrimination in the Canadian criminal justice system. The system does not recognize that differences in culture, values, language and traditions directly impact on the experience and treatment of First Nations people in the justice system. A troubling example of this systemic racism and discrimination is the approach the justice system has taken to address missing and murdered Aboriginal women in BC and across Canada. For many years, the provincial government and provincial and national law enforcement agencies failed to

[6] CERD, "Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada" UN Doc. CERD/C/CAN/CO/18 (2007) at para. 22.

[7] First Nations have repeatedly objected to the Crown's denial of rights and its failure to implement jurisprudence concerning Indigenous peoples' rights: see: First Nations Summit, "Implementation of Jurisprudence Concerning Indigenous Peoples' Rights: Experiences from the Americas – A Canadian Perspective" (October 2005) which is accessible online at www.fns.bc.ca.

acknowledge that Aboriginal women were going missing or being murdered at an alarming and disproportionate rate in BC.[8] The failure of the system to protect these missing and murdered Aboriginal women can be attributed in large part to indifference, systemic racism and discrimination, and a lack of understanding of the histories and cultures of First Nations people.

16. In its report, Canada indicates that the *Criminal Code of Canada*[9] provides a broad-based response to all forms of violence against women including measures such as prohibitions on specific forms of violence such as assault, sexual assault and criminal harassment. As well, Canada suggests that additional procedural protections (e.g. the use of testimonial aids), preventative measures (e.g. restraining orders), and sentencing principles (e.g. spousal abuse and abuse of a position of trust/authority are aggravating factors for sentencing) ensure that the criminal justice system is able to respond to violence against women. Canada, however, fails to comprehend that in order for these measures to be effective, Aboriginal women must feel safe in approaching law enforcement officers and others in the criminal justice system.

17. The measures that Canada points to in its report, however, do not address underlying issues such as the alienation experienced by many First Nations people and their deep mistrust of law enforcement officers and those involved in the criminal justice system. The Royal Commission on Aboriginal Peoples suggested in its 1996 report that many programs arising out of the criminal justice system do not attempt to change the way that the system deals with aboriginal people, but rather merely attempt to lessen the feelings of alienation experienced during interactions.[10] Justice Murray Sinclair suggested that it may be time to ask the question, "what is wrong with our justice system that Aboriginal people find it so alienating?"

18. In particular, there are a number of issues which give rise to the sense of alienation, including:

    - poor First Nations-law enforcement relations, including the treatment of First Nations people by law enforcement officers;[11]
    - the number of First Nations people who have died as a result of police actions or while in police custody;[12]

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[8] Note: Despite acknowledging in its 19th and 20th Reports to CERD that research shows that Aboriginal women and women belonging to racial/ethnic minority groups are particularly at risk of gender-based violence.

[9] Available online at: http://laws.justice.gc.ca/en/C-46/.

[10] Rudin in McCamus, *Ontario Legal Aid Review*, 1997: 458, citing "Bridging the Cultural Divide", 1996: 93.

[11] For example, the 1989 Royal Commission on the Donald Marshall, Jr. Prosecution noted how the criminal justice system failed Mi'kmaq Donald Marshall, Jr. "at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983."

[12] For example, the Coroner's Inquest and Commission for Public Complaints Against the Royal Canadian Mounted Police Report into the In Custody Death of Mr. Raymond Silverfox of the Little Salmon Carmacks First Nation, who died on December 2, 2008, after spending 13 hours in Whitehorse RCMP cells. The Commission for Police Complaints found that complacency and callousness of RCMP members contributed to Silverfox's death and that they had "failed to act in accordance with the *RCMP Act* and the RCMP's core values" with regards to their conduct; the 1989 Royal Commission on the Donald Marshall, Jr., Prosecution which looked at how the criminal justice system failed Mi'kmaq

- the disproportionate numbers of Aboriginal people charged with criminal offences and appearing at various levels of court;
- the need for improved sentencing approaches, including increased and continued funding for important sentencing tools, such as detailed "Gladue reports";[13]
- the treatment of First Nations people who are sentenced to serve time in provincial or federal institutions;
- the lack of Aboriginal people recruited into provincial and national police forces; and
- the lack of Aboriginal people appointed to the judiciary at all levels of the courts.

19. Over the years, the First Nations Summit, along with many other individuals and organizations, has been calling for public inquiries into Aboriginal justice matters, including inquiries into the death of Frank Paul after being left in a back alley by Vancouver police officers, the disproportionate number of Aboriginal women who have gone missing and been murdered in Vancouver's downtown eastside and along the Highway of Tears (Highway 16 in northern BC)[14] and a general examination of the over-representation of First Nations people in the Canadian criminal justice system.

20. Despite the First Nations Summit's direct involvement in calling for an inquiry into the missing and murdered Aboriginal women in Vancouver's downtown eastside, BC unilaterally established and announced the establishment of the Missing Women Commission of Inquiry. The First Nations Summit was never approached by BC regarding any aspects of establishing the Inquiry. In particular, BC did not seek the First Nations Summit's or individual First Nations' input on decisions such as the scope of the Inquiry's terms of reference or key appointments to the Commission. This resulted in the development of terms of reference that are exceedingly narrow and do not adequately identify the key issues of concern to First Nations.

Access to Justice - Role of the Courts

21. Far too often, First Nations are forced to resort to litigation to protect their constitutionally "recognized and affirmed" Aboriginal and treaty rights or to establish

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Donald Marshall, Jr. "at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983"; an Inquiry was also convened into the Death of Frank Paul, a Mi'kmaq man who died "alone and cold in a back alley in Vancouver sometime on December 5–6, 1998" after being left there by Vancouver police.

[13] Gladue reports are prepared in accordance with section 718.2(e) of the *Criminal Code* and are intended to support a restorative justice approach by providing a judge, Crown counsel and the accused's lawyer with information on an Aboriginal accused's background and any mitigating circumstances. The Legal Services Society in BC is currently funding the preparation of Gladue reports as a pilot project.

[14] Through First Nations Summit Resolutions #0608.14 and #0310.07, the First Nations Summit has been mandated by the First Nations Summit Chiefs in Assembly to push for a full public inquiry into the missing and murdered women and to raise public awareness about this important issue.

rights to resources in order to secure access to a "moderate livelihood"[15]. No other group in Canada has had to take such drastic steps to secure access to a livelihood or basic sustenance. In taking such drastic steps to protect their title and rights, First Nations face many obstacles, including financial barriers and questions about the actual appropriateness of Canadian courts as an arena to settle these matters. For example, in *Delgamuukw*[16], the SCC failed to protect the property rights of the Gitxsan and Wet'suwet'en, but, rather, sent the issue of Aboriginal title back to the lower court for determination. The Inter-American Commission on Human Rights ("IACHR") in its report on the admissibility of the Hul'qumi'num Treaty Group's claim took note of the fact that "this case lasted more than 15 years and cost the indigenous peoples involved over $14 million, and due to the lack of financial resources they have not been able to continue litigation in the courts."[17]

22. Similarly, in *Tsilhqot'in Nation v. British Columbia*, it took roughly ten years to reach a trial level decision and, although the court noted that the Tsilhqot'in Nation had proved title to significant areas within its traditional territory, it did not issue a declaration of title in favour of the Nation. In regards to this case, the IACHR noted that the Tsilhqot'in people "have spent more than $15 million in 24 years of litigation and responding to appeals without having won the recognition of their property rights or the protection of their ancestral lands against the actions of third parties."[18] This provides another example of the frustrations facing First Nations that seek to protect their rights to their traditional lands only to obtain an outcome that provides them with no legal protection. Further, in that case, the court suggested that the process of reconciling competing interests should take place outside of the adversarial milieu of the courtroom. In particular the court noted that:

> … this case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests…[19]

23. Many First Nations cannot afford to access justice through litigation due to the impoverished conditions that they face. Such conditions are the result of First Nations economies having been severely disrupted over time. First Nations have been marginalized and largely stripped of their land and natural resource base. In this regard, the IACHR observed:

> …A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective…[20]

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[15] See: *R. v. Gladstone*, [1996] 2 S.C.R. 723; and *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43.

[16] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[17] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. See also: Inter-American Commission on Human Rights (Organization of American States), Report No 105/09 re: Petition No. 592-07, Admissibility – Hul'qumi'num Treaty Group v. Canada, October 30, 2009, footnote 11.

[18] *Ibid*.

[19] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para 157.

24. In its report regarding the admissibility of the petition brought by the Hul'qumi'num Treaty Group, the IACHR notes that legal proceedings in the Canadian courts do not seem to provide any reasonable expectation of success because Canadian jurisprudence has not obligated the State to set boundaries demarcate, and record title deeds to lands of Indigenous Peoples.[21]

IV. ARTICLE 5: EQUALITY BEFORE THE LAW

Indian Act

(Comments regarding paragraph 93 of Canada's report)

25. Historically, First Nations were self-determining and relied on and benefitted from the lands, territories and resources. First Nations' traditional laws and systems of governance applied to their lands, territories and resources, citizens and to those passing through their territories. An important feature of self-determination was the right of each First Nation to establish its own systems for recognizing and obtaining citizenship. Generally, these systems were structured so that citizenship could be gained through a number of ways including birth, marriage, adoption and residency. However, colonization brought about significant changes to these traditional systems of governance and mechanisms for establishing citizenship.

26. Throughout Canada, First Nations were subjected to a new system of governance under various federal government statutes, most notably the *Indian Act*. The *Indian Act*, a mechanism to administer "Indians" and "Lands reserved for the Indians", was not designed to promote and respect First Nations' systems of governance. In particular, the *Indian Act* membership provisions fail to reflect First Nations' own systems and laws related to citizenship and have consequently significantly interfered with the jurisdiction of First Nations over citizenship. Canada's statute was principally designed to benefit and protect the interests of the Crown.

27. In 2009, the BC Court of Appeal, in the case of *McIvor v. Canada (Registrar of Indian and Northern Affairs)*[22], instructed Canada to amend certain registration provisions of the *Indian Act* that the court found to be discriminatory. As a direct response to this decision, the Government of Canada introduced *Bill C-3, Gender Equity in Indian Registration Act* on March 11, 2010. In further response to concerns

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[20] Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of Oct.6, 1987, Inter. Amer. Ct. of H.R., Series A No. 9 at para 24. See also: *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua ("Awas Tingni")*, Inter. Am Ct. H.R. Ser. C., No. 79 (Judgment) Aug 31, 2001 at para 134 where the court indicates that remedies are illusory and ineffective if there is unjustified delay in reaching a decision on them.

[21] Inter-American Commission on Human Rights, Report No 105/09, Petition No. 592-07 on Admissibility – Hul'qumi'num Treaty Group v. Canada, October 30, 2009.

[22] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (CanLII); 306 DLR (4th) 193; 190 CRR (2d) 249; [2009] 2 CNLR 236; 91 BCLR (4th) 1.

raised by First Nations and others concerning *Bill C-3*,[23] the government launched an "exploratory process" on issues relating to Indian registration, Band membership and citizenship, which ended in December 2011. Through the exploratory process, the First Nations Summit hosted a number of sessions at which Chiefs and their technicians identified and discussed a number of key issues and concerns.[24] Paramount among these concerns is the federal government's failure to recognize and respect First Nations' inherent right to determine who are their own Citizens and who is an "Indian". This continues to be the fundamental challenge that needs to be addressed by the Crown.

28. Canada has to date refused to address discrimination issues arising under the *Indian Act* in a comprehensive way that respects First Nations' inherent right to determine their own Citizens. It has also failed to respond to First Nations' profound concerns about how Canada's current approach to determining who is an "Indian" under the *Indian Act* threatens First Nations' very existence. In the not too distant future, many First Nations will not have any Status Indians left on their membership lists. This amounts to a statutory form of extinguishment and raises the concern that First Nations' reserve lands could revert to the provincial government if there are no Status Indians left on First Nations' membership lists.[25] It has also ignored First Nations' equally grave concerns related to funding for their members and would-be members who are Non-Status Indians. Instead, it has inadequately responded on a piecemeal basis to specific issues raised in litigation through initiatives such as Bill C-31 and Bill C-3.

Measures to address possible discriminatory approaches to law enforcement & Aboriginal people

(Comments regarding paragraphs 94-100 of Canada's report)

29. Law enforcement policies and actions, and the subsequent response of the Canadian criminal justice system to First Nations people, continue to give rise to serious issues. First Nations have expressed a sense of alienation and distrust of law enforcement officers and others involved in the criminal justice system. In a 2008 First Nations Community Police Service survey, approximately 85% of RCMP respondents reported that they believed they were delivering culturally sensitive and responsive police services, while only approximately 43% of First Nations respondents believed they were receiving such a service.[26] The relationship between law enforcement

[23] During Canada's engagement on its plan to implement the *McIvor* decision, First Nations and other groups identified a number of issues on Indian registration, Band membership and First Nations citizenship beyond the scope of the decision and the legislative amendments passed under *Bill C-3*. Further, First Nations and others called on the federal government to establish a joint process to examine and address the broader issues.

[24] The First Nations Summit final report, "We know who we are and we lift up our people" may be accessed online at: www.fns.bc.ca.

[25] Ibid, p. 8.

[26] RCMP FNCPS Review [A review of the First Nation Community Police Service in British Columbia for Canada, the province of BC and the CTA Steering Committee], March 2008, prepared by Steve Watt. This report was

officers and agencies and First Nations must improve in order for First Nations to feel safe in their communities and receive policing services in a manner that is culturally sensitive and responsive to the unique needs of each community.[27]

30. In response to the alarming increase in the number of serious police incidents involving First Nations citizens over the past decade, the First Nations Summit has steadfastly called for independent reviews, investigations and public inquiries into various law enforcement actions and investigations.

Limitations on land use by Aboriginal people & Aboriginal title issues

(Comments regarding paragraphs 106-111 of Canada's report)

31. First Nations have unique and special relationships with their lands, territories and resources giving rise to constitutionally-protected Aboriginal title and rights under section 35(1) of the *Constitution Act, 1982*. Aboriginal title and rights encompass the inherent jurisdiction and authority to make decisions about the stewardship of lands, territories and resources. As such, First Nations must be involved in all Crown decisions that impact upon their lands, territories and resources. Furthermore, Aboriginal title includes an "inescapable economic component", so First Nations must also share in the benefits that are derived from the development of their lands, territories and resources.

32. Canadian common law is intended to provide a legal framework to guide the development of state mechanisms for recognition of Aboriginal title and rights and for consultation with and accommodation of First Nations. In a number of key decisions,[28] the SCC established that Aboriginal title, which pre-dates and survived the assertion of sovereignty, exists as a legal right, independent of Crown recognition. Further, the SCC noted that section 35 of the *Constitution Act, 1982* is directed towards "the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory".[29] Yet, the federal and provincial governments have historically denied and continue to deny the existence of Aboriginal peoples' title and rights. The pattern of Crown conduct, as noted above, is reflected in the taking of Indigenous lands in BC without

commissioned by Canada and British Columbia, with the support of the provincial Community Tripartite Agreement Steering Committee to conduct a review of the RCMP First Nation Community Policing Service (FNCPS) delivered in BC.

[27] As recently as late September 2011, the First Nations Summit, along with the Union of BC Indian Chiefs, the BC Assembly of First Nations and the Native Courtworker and Counselling Association of BC, publicly expressed shock and outrage at the Royal Canadian Mounted Police (RCMP) beating of a 17 year old handcuffed Aboriginal girl in Williams Lake, BC, the death of a 19 year old Aboriginal male in RCMP custody in Prince George, BC and the RCMP tasering of an 11 year old Aboriginal child. These organizations also expressed support for the Gitxsan people in their call for action following the coroner's inquest into the RCMP shooting of Rodney Jackson, in the back, two years ago. These types of incidents are alarming and unacceptable.

[28] *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313. See also: *Roberts v. Canada*, [1989] 1 S.C.R. 322 at para 340; Delgamuukw v. British Columbia, [1997] 3 SCR 1010 at para 114.

[29] *R v Van der Peet*, [1996] 2 SCR 507 at para. 36.

agreement and without compensation. For example, in *Haida Nation v. British Columbia*, the provincial Crown submitted, "that the Plaintiffs' claim of aboriginal title is incompatible with Crown sovereignty and thus such a title claim cannot be capable of recognition at common law."[30]

33. At paragraphs 110 and 111 of its report, Canada cites *Delgamuukw* and references the SCC's comments on the inherent limits of Aboriginal title, such as the limitation that uses of Aboriginal title lands must not be irreconcilable with the nature of the Aboriginal group's attachment to the lands in question. Canada also references the court's finding that Aboriginal title affords legal protection to prior occupation of land in the present-day and thus recognizes the importance of the continuity of the relationship of an Aboriginal group to its land over time. Uses of land that would threaten that future relationship are excluded from the content of Aboriginal title. Canada concludes these paragraphs by stating that Aboriginal groups who wish to use their lands in a way that is not permitted under Aboriginal title may surrender those lands to the Crown, thereby converting them to non-title lands. In many cases, the inherent limitation, which precludes any use that would destroy the attachment to the land for future generations, is not a concern for First Nations as it is consistent with their own values and stewardship responsibilities.

34. The SCC attempted to clarify this matter by emphasizing that the limitation does not restrict the use of land to activities traditionally carried out on the land, as that would amount to a legal straightjacket on Aboriginal peoples who have a legitimate legal claim to the land.[31] The court went on to state that this approach "allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the Aboriginal title in that land."[32] Canada's pointed reference to these select passages in *Delgamuukw* overlooks the importance of First Nations' inherent right of self-government in the management of their Aboriginal title lands. This right encompasses First Nations' ability to define the nature of their attachment to, and make decisions regarding the use of, their lands, territories and resources in accordance with their own values.

35. Further, various international standards, laws and instruments provide important guidance with respect to First Nations land rights. In particular, the UNDRIP, which the Canadian government endorsed in December 2010, establishes minimum standards for the protection of Indigenous rights. These standards must form an integral part of the foundation for the federal and provincial Crown's relationships with First Nations. Article 32 has particular relevance and importance in connection with land rights and use:

    Article 32:

[30] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 at paragraph 25.

[31] *Delgamuukw*, para. 132.

[32] *Delgamuukw*, para. 132.

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Additional information requested by the Committee

(Comments regarding paragraphs 112-116 of Canada's report)

Treaty Negotiations Process

36. BC is the only Canadian province where reconciliation of pre-existing Aboriginal title and asserted Crown sovereignty through treaties is largely outstanding. In BC, the federal Crown and provincial Crown continue to alienate lands that may be important to concluding treaties. Crown policy must recognize the existing Aboriginal interest in these lands, territories and resources and provide for interim measures to protect them while negotiations are ongoing in order to increase the likelihood of successfully concluding agreements.[33]

37. The BC treaty negotiations process began in 1992 with the signing of the BC Treaty Commission Agreement, and a commitment to a "made-in-BC" approach to treaty negotiations. Since then, many First Nations in BC have entered into modern-day treaty negotiations with Canada and BC. Currently, sixty negotiation tables (representing 110 of the 198 First Nations in BC) are at various stages of negotiations. The following sets out the current status of the negotiation process:

- Two ratified treaties.[34]
- Three completed, un-ratified treaties.[35]
- $422 million (approximately) in loan debt for First Nations as of March 31, 2011.[36]
- A number of continuing and critical barriers to concluding agreements:

[33] The current lack of land protection is having serious consequences in the treaty negotiation process. For example, the Musqueam First Nation has been forced to litigate in an effort to protect key lands, which the First Nation intends to be subject to treaty negotiations, from alienation by Land and Water BC, a provincial Crown corporation.

[34] Tsawwassen First Nation Final Agreement and Maa-nulth First Nations Final Agreement.

[35] Lheidli T'enneh, Yale and Sliammon.

[36] BC Treaty Commission Annual Report 2011, p. 29 at http://www.bctreaty.net/files/pdf_documents/2011_Annual-Report.pdf

- Certainty and recognition – lack of acceptable and workable model,
- Interim Measures – lack of protection for and access to lands, territories and resources,
- Fisheries – unilateral shutdown,
- Fiscal relations and taxation – unilateral imposition of outcomes,
- Government mandating processes – lengthy and costly delays and inadequate outcomes,
- Government disengagement from or limited engagement with negotiation tables,
- Loan funding to support First Nations' negotiations – crippling debt and an uneven negotiation process, and
- Implementation – inadequate commitment to provide the required resources and to resolve implementation-related disputes.

38. The BC Claims Task Force report, which set out the blueprint for the BC treaty negotiations process, stated that,

> To achieve successful and lasting agreements, the process of negotiations must embody the following [principles]: …
>
> **Made in British Columbia:**
>
> To meet the special circumstances of these negotiations, the process must be located and managed here in British Columbia.

39. In its 1991 response to the BC Claims Task Force Report, Canada stated, "Clearly, the unique situation in B.C. calls for a 'made-in-B.C.' approach to resolving [native claims]." Canada further stated in its response that it "has already modified its comprehensive claims policy to allow an effective 'made-in-B.C.' approach to be developed." Yet, Canada is clearly shifting many of its policy approaches in BC to make them more consistent with a "national" approach, contrary to the 1991 commitment to a made-in-BC approach. For example, Canada is increasingly taking a national approach to fiscal negotiations and negotiation support funding.

40. Canada's national approach to modern treaty negotiations is set out in its comprehensive claims policy ("CCP"), which was first introduced in 1973 following the SCC decision in *Calder*.[37] The CCP is not a single policy, but consists of a number of public and internal mandate directives for Canada's participation in treaty negotiations. The CCP is outdated and inconsistent with Canadian common law and international standards, laws and instruments regarding Indigenous rights.

41. Canada's increased focus on "national" policy and mandate development and on the outdated CCP is significantly contributing to delays at the treaty negotiation tables in BC. The development of national policies generally takes considerably more time and

[37] *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

is likely to be less responsive to BC First Nations' unique issues and concerns. This slow and non-responsive government mandating process has resulted in very few treaties being concluded and has slowed down or completely stalled negotiations all together at many tables. Meanwhile, First Nations' debts continue to grow with minimal to no progress in their negotiations.

42. Many First Nations have expressed deep concern regarding Canada's and BC's inflexible and inadequate treaty negotiation policies and mandates. Governments frequently maintain that they do not need to align treaty mandates with court decisions because the treaty negotiations process is not a proof of rights-based process. Canada and BC maintain that treaty negotiations must be forward-looking, characterizing negotiations as a "political exercise"[38] within a "non-rights based treaty process".[39] This position precludes any negotiation of compensation for rights violations, a critical issue for First Nations, as "the federal government considers that there is no basis to establish such compensation since negotiations are not based on rights".[40] Government negotiators continue to approach negotiations as though treaties are not about reconciling title and rights. As observed by the federal Auditor General in November 2006, "the two governments base their participation in the treaty process on their own policies, and do not recognize the Aboriginal rights and title claimed by the First Nations".[41]

43. Treaties must retain the flexibility to adapt to changing circumstances. Failure to draft a treaty with a view to both the present and to the unknown future would fail to achieve the ongoing reconciliation purpose that the courts have mandated for section 35 of the *Constitution Act, 1982*. Further, it is unreasonable to expect First Nations to agree to a "full and final settlement" when compensation is not offered for violations and other infringements of their constitutionally-protected rights.

44. Other elements of the negotiating mandates of Canada and BC exacerbate the problems associated with a "full and final settlement" and "modification" of rights. This includes the Crown's land mandates. Federal and provincial negotiators continue to deny that Aboriginal title exists over any specific lands in BC. Canada and BC have taken the arbitrary position that no more than five per cent of the lands within BC would be made available for land selection by First Nations. The quantum of land on offer at treaty negotiating tables is therefore a very small percentage of the traditional territories of First Nations – far too small to sustain their distinct societies.

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[38] *Luuxhon v. Canada*, (23 March 1999), Vancouver C981165 (BCSC) at para 61.

[39] Letter from Chuck Strahl, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians to Grant Chief Stewart Phillip, Chief Robert Shintah and Chief Mike Retasket (25 October 2007).

[40] Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons*, Chapter 7: Federal Participation in the British Columbia Treaty Process – Indian and Northern Affairs Canada (Minister of Public Works and Government Services Canada, Ottawa, 2006) at 15.

[41] Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons*, Chapter 7: Federal Participation in the British Columbia Treaty Process – Indian and Northern Affairs Canada (Minister of Public Works and Government Services Canada, Ottawa, 2006) at 2.

45. A number of First Nations began exploring various mechanisms to achieve progress in treaty negotiations. In December 2007, over 60 First Nations came together to collectively engage Canada and BC on key issues in the treaty negotiation process to identify obstacles, address barriers and promote the speedy conclusion of fair and viable treaties, based on the recognition and reconciliation of Aboriginal title and rights. Six topics were identified for discussion at the Common Table including: recognition/certainty, including overlapping claims/shared territories; the Constitutional status of lands; governance; co-management, including shared decision-making; fiscal relations, including own source revenue and taxation; and fisheries. To date, Canada has stated it is only willing to engage in discussions through the Common Table on one of these issues – recognition/certainty.

46. With respect to the issue of certainty, Canada used the "extinguishment model", which required First Nations to "cede, release and surrender" any existing rights they may have had, in exchange for defined, codified "treaty rights". This extinguishment model was used in the numbered treaties and in most of the northern treaties and has come under attack from numerous commentators, including CERD. Canada has asserted to the international community that it no longer requires the extinguishment or surrender of rights in treaty negotiations.[42] In 2007, CERD stated, "While acknowledging the information that the 'cede, release and surrender' approach to Aboriginal land titles has been abandoned by [Canada] in favour of 'modification' and 'non-assertion' approaches, the Committee remains concerned about the lack of perceptible difference in results of these new approaches in comparison to the previous approach…."[43] Canada has challenged these findings.[44]

47. First Nations object to the Crown's denial that treaty negotiations are rights-based, while at the same time requiring that a First Nation's rights be "exhaustively" set out in the treaty to achieve "full and final" settlement. More specifically, Canada has to date insisted that to achieve "certainty", Aboriginal title and rights can continue only as "modified" by, and set out in, the treaty. Further, First Nations are required to indemnify Canada and BC, to release the Crown and all other persons with respect to any past claims it has for infringement of its Aboriginal rights that are other than, or different in attributes or geographic extent from, the rights as set out in the treaty. This "full and final" approach to achieving "certainty" is inflexible and does not allow the relationship between First Nations and the Crown to evolve.[45]

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[42] See, e.g., CERD, "Consideration of Reports, Comments and Information Submitted by States Parties under Article 9 of the Convention: Seventeenth and eighteenth periodic reports of Canada" UN Doc CERD/C/SR.1790 (2007) at para. 46.

[43] CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, 70th Session, February-March, 2007.

[44] On March 2, 2010 Canada announced changes to its mandates regarding certainty and extinguishment. In particular, Canada noted that as part of its "retooling" initiative, it has approved use of a variation of the modification technique to achieve certainty. The revised mandate still contains reference to "modification" of Aboriginal rights and the specific meaning and scope of this amendment remains unclear as the actual language has yet to be negotiated.

[45] See TFNFA, clauses 2.11 – 2.14, 2.17; MFNFA, clauses 1.11.1 – 1.11.4, 1.11.7.

48. Another critical issue that continues to plague the treaty negotiations process is the growing First Nations' treaty negotiations debt. This debt has arisen because First Nations' participation in treaty negotiations is funded through by Canada and BC through a combination of loans and non-repayable contributions. The IACHR, in commenting on the funding model used in this process, has stated:

> … the State [Canada] promotes that process as an ideal mechanism to address, in a comprehensive manner, the territorial claims of indigenous peoples without having to incur the high financial costs or meet the legal or technical requirements necessary to carry out litigation.

Despite these claims that the process does not require First Nations to incur "high financial costs", the treaty debt of First Nations in BC had reached $422 million as of March 31, 2011.[46] This amounts to an average debt load of $7 million per First Nation. This is an amount of money that most First Nations will not be able to repay unless they reach a treaty.

49. The mechanism of issuing loan funding to support First Nations participation in treaty negotiations has been strongly criticized on the basis that it was known from the start that First Nations would not be able to repay the loan unless they concluded a treaty. The growing treaty negotiation loan debt threatens to significantly erode the value of treaty settlements as First Nations that conclude treaties use the capital transfer funding, provided in the treaty, to repay their loans. It also creates tremendous uncertainty about how a First Nation will repay its loans if it is unable to reach a treaty. First Nations are concerned that if First Nations withdraw from treaty negotiations on the basis of their concerns with government mandates, they will not have the resources to repay their treaty negotiation loans, which will eventually come due. Even First Nations who expect to reach a treaty worry about what the net value of their capital transfer under their treaty will be once the loan has been deducted from the total. Furthermore, some First Nations are concerned that their treaty debt may consume the entire capital transfer.[47]

50. The funding arrangements used to support First Nations participation in treaty negotiations should be consistent with Article 39 of UNDRIP, which states:

> Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

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[46] BC Treaty Commission Annual Report 2011, p. 29 at http://www.bctreaty.net/files/pdf_documents/2011_Annual-Report.pdf

[47] It should be noted that Canada takes pride in being one of the global leaders in offering loan forgiveness to African countries. Under the Canadian Debt Initiative that began in 1999, Canada will forgive over $1.1 billion in debts owed to Canada by Heavily Indebted Poor Countries. On a separate note, the Yale First Nation's loan will consume more than 50% of its capital transfer under its Final Agreement.

51. Through various First Nations Summit resolutions,[48] First Nations in BC have consistently objected to the fact that they have no choice but to take loans to participate in treaty negotiations to achieve reconciliation and address their rights and title and the outstanding "land question." First Nations maintain that the Crown has illegally appropriated their lands, territories and resources and continue to benefit from the wealth of the territories contrary to the Constitution, as well as legal principles set down by the courts, which requires reconciliation of pre-existing Aboriginal rights with the assertion of Crown sovereignty.

52. Through its petition to the IACHR, the Hul'qumi'num Treaty Group has demonstrated that numerous international human rights bodies and independent experts have closely examined Canada's approach to modern-day treaty negotiations with First Nations and have all reached similar conclusions – namely that Canada's approach is failing to adequately address the rights of Indigenous peoples.[49] In its admissibility report, the IACHR concluded that, "the treaty negotiation process is not an effective mechanism to protect the rights claimed by the petitioners."[50] In 2007, CERD expressed a number of similar concerns about Canada's approach, including Canada's refusal to address the issue of limitations imposed on the use of traditional lands by First Nations peoples.[51]

53. First Nations in treaty negotiations are concerned regarding the BC Premier's comments about BC's position on treaty negotiations. The Premier's comments, which were recently reported in the media, raise questions and concerns about the Province's commitment to the treaty negotiations process. The tone of the Premier's comments suggests that the Province of BC will shift away from treaty negotiations because they "failed to deliver either economic growth for aboriginal communities or security for business investors".[52]

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[48] First Nations Summit Resolution #0901.09 re Conversion of First Nations' Loan Funding to Contribution Funding; First Nations Summit Resolution #0904.03 re Call for Auditor General of Canada to review conduct of treaty negotiations in BC, implementation of modern and historic treaties and loan funding arrangement for First Nations; First Nations Summit Resolution #0911.04 re First Nations' Treaty Negotiations Support Funding Debt.

[49] For example, the United Nations Committee on Economic, Social and Cultural Rights ("CESCR") review of Canada in 1998 and 2006, the UN Human Rights Committee ("HRC") review in 1999, the CERD, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples in 2004, 2005, and 2006, and the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in 2004. Further, Canada's human rights record was reviewed by the Universal Periodic Review working group in 2009.

[50] Report No 105/09 re: Petition No. 592-07, Admissibility – Hul'qumi'num Treaty Group v. Canada, October 30, 2009, para. 38.

[51] Report of the CERD, U.N. Doc. A/62/18 (2007).

[52] See the *Globe & Mail* article, "B.C.'s Premier Clark breaks with decades-long first nations strategy," November 4, 2011.

RECOMMENDATIONS

The First Nations Summit recommends that Canada:

1. Promote and fully implement UNDRIP;

2. Use UNDRIP as the framework for assessing Canada's fulfilment of its obligations regarding the human rights of Indigenous peoples;

3. Uphold the honour of the Crown by:

    - recognizing, respecting and implementing Aboriginal title and rights to First Nations' lands, territories and resources;
    - taking action to fully implement historic and modern treaties; and
    - fulfilling its obligations to First Nations under domestic and international law;

4. Engage in good faith treaty negotiations with First Nations in BC to settle the still outstanding land question and to reconcile pre-existing Aboriginal sovereignty with the assertion of Crown sovereignty;

5. Jointly review and revise, in collaboration with First Nations, its comprehensive claims policy and other related policies to be consistent with and reflective of current domestic and international law, international conventions and the spirit and intent of historic and modern treaties;

6. Enable First Nations to have access to and benefit from their lands, territories and resources to support self-sufficiency and self-determination, through revenue sharing and other joint initiatives;

7. Engage with First Nations on a government-to-government basis and develop joint decision-making mechanisms that recognize First Nations' right to participate in decision making and their authority over their lands, territories and resources;

8. Cease pursuing its adversarial strategy of "rights-denial" in litigation and negotiations;

9. Abandon inflexible mandates in treaty negotiations and develop mandates that respond to and are reflective of the diversity of First Nations in BC, with the goal of achieving workable treaties that help to sustain First Nations as peoples; and

10. Provide First Nations with sufficient access to financial assistance in the form of contributions (rather than loans) to participate effectively in treaty negotiations, and forgive First Nations loan debts as it has done for some third world countries.