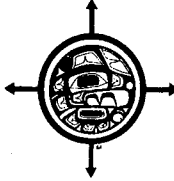


OUR LAND IS OUR FUTURE

UNION OF BRITISH COLUMBIA INDIAN CHIEFS

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July 25, 2007

Via Fax: (613) 941-6900

Office of the Prime Minister
Langevin Building
80 Wellington Street
Ottawa, ON K1A 0A2

Attn.: Right Hon. Stephen Harper

Via Fax: (250) 387-0087

Province of British Columbia
P. O. Box 9041, Stn. Prov. Govt.
Victoria, BC V8W 9E1

Attn.: Hon. Gordon Campbell, Premier

Via Fax: (819) 953-4941

Ministry of Indian Affairs
and Northern Development
Terrasses de la Chaudière, North Tower,
Suite 2100 - 10 Wellington Street
Gatineau, Quebec K1A 0H4

Attn.: Hon. Jim Prentice, Minister

Via Fax: (250) 953-4856

Ministry of Aboriginal Relations
and Reconciliation
P.O. Box 9052, Stn. Prov. Govt.
Victoria, BC V8W 9E2

Attn.: Hon. Michael De Jong, Minister

Dear Prime Minister Harper, Premier Campbell and Honourable Ministers:

Re: Federal Comprehensive Claims Policy

As the Executive of the Union of British Columbia Indian Chiefs ("UBCIC"), we are writing to you concerning the federal Comprehensive Claims Policy and its relationship to the Crown's failure to address the Land Question in British Columbia.

Over the years the UBCIC and its member Nations and communities have forwarded repeated proposals, petitions, statements and resolutions presented to governments calling for the resolution of the Land Question, based on recognition and respect for our Aboriginal Title and Rights. In 1910, the Chiefs of the Interior presented a Memorial to Sir Wilfrid Laurier which closed with the demand that:

" ... our land question be settled and ask that treaties be made between the government and each of our tribes We desire that every matter of importance to each

tribe be a subject of treaty, so we may have a definite understanding with the government on all questions of moment between us and them.”¹

Our position has not changed over the century.

Canada’s policy has moved from one of direct assimilation, to one of claims, but has otherwise changed little over the century. Duncan Scott, Superintendent General of Indian Affairs, in 1920, expressed the Crown’s assimilation policy “to continue until there is not a single Indian in Canada that is not been absorbed into the body politic, and there is no land question and there is no Indian Department”. Governments were forced to change their policy of outright assimilation in response to the Supreme Court of Canada’s 1973 decision in *Calder*², which recognized Aboriginal Title as a pre-existing legal right to the land. Indigenous Peoples then successfully fought for the inclusion of Aboriginal Title, Rights and Treaty Rights in s. 35 of the *Constitution* in 1982. Government’s assimilation policy changed to a “claims” policy and in 1986, Canada published its Comprehensive Claims Policy, supplemented several years later with the Inherent Right to Self-Government Policy.

Meanwhile, the Supreme Court of Canada has continued to articulate principles governing the Aboriginal/Crown relationship in decisions such as *Delgamuukw*³, *Haida*⁴, *Taku*⁵ and *Morris*.⁶ The Court’s decisions have eclipsed the 1986 Comprehensive Claims Policy, which is now contrary to law. You have not responded to our requests that your governments indicate how they will alter their relationship to Indigenous Peoples, through an amendment to the Comprehensive Claims Policy, so that *Delgamuukw* and other decisions of the Supreme Court of Canada are followed and implemented.

While silent in response to our repeated request for a response which recognizes and respects Aboriginal Title, your governments have continued with a “business as usual” approach which entirely ignores the direction of the Supreme Court of Canada. Provincial laws continue to apply on our territories and interfere with our Aboriginal Title, disrespect our laws which have taken care of the land for centuries, and leave our people living at a standard far below that of Canadians. While Canada has been ranked at the highest level in the UN Human Development Index which measures how different countries compare to one another based on the standard of living for their citizens, Indigenous Peoples within Canada are ranked below many Third World countries. The impact of this disparity in wealth and living conditions upon our people is brutal.

We write once again, seeking an official response from you concerning your Comprehensive Claims Policy, which drives the government negotiation mandates for negotiating Treaties through the British Columbia Treaty (“BCTC”) process. Within the last several decades, Canada and the provincial government have chosen to focus all of their efforts and resources on negotiating Treaties within the BCTC process. All Treaties negotiated under the BCTC process are subject to the constraints of Canada’s Comprehensive Claims Policy

¹ Memorial to Sir Wilfrid Laurier, Premier of the Dominion of Canada, from the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia, presented at Kamloops, B.C., August 25, 1910.

² *Calder v. Attorney General of B.C.*, [1973] S.C.R. 313.

³ *Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010.

⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

⁵ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

⁶ *R. v. Morris*, [2006] 2 S.C.R. 915.

reflecting a denial of Aboriginal Title and a surrender and grant-back process. First Nations negotiate with the Crown for recognition of specialized Treaty rights; in exchange, they must agree to surrender all of their Aboriginal Title to the totality of their traditional territories. Negotiating a Treaty under such a Policy is not an option for UBCIC and its members who will never exchange their land for limited Treaty rights.

Indigenous Nations outside of the BCTC process have been ignored and are expressly excluded from any consultation about the impact of agreements being negotiated within the BCTC process on their Aboriginal Title and Rights. This deficiency has resulted in a wave of First Nations litigation as we recently saw with the challenges by the Shuswap Nation and Treaty 8 First Nations to the Lheidli T'enneh Final Agreement, and the current challenge by Semiahmoo to the Tsawwassen Final Agreement.

It is fair to say that 100% of First Nations in British Columbia unequivocally have rejected Canada's Comprehensive Claims Policy and called for changes to it, as reflected in the resolutions and consensus statements passed by the Assembly of First Nations ("AFN"), UBCIC and the First Nations Summit ("FNS"), enclosed. Recently, the Nanaimo Unity Protocol Group, comprised of First Nations who have negotiated through the BCTC process, called for fundamental revisions to the governments' negotiation mandates - a call for change which has been supported by UBCIC resolution. This represents 70% of Indian Bands in British Columbia, both inside and outside the BCTC process, who have announced their demand for a fundamental change of the Treaty process and associated government claims policy and negotiation mandates.

Government's continued refusal to deal with the Land Question honourably and justly by acknowledging Aboriginal Title as the Supreme Court of Canada has directed you to do, can only lead to more confrontations with resulting economic harm to all - billions of dollars, hundred of jobs. We have been told by government many times to wait, to be patient, to restrain our citizens from confrontation. We have now waited a long time - too long, in fact. Indigenous Peoples have spent over three decades and countless billions of dollars in Canadian courts to achieve the recognition of Aboriginal Title, Rights and historic Treaty Rights in British Columbia, and the legal articulation of the corresponding constitutional duties on the Crown. In spite of court rulings, Canada's Comprehensive Claims Policy remains deeply embedded in a political and legal culture which remains unresponsive, not only to Indigenous Peoples, but to the direction provided by the highest court. This not only inflames the discontent in Indigenous communities, but also breeds disrespect for all laws.

We now turn to the law. The Supreme Court of Canada has been clear as to the law which must inform the Crown's conduct to First Nations. We have studied the law and compared it to the Comprehensive Claims Policy and to government negotiation mandates. The contrast is startling, and we have outlined the key points of discord between government policy and the law below.

1. The Law

- Aboriginal Title exists in British Columbia. It is the right to the land itself, and is a collective property right, with an inescapable economic component.⁷

⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

The Policy

- The Comprehensive Claims Policy is based upon the discredited assertion that Aboriginal Title is a weak, non-proprietary right which has been extinguished through provincial tenures except land extensively used and occupied by Indigenous Peoples today. In effect, this is not a recognition of Aboriginal Title, but only the Aboriginal use of lands.
- Revenue sharing arrangements “will not imply resource ownership rights”.
- Government unwillingness to discuss land as a basis for settlement, except approximately 2 to 5% of an Indigenous Nation’s territory, which must be held as fee simple land rather than under the constitutional status of s. 91(24) of the *Constitution Act, 1867* or s. 35 of the *Constitution Act, 1982*.
- Government refusal to negotiate compensation for past infringement of Aboriginal Title and Rights.

2. The Law

- Aboriginal Title includes the right to choose to what purposes the land will be put, and includes recognition of Indigenous laws about the land and resources upon the land.⁸

The Policy

- Government refusal to recognize Indigenous laws, including inherent rights of Self Determination and governance. Any limited recognition of a First Nations’ authority usually occurs in a concurrent law model which means that First Nations’ jurisdiction over their lands and resources must give way to conflicting federal and provincial laws.

3. The Law

- Aboriginal Title has never been extinguished in British Columbia. The Province has never had the constitutional capacity to extinguish aboriginal title or rights, because those rights are at the heart of s. 91(24) of the *Constitution Act, 1867*.⁹ The Constitution prohibits the Province from intruding into s. 91(24) with its legislation. While, according to the courts, the federal Crown did have the power to extinguish Title prior to 1982 though legislation with a clear and plain intent to extinguish Title, it has not done so.

The Policy

- The Comprehensive Claims Policy is based on the assumption that most Aboriginal Title has been extinguished. As to the remainder of our land, despite

⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

its claim that the Comprehensive Claims Policy provides alternatives to extinguishment, this clearly is not so. The “options” to extinguishment set out in the Comprehensive Claims Policy require the cession and surrender of Aboriginal Title, despite that they may occur under other names.

4. The Law

- Aboriginal Title and Crown Title co-exist.¹⁰ The purpose of s. 35 of the *Constitution Act, 1982*, is to achieve a reconciliation of the prior occupation by Aboriginal Nations with the assertion of Crown sovereignty.¹¹ Reconciliation has been placed at the heart of Aboriginal/Crown relations, not extinguishment.

The Policy

- Government refusal to recognize Aboriginal Title except to small spaces.
- Extinguishment as the method to create “certainty”, is contrary to reconciliation of titles, and does not in any way further the purposes which s. 35 of the *Constitution Act, 1982* was enshrined to protect.

5. The Law

- Aboriginal Title extends to subsurface rights.¹²

The Policy

- Canada will only recognize subsurface rights to land which is still held within federal jurisdiction. This means that both governments refuse to recognize the vast majority of subsurface rights in what they deem to be provincial Crown lands.

6. The Law

- *Delgamuukw*, *Haida* and *Taku* have made it clear that, where the Crown contemplates conduct which may infringe Aboriginal Title or Rights, there can be no interference without consultation. In some instances, the required consultation must involve obtaining the consent of the First Nation before there can be any interference.¹³

The Policy

¹⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

¹¹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

¹² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

¹³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

- Aboriginal Nations are left at the mercy of others, because there are no measures to protect or safeguard Title against provincial laws and policies which do not recognize Title.

7. The Law

- The Supreme Court of Canada rejected the federal Crown's argument in *Delgamuukw* that its obligations are towards "Indians on Indian reserve land". Section 91(24) embraces Aboriginal Title off reserve as well as on.

The Policy

- The federal Policy does not protect Aboriginal Title to lands off reserve, and indeed, can be seen to be adversarial to the existence of Aboriginal Title.

9. The Law

- Harvesting rights can include livelihood rights.¹⁴

The Policy

- The governments will only negotiate the right to fish for food, social and ceremonial purposes, without recognizing the right of Indigenous Peoples to earn a moderate livelihood, while setting fixed allocations without taking into account Indigenous Nations' future population growth, health and social needs.

10. The Law

- Harvesting rights protected by Treaty, including hunting rights under the Douglas Treaties, fall under federal jurisdiction and are beyond the power of the Province.¹⁵

The Policy

- All harvesting rights, even those under the Douglas Treaties, are subject to provincial regulations and limitations.

11. The Law

- An overarching constitutional imperative in the Crown's relationship with Aboriginal Nations is that of the honour of the Crown. The honour of the Crown requires that Aboriginal Title and Rights be recognized and respected, which requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown requires appropriate consultation and accommodation.¹⁶ The honour of the Crown also requires that Aboriginal Rights (including Title) be given a priority.

¹⁴ *R. v. Gladstone* [1996] 2 S.C.R. 723 ; *R. v. Marshall*, [1999] 3 S.C.R. 456.

¹⁵ *R. v. Morris*, [2006] 2 S.C.R. 915.

¹⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

The Policy

- The Policy breaches this requirement at every turn: conditions are imposed upon First Nations; third party rights are given priority. There is no framework for fulfilling the honour of the Crown obligation. There is no foundation upon which to achieve a consensual process because we do not have the financial resources to support our Title and Rights and to engage in the negotiations which would protect them.

Recently, the Lheidli T'enneh voted down a Final Agreement negotiated under the BCTC process. The voters were concerned about the requirement to extinguish their interests in 4,500,000 hectares (over which they are entitled to resource revenue sharing) for all but 4,330 hectares. Why would any First Nation want to extinguish their Aboriginal Title and Rights in such a situation? This week, the Tsawwassen First Nation will vote on a Final Agreement, also concluded under the BCTC process. The Tsawwassen First Nation must find a path to the future which gives them a fighting chance at economic self sufficiency in a situation where most of their territory has been taken up by settlement. Whether the Lheidli T'enneh or Tsawwassen ratify or refuse to ratify the Final Agreement is not our point. The Treaty process is fundamentally flawed, due to the insistence by government on unilateral and arbitrary implementation of the 1986 Comprehensive Claims Policy and Inherent Right to Self-Government Policy. It is not the model to achieve reconciliation in British Columbia. Until a respectful and legal process is established, British Columbian citizens will continue to be challenged by uncertainty of land tenures, as the Crown has never perfected Crown title, or the Crown's asserted sovereignty over Indigenous Nations' lands and resources in this Province.

The goal to ultimately achieve respectful resolution of the Land Question is a profoundly human one. It is the challenge of diverse peoples and cultures identifying ways to live together in harmony. It is the challenge of working to overcome the injustices of the past, by identifying new patterns of social, economic and political life for the future. This can be achieved only once Aboriginal Title is recognized, and the honour of the Crown is realized and reflected in Canada's policy and negotiation mandates. If governments approach us from a vision of recognition and ready to reconcile, perhaps justice could at long last be achieved.

It is important that we straightforwardly set out our respective views and intentions. In this regard, we would ask that you kindly respond to the following:

1. Is the 1986 Comprehensive Claims Policy Canada's current decision as to how it will fulfil its constitutional obligations in relation to Aboriginal Title? If not, could you provide us with a statement as to how this Policy has changed?
2. Are the governments prepared to work collaboratively with First Nations in British Columbia to change the Comprehensive Claims Policy from an extinguishment model to a model based on the recognition of Aboriginal Title and Rights, which co-exist with Crown title and jurisdiction?
3. Are the governments prepared to work with First Nations in British Columbia to examine and change government negotiation mandates, and identify and change gaps between the

1986 Comprehensive Claims Policy, the principles of law, and the New Relationship Vision?

4. Are governments willing to reconsider the approach that they have taken to the Douglas Treaties, and to examine and change how the 1986 Comprehensive Claims Policy violates these historic treaty rights?

We look forward to hearing from you. Because we have waited for so long now, we would like to have your answer within 30 days of receipt of this letter.



Chief Stewart Phillip
President



Chief Robert Shintah
Vice-President



Chief Mike Retasket
Secretary-Treasurer