

“Fight for Our Rights”

Solutions Based on Indigenous Inherent Rights

**Prepared for
Kukpi7 Wayne Christian
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I. INTRODUCTION

*"We and other Indian tribes of this country are now uniting and we ask
the help of yourself and government in this fight for our rights."*

(Memorial to Sir Wilfrid Laurier presented in Kamloops, B.C., on August 25, 1910)

Through this paper, we hope to carry on the dialogue on solutions based on inherent rights as set out in our paper *Towards Recognition of our Inherent Rights as Indigenous Peoples, commissioned* by Kukpi7 Wayne Christian for the All-Chiefs Assembly on August 25, 2009. Now is the time to unite as Indigenous Peoples with the goal to “fight for our rights” as our leaders stipulated in the Memorial to Sir Wilfrid Laurier commemorated on the 100th anniversary hosted by Kukpi7 Shane Gottfriedson on August 25, 2010.

The Allied Tribes of BC were formed in 1916 to present land claims directly to the Imperial Privy Council (as Canada was not fully independent until the *Constitution Act, 1982*) and to rebut the *McKenna-McBride Royal Commission Report*, which did not recognize Aboriginal Title and Indigenous Sovereignty over those lands. In 1927, the *Indian Act* was amended to prevent Indigenous Peoples from fund raising, hiring legal counsel or organizing around indigenous land rights.

The Union of BC Indian Chiefs (UBCIC) was formed in 1969 to oppose the assimilation policy of the White Paper and mandated “to help First Nations exercise their inherent rights by holding the Crown to its obligation to honour and respect those rights”. We must continue to legally and politically pursue the protection of our inherent Title and Rights and join with other Indigenous Peoples in the “fight for our rights” instead of responding to British Columbia and Canada’s continued justifications for exploiting our lands and resources. We need to be loyal to the voice of our ancestors and to learn from their experiences.

The authors of this paper are lawyers and related to one of the Allied Tribes of BC: Cynthia Callison, Tahltan; Mavis Erickson, Dakelhne; Darwin Hanna, Nlaka’pamux; June McCue, Nat’ooten; and Nicole Schabus. We thank Kukpi7 Christian for making space for indigenous’ legal perspectives.

II. FANNING THE EMBERS OF OUR ALLIED NATIONS

A. Inherent Rights and Jurisdictions of Indigenous Peoples

On August 25, 2009, as indigenous lawyers and advocates we presented a paper proposing visioning goals for the recognition of an inherent jurisdiction framework that Indigenous Peoples and Nations could consider for creating short-term and long-term solutions to achieve self-determination. These goals were structured to respect the inherent jurisdiction of Indigenous Peoples to govern themselves in accordance with their respective laws and way of life. This inherent jurisdiction flows from ancient connection to territories and ancestors. The on-going legitimacy of our inherent powers is formulated through indigenous institutions that we have created to meet our destinies, needs and aspirations over time and which we participate in and renew through our kinship connections. Though colonization has impacted our ability to continuously activate our decentralized way of ordering our societies, we have proposed that the decolonization and exercise of self-determination by Indigenous Peoples begins with the recovery of our inherent jurisdiction. We need a decolonized paradigm that shifts indigenous thoughts and actions about governance, laws, economic, social and cultural development away from dependency on western subordinate administrative models that capture Indigenous Peoples within state structures, to one that respects the indigenous understandings of humanity and relationships to their territories. In this important work, we must not limit our potential for inspiring healthy ways of living in this world and connecting to our lands and waters.

B. Inherent Indigenous Peoples Alliance Solutions

Our indigenous knowledges are critical for all humanity and this will come to light through our abilities to renew alliances formed by our ancestors or create new alliances to meet the pressures of today. We propose the following solutions for “fanning the embers of our Allied Nations”:

- Convene Indigenous Peoples and Nations to discuss alternatives based on existing or new political alliances and protocols;
- Learn from our alliances in the past such as the efforts put forth by the Allied Tribes;
- Develop coalitions with others that respect our inherent jurisdiction, right to self-determination as peoples, and need for constitutional, law and policy reform; and
- Peace Making between Indigenous Peoples based on our Indigenous laws and protocols and indigenous treaties to address issues between our Peoples and build stronger Indigenous Alliances.

C. International Recognition and Rights of Indigenous Peoples

We also proposed that Indigenous Peoples and Nations exercise and lead the pathway for ensuring state compliance with the international and human rights standards now set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). These standards can guide and transform relationships between states and Indigenous Peoples by recognizing first that Indigenous Peoples as international actors with political and legal status can now freely contribute to world affairs without discrimination. At the same time, UNDRIP offers Indigenous Peoples and states like Canada the opportunity to create better relationships.

The following solutions foster the international recognition of Indigenous Peoples rights:

- Develop educational forums on UNDRIP with Indigenous Peoples and Nations;
- Deliberate and translate UNDRIP standards to Indigenous languages and ensure consistency with indigenous legal traditions;
- Develop think tanks to work with Indigenous communities on UNDRIP implementation;
- Ensure litigation strategies incorporate international legal developments that recognize the inherent and human rights of Indigenous Peoples; and
- Assist in the organizational capacity of indigenous delegations to advocate for their inherent rights and international political status in international forums, dispute resolution bodies, courts and commissions and UN or other international agencies and organizations.

D. Domestic Implementation through co-existing legal systems

At the domestic or state level we called for solutions that worked towards the continuation of constitutional and policy reform with respect to land and jurisdiction. We also called for the realization of true legal pluralism. Finally, we advocated for supporting the restoration of the equal place that our Indigenous women have within our traditional and inherent matrilineal societies. The roles and responsibilities of Indigenous Women flow from these inherent political orderings. Restoring Indigenous Women as key decision-makers within our Nations is fundamental to the recovery of our territories, jurisdiction, peace and security.

The Indigenous Inherent Rights and Jurisdiction Framework we advocate for in the following paper offers new solutions for fighting for our indigenous inherent rights.

III. INDIAN STRATEGY TO IMPLEMENT INDIAN JURISDICTION & TITLE OVER OUR TERRITORIES

A. Inherent Indigenous Jurisdiction

When they (the settlers) first came among there were only Indians here. They found the people of each tribe supreme in their own territory, and having tribal boundaries known and recognized by all.
(Laurier Memorial 1910)

Our ancestors have always maintained our inherent jurisdiction and inherent rights over our territories. Our generation is challenged to maintain this position, in light of government policies that want to convert our rights and secure federal and provincial jurisdiction over our territories. The governments can no longer ignore us because we have secured international recognition of indigenous rights, constitutional protection and Aboriginal Title and Rights court cases. Now, we have to bring our inherent rights agenda forward politically and legally to counter government agendas and processes that require us to recognize their jurisdiction. UBCIC was founded to fight assimilation policies and has traditionally taken a strong position on protecting "Our Land and Our Future".

B. Counter Provincial Government Jurisdiction Claims

We condemn the whole policy of the BC government towards the Indian tribes of this country as utterly unjust, shameful and blundering in every way. We denounce same as being the main cause of the unsatisfactory condition of Indian affairs in this country and of animosity and friction with the whites.
(Laurier Memorial, 1910)

Our ancestors recognized the province as the main opponent for Indigenous Peoples asserting exclusive jurisdiction over our territories. In the Tsilhqot'in trial court decision (Tsilhqot'in Nation v. British Columbia [2007] BCSC 1700) Justice Vickers found that Aboriginal Title can serve as a jurisdictional ouster for the province. The province continues to argue on appeal that the Tsilhqot'in Nation cannot prove exclusive occupation of their territory and therefore cannot claim Aboriginal Title to it. The Province further relies on Roman law principles that require a combination of physical possession to the exclusion of others (*occupatio*) and title to be able to claim ownership. These are colonial law and Eurocentric concepts to limit Aboriginal Title and Rights. At the same time, British Columbia sustains provincial processes to claim provincial jurisdiction over indigenous territories. Canadian courts have recognized that Aboriginal Title is a *sui generis* right (of its own kind) that is defined by indigenous law and recognized by the Canadian constitution and common law.

C. Assert Indigenous Jurisdiction and Underlying Title

Indigenous Peoples must counter this provincial approach by putting forward our own inherent rights allied agenda to assert our Indigenous jurisdiction. A pressing matter is the proposed Prosperity Mine, which would destroy Fish Lake in Tsilhqot'in territory. The British Columbia Supreme Court has already put at issue provincial jurisdiction in their territory in the 2007 Tsilhqot'in case. The Tsilhqot'in People have maintained control over their territory but need the support from and alliances with other Indigenous Peoples and indigenous organizations, not just through *pro forma* press releases, but through political and legal support including taking their struggle from the local to the international level. We need to continue to assert and exercise indigenous jurisdiction in our lives and in our territories by collectively arguing that as Indigenous Peoples we hold jurisdiction to self-determination and underlying Title that continues to exist throughout our territories. Aboriginal Title as an underlying title entitles us to remuneration for all benefit and revenue drawn from our traditional territories. This includes property taxes in case of fee simple lands and revenues from forestry and mining and any other resource extraction that we provide permission based on our exercise of inherent jurisdiction.

D. Macro-Economic Strategy

Government payments and revenue sharing policy constitutes a subsidy because the individuals or corporations using our lands and resources do not have to pay us as the traditional owners of the territories based on Aboriginal Title. Indigenous Peoples from British Columbia were the first to submit this position to the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA) tribunals. In the Softwood Lumber Dispute, over two billion dollars was collected in countervailing duties and the USA was willing to transfer the majority of the collected duties to Indigenous Peoples in recognition of and remuneration for our ownership of the timber resource. The Canadian government opposed the independent submissions by Indigenous Peoples on procedural and substantive grounds even though the concept of a subsidy was accepted by international trade tribunals. As Indigenous Peoples we can develop our own macro-economic strategies for the implementation of our respective inherent rights.

E. Counter Federal Government Strategy

After a time they saw that our patience might get exhausted and that we might cause trouble if we thought all the land was to be occupied by whites they set aside many small reservations for us here and there over the country. This was their proposal not ours, we never accepted those reservations as settlement for anything, nor did we sign any papers or make any treaties about same.
(Laurier Memorial 1910)

Rather than addressing the issue of underlying Title in our indigenous territories, the most recent initiative of the Department of Indian and Northern Affairs (DIAND) is to break apart Indian Reserve lands by transferring portions of reserve lands into fee simple and to create provincial jurisdiction over Indian Reserve lands. Duplicating mainstream property regimes serves a number of government purposes. For example it:

- undermines collective property rights of Indigenous Peoples;
- removes the protection that makes Indian reserve lands inalienable; and
- indirectly affirms and legitimizes fee simple and individual property off reserve.

As Indigenous Peoples, we collectively hold Title to our respective traditional territories and jurisdiction over them. The government is promoting individual property rights since those have no jurisdictional element and fall under provincial authority. The government does not want to recognize Aboriginal Title as an underlying Title because this would challenge the government claims to exclusive jurisdiction and control in our respective territories. This current plan replicates the 1969 White Paper, which attempted to break up Indian reserves and assimilate Indigenous Peoples into Canadian society as individuals without a contiguous land base.

Conservative strategists suggest that our poverty can be blamed on the collective ownership of our Indian reserves. They propose to privatize our lands, so that they can be subject to real estate speculation, sold and alienated. This plan will dispossess future generations from their homes and end the integrity of their communities. The poverty of our peoples is due to the ongoing alienation of our territories and lack of implementation of our Aboriginal Title by the Canadian government. Indigenous Peoples were strategically and economically marginalized by forced confinement on Indian Reserves. If the limited protection for Indian reserve lands is removed based on a rationale to alleviate the current conditions of poverty in our communities, many of our people will lose their parcels of reserve land and their dislocation and poverty will be aggravated. We will also lose jurisdiction, control and ownership of our lands.

F. Reverse the Federal Comprehensive Claims Policy

The attempt by the federal government to privatize Indian Reserves must be considered with the federal policy aiming at the extinguishment of our Aboriginal Title and collective proprietary interests throughout our traditional territories. International bodies recognized that the federal Comprehensive Claims Policy aims at the *de facto* extinguishment of Aboriginal Title. Extinguishment or modification of our inherent rights is still the basis of all comprehensive federal negotiating processes, including the British Columbia Treaty Commission Process.

The National Chief has committed to overturning the federal policy aiming at the extinguishment of Aboriginal Title and Kukpi7 Wayne Christian has been an important leader in this process. Together we can change the federal policy to recognize Aboriginal Title as an underlying title throughout our traditional territory. Title, is collectively held by the members of each respective Indigenous Nation. Provincial organizations do not have the right to make decisions or policy concerning Title. Rather the role for organizations like UBCIC should be to advocate for the reform of the federal claims policy aiming at the extinguishment of Aboriginal Title, rather than participating in processes that affirm provincial jurisdiction over Aboriginal Title.

Indigenous Peoples can secure recognition of collective indigenous jurisdiction and ownership over our entire territories. We must be remunerated for any authorized use of our territories. If we, as Indigenous Peoples from British Columbia work together, we can politically secure implementation of Aboriginal Title, as underlying Title throughout our entire territories.

G. Implement International Minimum Standards

International minimum standards must be implemented in Canada including adopting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) unconditionally.

International instruments enshrine a broader protection for Indigenous land rights than the Canadian cases. Canada voted against UNDRIP because they know that their current negotiating processes do not meet international minimum standards. UBCIC must start using its consultative status with the United Nations to secure implementation of these international minimum standards on the ground. With mandates from Indigenous Peoples, UBCIC could assist such efforts by taking issues from the local to the international level.

While the federal government has a fiduciary duty to Indigenous Peoples, the federal government repeatedly intervenes and forwards the position of the province and corporations in submissions to international tribunals. In the Hul'qumi'num submission to the Inter-American Commission on Human Rights (IACHR), Canada argues that fee simple lands cannot be part of treaty negotiations, thereby confirming its view that fee simple interests take precedent over indigenous rights. By continuing to make international submissions and taking cases to international tribunals, we can challenge such positions and seek better protection for our indigenous land rights. If invited, UBCIC could make an *amicus curiae* submission in the Hul'qumi'num case that specifically addresses the conflict between underlying Title and fee simple.

IV. NO MORE LIMITATIONS

A. Limitations in Government Policies

The federal and provincial governments claim exclusive jurisdiction over our traditional territories and they constantly try to limit indigenous jurisdiction. This is best reflected in the negotiating mandates set out in the federal Comprehensive Claims Policy and the self-government policy. In treaty negotiations, the governments refuse to discuss key issues such as water and fee simple lands. Other limitations in negotiating mandates that have been identified by Indigenous Peoples negotiating under the BCTC are:

- Certainty provisions, which require that inherent rights are modified into very limited rights in the agreement;
- The constitutional status of lands, and that following a treaty settlement provincial standards and laws have to be applied and the lands are no longer under federal jurisdiction;
- The current model is based on a land selection process, it does not aim at Co-Management throughout Traditional Territories, including Structures for Shared Decision-Making;
- Fisheries and the inherent right to fish are not part of final settlements but rather they are negotiated as separate agreement that are subject to change; and
- Fiscal Relations, including taxation, the governments insist that the tax exemptions that apply on Indian Reserves have to be removed and taxation regimes similar to the province have to be put in place.

Federal and provincial governments have dictated these limitations. Treaty negotiating groups that are involved in the BCTC as well as the Common Table have not been able to get them opened up. Such limitations also affect Indigenous Peoples who are not involved in treaty negotiations, as they can face the same limitations.

B. Self-government Policy

The federal self-government policy contains even more exclusions. There are two categories of subject matters, which Canada is not prepared to negotiate in the context of self-government: 1) powers related to Canadian sovereignty, and 2) "other national interest powers". In these areas, according to the "self government" policy, exclusive jurisdiction must remain with the federal government. Moreover, they argue that there are no compelling reasons for Aboriginal government to exercise power in these areas, which "cannot be characterized as either integral to Aboriginal cultures, or internal to Aboriginal groups".

The Powers Related to Canadian Sovereignty include: International/diplomatic relations and foreign policy; national defence and security ; international treaty-making; immigration, naturalization and aliens; international trade, including tariffs and import/export controls.

Other "National Interest Powers" include: management and regulation of the national economy, including fiscal and monetary policy, currency, the banking system, trade and competition policy, bankruptcy and insolvency; intellectual property; maintenance of national law and order and substantive criminal law", emergencies and the peace, order and good government power; Protection of health and safety of all Canadians.

The federal "self-government" policy makes it clear that provincial participation in negotiations is essential. However, the reality of provincial powers, and their impact on what can be negotiated, is not dealt with in any detail in the federal "self-government" policy. According to the federal "self-government" policy, any First Nation jurisdiction off reserve (ie., harvesting, lands and resources, off-reserve members and services) or which affects the Provincial heads of power (ie., taxation, commerce) will require provincial - as well as federal - participation and consent.

Again the governments unilaterally impose all these exclusions and when looking at them closely those are all the powers that they use to exercise control over our territories and draw benefit from them. They want to be the only ones in charge of trade and revenue generation.

C. Inherent Jurisdiction has no Limits

As Indigenous Peoples we have inherent jurisdiction, which cannot be limited by Canadian government policies; and this includes trade and foreign relations. Indigenous Peoples have always engaged in trade and we have our own indigenous laws, protocols and treaties for engaging with other Indigenous Peoples. We have to assert our own inherent jurisdiction and exercise our nationhood as Indigenous Peoples by building alliances with other Indigenous Peoples and affirming each other's nationhood.

Our Peoples exercise their inherent jurisdiction and nationhood by going international and challenging Canada's policies, laws and jurisdiction. We have standing at international law and other nations treat us like independent Peoples. There are a number of issues that we can jointly organize around as Indigenous Peoples to exercise our right to self-determination and to overcome the limitations that the governments want to impose.

D. Water is Our Life

"As Indigenous Peoples, we raise our voices in solidarity to speak for the protection of Water. The Creator placed us on this earth, each in our own sacred and traditional lands, to care for all of creation. We stand united to follow and implement our knowledge, laws and self-determination to preserve Water, to preserve life."

Indigenous Declaration on Water, July/August 2001, British Columbia,
Canada

One key issue to organize around is water and to assert our indigenous inherent rights to water. Water, including our rivers, lakes and the ocean are an essential part of our traditional territories. There are ongoing attempts by the province to claim jurisdiction over water and commodify it. Indigenous traditional teachings recognize and respect water as a sacred and powerful gift from the Creator. Water, the first living spirit on this earth, gives life to all creation. Our knowledge, laws and ways of life teach us to be responsible at all times in caring for this sacred gift that connects all life. As Indigenous Peoples we cannot allow the comodification of water.

There is increasing concern about Waters are being polluted with chemicals, pesticides, sewage, disease and nuclear waste. Our Waters are being depleted or converted into destructive uses through the diversion of Water systems to different lands, unsustainable economic, resource and recreational development, the transformation of excessive amounts of Water into energy, and the treatment of Water as a commodity or a property interest that can be bought, sold and traded in global and domestic economies.

Governments create commercial interests in Water that lead to inequities in distribution and prevent indigenous access to the life giving nature of Water. Waters are governed by state imposed laws and practices that disconnect Indigenous Peoples from the ecosystem. These laws do not respect that life is sacred, that Water is sacred.

Indigenous Peoples can assert their right to Self-Determination, jurisdiction, knowledge and laws to protect the Water and call on all others concerned to join Indigenous Peoples in protecting water. By communicating a strong indigenous message and expressing our power to protect Water and life, we can build strong Water alliances and networks amongst Indigenous Peoples and with non-indigenous persons.

V. LAND AND RESOURCE DEVELOPMENT

"The country of each tribe was the same as a very large farm or ranch (belonging to all the people of the tribe) from which they gathered their food, clothing and fish which they got in abundance for food... You will see the ranch of each tribe was the same as its life and without it the people could not have lived."

Laurier Memorial, 1910

A. Long-Term Sustained Indigenous Positions

The objective of this section is to advocate for land and resource development that reflects Indigenous Peoples' own vision, perspectives, priorities and strategies of self-determined development within the framework of free, prior informed consent. Instead of looking for a quick solution to the "land question", Indigenous Peoples must accept that long-term, sustained pressure is required in order to be effective in achieving respectful relations with Canada and British Columbia based on inherent indigenous rights, knowledge and laws.

B. Indigenous Organizing Principles

To improve our efforts of unifying for the same purposes as the Allied Tribes, we need to learn from these experiences and develop alliances based on paradigms that respect the inheritance our ancestors left us. The Allied Tribes organized almost one hundred years ago to protect our inherent jurisdiction and Title to our territories. They had to address organizational issues that indigenous leaders face today including:

- traditional structures of authority;
- political agenda at the forefront;
- council of indigenous advisors;
- grass-roots, local-level organization;
- consistent public messages about priorities and standards; and
- advocate for international standards and fora.

C. Changing the Paradigm to Free, Prior Informed Consent

Based on Indigenous laws, Indigenous Peoples collectively hold inherent jurisdiction and Title over our respective territories, lands and resources to the exclusion of others and collectively regulate their use (including use by guests) based on our deep connection with our territories as the original peoples from which flows our inherent jurisdiction to determine through free, prior informed consent access to lands and resources for development in our territories.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes that Indigenous Peoples have the right to self-determination. Applying and implementing the principle of free, prior informed consent of Indigenous Peoples regarding all developments in their traditional territories will:

- promote the full and effective participation of communities in the planning and development of projects;
- result in the empowerment of Indigenous Peoples;
- secure Indigenous Peoples' territorial and resource rights integrating culture, identity, and knowledge;
- build and strengthen Indigenous Peoples governance systems and jurisdictions; and
- can enrich the development of all Canadians.

We can trace many of our own community problems to the dispossession and development imposed on us, which in some cases, destroyed indigenous political, economic, cultural and social systems. Development of our lands and resources without indigenous prior informed consent violates the international right to self-determination, which provides that Indigenous Peoples must be able to collectively determine their own futures. The principle of free, prior informed consent is consistent with what we have always demanded in how development should take place in our territories. Indigenous Peoples must stop calling for consultation and accommodation and instead change the paradigm to a free, prior informed consent framework that recognizes jurisdiction and takes into account substantive rights as the minimum standard provided in UNDRIP.

D. Stop Consultation that Justifies Infringement

For example, the petition against British Columbia's *Clean Water Act* signed by many First Nations at the All-Chiefs Assembly in May 2010 on the basis of a lack of consultation provided the government with a convenient way of justifying this legislation and their jurisdiction. This outcome violates the free, prior informed consent powers that our Indigenous Peoples possess and prevents us from being able to exercise self-determination as it relates to the waters in our territories. We recognize that some development is supported by Indigenous Peoples with varying levels of economic empowerment based on negotiated agreements with companies and, very recently, with British Columbia. However, if an indigenous community decides that it cannot support a development project, both Canada and British Columbia continue to authorize such development in our territories. These conflicts must be taken to international tribunals for independent, impartial adjudication instead of bringing these claims to Canadian judicial system, which increasingly applies the Canadian standard of consultation and accommodation. Instead we can use international dispute resolution mechanisms and standards to adjudicate conflicts between Indigenous Peoples and Canada over land and resource development.

E. Decision Making Power and Remuneration

Our Title is based on our inherent rights and jurisdiction over our traditional territories. We, therefore, are the decision-makers regarding all projects proposed to take place in our traditional territories. We will have to be provided with all the substantive information regarding any projects and with the necessary time and resources to conduct our own assessments based on our indigenous knowledges especially regarding biodiversity and sustainable development. Based on that information, Indigenous Peoples will then take an informed decision about which developments can take place in our traditional territories. If the projects are supported, they will be subject to agreements, which ensure that Indigenous Peoples, as owners of the land and resources, receive fair remuneration or payment for the use of our land and resources. For example, the Economic and Community Development Agreement with the Stk'emplupsemc of the Secwepemc Nation in August 2010 to share the future mineral tax revenues that the provincial government receives from the New Afton Mine. This agreement provides the Stk'emplupsemc with a direct revenue stream from development in their territory to support their own economic self-determination.

In other states, governments and Indigenous Peoples have implemented systems of decision-making informed consent models including:

- *Culturally-appropriate, foundational principles* agreed to by the parties before the start of negotiation processes. While the goal of these processes is to reach an agreement between the parties, this does not mean that all negotiations will lead to the consent and approval by the affected Indigenous Peoples of a proposed project.
- *Permission to consult and seek consent* from the affected Indigenous Peoples for project proponents. Proponents should request permission from the affected Indigenous Peoples to consult with them at the early stages of a proposed project not when the need to obtain approval arises.

Furthermore, *fundamental elements of good faith negotiations* if permission has been granted to seek consent can include:

- Identification of Parties to the Negotiation and Decision-Makers;
- Agreement on Timing;
- Additional Community Protocols;
- Third Party Mediator/Negotiator;
- Social & Environmental Assessments;
- Information Sharing;
- Benefit Sharing;
- Mechanisms for Continued Negotiations and Consensus Processes;
- Participatory and Independent Oversight; and
- Resolution of Disputes and Complaint Mechanisms.

F. Social, Cultural, Environmental and Economic Issues

Indigenous communities bore a disproportionate burden of the negative social, cultural, environmental and economic effects from land and resource development without receiving commensurate benefits. Self-determined development means that indigenous peoples are the main players in designing, planning, implementing, monitoring, and evaluating their own social, cultural, environmental and economic systems based on inherent land systems. Self-determined development has several important components including:

1. Respect for the collective, inherent rights of indigenous peoples;
2. Participation in all decision-making processes on an equal footing with the federal government;
3. Control over their own territories including the pace and scale of development; and
4. Just and equitable distribution of revenue without bureaucratic and institutional barriers on the use of the funds (indigenous government must be accountable and transparent with their members).

The following approaches can be taken for development to become meaningful for Indigenous Peoples in British Columbia.

- *Social and Cultural* – Change timing of projects to be responsive to indigenous peoples' social and cultural concerns. Undertake baseline assessments and on-going monitoring of social and cultural impacts based on the indigenous communities own indicators. Implement programs and services to address the social and cultural impacts.
- *Environmental* - Carry out an independent evaluation to improve and protect the environment on proposed development projects instead of the current environmental assessment processes. Enhance development by indigenous peoples' knowledge, values, and practices of development. As Indigenous Peoples collectively we hold the most long-term knowledge about our traditional territories, which in turn can form the basis for sustainable development in our traditional territories.
- *Economic* – Determine what and how development should be pursued. Collectively discern whether economic benefits outweigh the social, cultural and environmental impacts from development. Improve the quality of life in indigenous communities by generating business enterprises and income. Indigenous voices must exist in wider economic policy development and land use planning. Indigenous peoples determine the share of benefits with Canada, British Columbia and third parties from the development of lands and resources in their territories. It is not about compensation, which usually occurs in the case of loss of ownership; and discretionary revenue sharing arrangements under provincial budgets; but instead mandatory remuneration for use of indigenous lands and resources.

VI. INDIAN LITIGATION AGENDA

Respect of Indigenous Peoples' inherent jurisdiction must frame litigation strategies and agendas.

A. Basic Principles for Indigenous Litigation

- Indigenous Peoples must be in charge of their cases instead of lawyers directing the litigation, which may not be based on inherent rights.
- Litigation draws on the indigenous knowledge of our elders and the process for litigation strategy development and management of cases should be used to include and educate our young people.
- Indigenous lawyers (preferably from the respective nations), rather than being relegated to marginal roles, must play a key advocacy role in indigenous litigation by presenting indigenous laws, theories, and concepts.
- Measure, assess, and structure litigation strategies based on inherent rights to ensure consistency with indigenous values, international human rights, and inherent indigenous legal standards necessary for Indigenous People's self-determination.

B. Intervene in and Support Litigation of Indigenous Peoples

UBCIC, as an advocacy organization for indigenous rights, must support Indigenous Peoples in their respective litigation and promote principles that would benefit many Indigenous Peoples. There are a number of cases currently underway or likely to proceed regarding:

- Mining (Fish Lake);
- Power generation (Site C);
- Transmission Lines; and
- Enbridge Pipeline.

As Indigenous Peoples, we know the negative impact mega projects can have on our traditional territories. As traditional knowledge holders, we have the most long-term data and knowledge about our traditional territories. We can best assess the impact mainstream commercial industrial developments will have on our lives and our lands. We hold the decision-making power to ensure economically, environmentally and culturally sustainable development in our traditional territories.

C. Jurisdictional Challenge

At the state level, we suggest bringing constitutional jurisdictional challenges to the attempts to solidify provincial jurisdiction over the inherent jurisdiction of our nations. For example, the creation of mountain resort municipalities (under delegated provincial authority) in Aboriginal Title lands violates indigenous sovereignty, the international prior informed consent standard, and constitutional division of powers.

At the international level, a jurisdictional challenge may be brought to question Canada's assertion of sovereignty in matters that concern us as Indigenous Peoples. As Canadian courts have been established under this assertion of sovereignty, these institutions of the state will always be limited in their understanding of indigenous laws and in turn will try to limit indigenous laws and make them subsidiary to common law. The end result would be codification or recognition of indigenous laws as customary laws or worse rather than recognition of indigenous laws and jurisdiction independently.

True co-existence of legal systems requires a constitutional framework where Canadian courts and indigenous institutions and legal systems operate at the same level – on equal footing. This is what is referred to as Legal Pluralism, a different legal system coexisting at the same level, as opposed to recognition of customary law which is subsidiary and subject to the Canadian legal system. As Indigenous Peoples we can bring domestic and international challenges to Canada's assertion of sovereignty. We can advocate for constitutional reform to achieve legal pluralism and respect for Indigenous Peoples' inherent jurisdiction.

D. UBCIC - An Advocacy Organization

Many Indigenous Peoples are dealing with large developments in their traditional territories. They have been asserting their jurisdiction and taking issue with provincial processes. They have called for prior informed consent of Indigenous Peoples to any developments in their territories and have requested independent indigenous decision-making processes which ensure sufficient time and funding to take into account indigenous knowledge and rights. They often find themselves isolated and confronted with provincial processes. To bring a challenge to provincial jurisdiction in each case would be very costly. In addition, the federal government is difficult to engage regarding most issues and gives a lot of deference to the province, if they become involved in litigation it is to oppose Indigenous Peoples assertions. Comprehensive negotiation processes are based on the federal Comprehensive Claims Policy that aims at the extinguishment of Aboriginal Title. Indigenous Peoples who assert strong positions based on inherent rights feel isolated.

VII. COUNCIL OF INDIGENOUS ADVISORS

In the course of practising law, we have had the opportunity to engage in dialogue and present our viewpoints on various issues affecting our communities and nations. However, we have always felt constrained in our ability to share information with Indigenous Peoples in larger fora and gatherings as provincial organizations have tended to rely upon in-house counsel instead of providing for a broader forum for Indigenous Advisors. UBCIC should consider how it can benefit from the experience of Indigenous Advisors who are willing to make a difference for the betterment of our communities. Many Indigenous Advisors are willing to share their time, experience and knowledge. As part of the decolonizing experience, Indigenous Peoples must have faith and trust in other Indigenous People. With the increasing number of Indigenous advisors, UBCIC and its member Bands are well positioned to benefit from the success of Indigenous advisors who want to make a lasting contribution. UBCIC could create the space for Indigenous advisors to provide information, engage in dialogue and provide strategic advice.

There are many examples of organizations around the world that establish knowledge and research centres in an effort to provide tools and resources for communities to be empowered and to build the capacity to address their future through self-determination. We are recommending that UBCIC establish a Council of Indigenous Advisors to undertake the following work -

- address questions of law and policy respecting aboriginal rights and title;
- oversee and coordinate research projects;
- facilitate knowledge-sharing and think-tank outcomes;
- prepare research papers;
- provide advisory services;
- oversee the dissemination of information; and
- coordinate regular conferences, workshops and think-tanks.

The work of the Council would be directed at increasing the positions and capacities of Indigenous Peoples through empowerment events and the sharing of information.

VIII. ACCOUNTABILITY

A. The Dangers of the Provincial Model

British Columbia promotes provincial processes to claim provincial jurisdiction over indigenous territories. A recent attempt was the proposed *Recognition Act*, which would have served to recognize provincial jurisdiction over Indigenous Territories, right when provincial jurisdiction was coming under increasing scrutiny by Canadian courts, as well as international investment security. Under the proposed legislation, the province would have

set up provincial processes for consultation and revenue sharing based on the discretion of the province. Revenue sharing is different from remuneration where Indigenous Peoples are paid as the owners of the land and resource, commensurate to what is taken from their territory. The province attempted to centralize consultation rather than addressing inherent rights with the respective Indigenous Peoples in their territories. It was Indigenous Peoples who recognized the danger of provincial legislation and regulation, which was used to control and colonize them. The *Recognition and Reconciliation Act Initiative* was buried. But the ghost of the Recognition Act is still haunting us, since the province has continued to push this approach through provincial processes, policies and strategic engagement agreements. The purpose of the province is to create relationships that support provincial jurisdiction on a sector by sector and case by case basis. This approach, if successful, will place our Peoples largely under provincial control and jurisdiction. As these provincial processes are structured to gain access and control over our territorial resources, our lands and cultures are in need of protection now! Our elders always remind us that our relationship is with the Crown on a nation-to-nation basis and not with the provincial government.

The First Nations Leadership Council (FNLC) and its enabling organizations (BCAFN, FN Summit, and UBCIC) do not hold and cannot exercise inherent rights of Indigenous Peoples and Nations to self determination including economic, social and cultural development. The right to self determination is an inherent right held by Indigenous Peoples and recognized as the legal standard in UNDRIP. Reconciliation must be effected through Indigenous Peoples own agendas and priorities and cannot be determined by the FNLC. Slowly through the FNLC and its councils, committees, and societies, the transition to provincial control and jurisdiction is occurring. This transition denies Indigenous peoples right to self-determination to economic, social and cultural development and allows the federal government to avoid their constitutional obligations by limiting responsibility and allowing the province to claim control and jurisdiction over those issues. This is a subtle attempt by province and federal governments to end their responsibility to Indigenous peoples and to engage and interact only with the FNLC.

Again, UBCIC Members must reflect on their involvement and participation in the FNLC. It is well-known that legislation and regulation were used to control and govern colonial subjects while transforming Indigenous societies. Now, the FNLC is using provincial and federal legislation to control First Nations and to change our societies' traditional governance. It is inappropriate for the FNLC to use colonial methods to obtain control and power over our people, our societies, our lands and resources, and our futures. Indigenous laws regulate our societies and our families. We must determine our futures and we must speak for ourselves.

B. Good Governance

The rejection of the *Recognition and Reconciliation Act Initiative* last August raised the issue about how UBCIC governs itself vis-à-vis decisions that have the potential to affect aboriginal title. Somewhere along the line there became a disconnect between the agenda behind the *Recognition and Reconciliation Act Initiative* and Indigenous Peoples, who were marketed that the initiative was without risk. The initiative failed as a result of a lack of good governance and inconsistency with the indigenous inherent rights agenda. The lesson to be learned is that initiatives cannot be fast-tracked for political purposes. As members of the community, we appreciate the work of the leadership in advancing issues and positions while following good governance practices. What is good governance?

“Good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law.” (UN Economic and Social Commission for Asia and the Pacific).

Although there are other aspects of good governance in the Indigenous context, the foregoing characteristics are consistent with the Indigenous worldview. The principle of “free, prior informed consent” should be the threshold for making decisions in respect to policy, laws and activities that may affect aboriginal rights and title. How do we ensure that decisions are based upon “free prior informed consent”? Although Indigenous organizations, such as the UBCIC, have an advocacy role to support Indigenous Nations to address Aboriginal Title, we need to remind ourselves that each Indigenous member of an Indigenous Nation has a right to be inclusively involved in any decision-making process. Governance actions that may affect collective rights and communal assets must involve all members. Inclusivity can be achieved by disseminating information and engaging in dialogue through meetings, for a, workshops, conferences, gatherings, newsletters, websites, cultural events, and voting. Consensual decision making has the following elements:

- Focusing on identified issues;
- Seeking out interests and possible solutions;
- Participation by all persons;
- Discussion framed to consider options for solutions; and
- Debate options, reformulate solutions and agree on solutions.

We can foster good governance through consensual decisions (overwhelming support) that are based on indigenous protocols and laws arrived through using the consensual decision making elements outlined above. In the end, the dialogue process must be ongoing and tailored as the circumstances require. We encourage UBCIC to adopt best practices for disseminating information to its member Bands and enabling members to participate in debate and dialogue.

IX. INDIGENOUS WOMEN, CHILDREN AND FAMILIES

A. The Pivotal Role of Indigenous Women

Indigenous women in Canada suffer tremendously and have been discriminated against under the *Indian Act* regime. Indigenous women lost membership and residency rights. As a result, many roles of women in mainly matrilineal societies were undermined and women are no longer participants in community decision-making in their past roles. The revitalization of languages must be implemented in order to restore women to their rightful places in their communities because it is the traditional languages that keep the matrilineal societies alive. Many Indigenous languages are gender-neutral and do not have pronouns for men and women instead people were referred to by their name. Children were referred to as children or child not as boys and girls. The roles of the children were not marred by colonial, patriarchal ways. Revitalization of language would go a long way to teaching our children respect for girls and women. Our matrilineal and traditional ways of treating women as equals are still alive in all of our collective languages. Indigenous societies must stop the continued colonial treatment of Indigenous women. It is important to have women participate in the revitalization of their roles and traditions. Indigenous men must begin to ensure Indigenous women's voices especially in the political realm are heard. Public abuse of Indigenous women can no longer be chalked up to "politics". It is just no longer acceptable. As Indigenous Peoples, we need to create the space for Indigenous women in matrilineal societies once again and ensure that women regain their rightful place beside men in all levels of leadership and decision-making.

B. Stop Violence Against Indigenous Women

The Cheyenne believe that "A Nation is not conquered until the hearts of its women are on the ground. Then it is finished, no matter how brave its warriors or how strong its weapons." In Canada, Indigenous women are missing and disappearing at a greater rate than any other group in Canada. In July 2010, the Attorney General of the Province of British Columbia dismissed 20 murder charges against the worst serial killer in Canadian history. The majority of his victims were Indigenous women. The charges were dropped based, not on legal precedent, but on economic considerations. There was no public outcry regarding the dismissal of the charges against the serial killer or the sheer injustice to the 20 victims and their families. Justice was denied and the women will be forgotten once again as soon as the news fades from the headlines. British Columbia has the highest number of missing and murdered women in any province in Canada. In 2006, the Native Women's Association of Canada (NWAC) reported that there were 136 missing and murdered women in British Columbia. This number continues to grow.

Kukpi7 Wayne Christian challenges Chiefs today by asking them “what happened to our traditional roles of protecting our women?” Christian’s question speaks to the safety and security of Indigenous women and their basic human rights. The protection of Indigenous women’s human rights to safety and security in Canada and especially in British Columbia are being wantonly and recklessly violated. We have to organize to reduce the high rate of deaths and disappearances of Indigenous women in this province and to ensure that Indigenous women’s human rights are not violated.

All forms of violence against Indigenous women must stop. Indigenous men have a very strong role to play in stopping violence of all kinds. This is a huge role but it should start with our daughters, granddaughters, wives, aunts, nieces, mothers and grandmothers. Indigenous men need to understand that they are giving up the colonizer’s ways of oppressing women. The colonial, patriarchal ways must be abandoned in order to provide a healthy future for our girls and women. It is clear that the basic fundamental human rights of Indigenous women are not a priority of the federal or provincial governments. Safety and security of Indigenous women must become a priority for Indigenous Nations, especially Indigenous men.

At the international level, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) stipulates in Article 22 that:

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

The implementation of these international standards can stop violence against Indigenous women. Indigenous Peoples must make the protection of Indigenous women’s human rights a priority through strong advocacy and organization; seek redress for all forms of violence against Indigenous women, including those women that have died or disappeared in this province; and call on Canada to work with Indigenous women and men and their political representatives to implement article 22 of UNDRIP.

C. Indigenous Approaches – Not Government Policies

The death of Indigenous women in British Columbia and denial of injustice illustrates the need to reject government agendas and policies in favour of our own traditional knowledge. The federal and provincial governments do not take the fundamental human

rights issue of safety and security of Indigenous women seriously. The federal government has received international pressure to investigate missing and murdered Indigenous women and still the federal government has chosen to do nothing. The provincial government has recently agreed to have an inquiry into the reasons law enforcement took so long to catch Canada's worst serial killer. The inquiry is not broad enough to deal with other missing and murdered women's cases including the Highway of Tears. The province leads the country in missing and murdered women and continues to deny those women justice. UBCIC could create an "Indigenous Women's Council" to examine issues negatively impacting women instead of issues dictated by men or by government. The council could include a representative from each community that has membership in UBCIC. The council could meet at the same time as regular UBCIC meetings. This would be a more inclusive approach to have women's voices heard and to promote gender balance rather than setting up a separate society where women oppose men or become tokens. It is important to understand that men and women must work together as a team with equal roles as they did in our traditional matrilineal societies. In the past men and women worked together inclusively, not exclusively of each other. The *Indian Act* must stop dictating and regulating the way Indigenous women interact with Indigenous men.

D. International Inquiry Into Missing And Murdered Women

UBCIC may also consider a submission to Committee on the Elimination of Discrimination against Women (CEDAW) and ask for an investigation into the missing and murdered women in British Columbia. Once CEDAW make a decision to conduct an investigation, it is important to ensure that Indigenous women play a key role in the investigation. In the past CEDAW has conducted international investigations into femicide (killing of women) and disappearances in Latin American and Mexico. Canada has not responded to international pressure. We therefore recommend submitting a CEDAW application for investigation into the missing and murdered women in British Columbia.

E. Indigenous Family Values

Family is a key to the social, economic, cultural and political development of Indigenous Peoples. Indigenous family values are expressed in our traditional languages. Our traditional languages speak to enforcement of our family values. Family plays an important role in the restoration of women to their proper place within our Indigenous communities. The concepts within in our languages must be used to best understand our needs for the future and the rebuilding of both communities and government. Instead of duplicating

colonialist society in furthering community development, it is important to look at our own traditional ways and values to build healthy families. We should not be ashamed of our traditional communities and governments and languages. Languages contain a key to restoring women and girls to their traditional roles.

Our traditional matrilineal societies were vibrant and full of democratic traditions including equality for women, a democratic concept worth keeping alive, instead of continuing to accept the application of structures and institutions dominant in patriarchal society. It would be an atrocity to permanently throw away matrilineal societies in favour of predominantly patriarchal society designed by men. This society threw out 20 homicide charges against the worst serial killer in the history of this country based on money. This clearly denies justice to Indigenous women and clearly is not a path Indigenous women want to continue. We recommend supporting the protection of Indigenous family values through traditional language revival and respecting the equality of Indigenous women and traditional matrilineal societies.

F. Indigenous Children

There are over 27,000 Aboriginal Children in care across Canada, and almost half of them in British Columbia alone. This means that more of our children are in care today than were in residential school. The province of British Columbia claims exclusive jurisdiction over child welfare, and the federal government would prefer to devolve jurisdiction to the province. This has to stop – as Indigenous Peoples we have inherent jurisdiction over our children, wherever they live.

Indigenous Peoples should be in charge of caring for their children independent of where they live. Exercising Jurisdiction over Indigenous Children is an exercise of the right to self-determination of Indigenous peoples. In addition UNDRIP enshrines a provision (Article 7) that Indigenous Peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group. Further Article 22 of UNDRIP sets out a directive to pay particular attention to the rights and special needs of Indigenous children and so that they can enjoy full protection and guarantees against all forms of violence and discrimination.

We recommend holding Canada accountable to implementing Indigenous Peoples' inherent jurisdiction regarding Indigenous children as well as UNDRIP standards that protect Indigenous children.

X. CONCLUSION

In this paper, we propose Indigenous strategies based on inherent rights as a solution to government agendas as set out in the following table:

INDIGENOUS ALLIED STRATEGY	GOVERNMENT AGENDA
Indigenous Inherent Rights & Jurisdictions	Exclusive Federal and Provincial Jurisdiction
Ouster of Provincial Jurisdiction by Indigenous Underlying Title	Recognition of Provincial Jurisdiction through denial of Exclusive Occupation
International Tribunal Complaints & Cases	Canadian Court Cases & Remedies
Implement UNDRIP Standards	Provincial Policy & Status Quo
Indigenous Economies	Business as Usual
Prior Informed Consent	Consultation and Accommodation
Remuneration for Development on Indigenous Territories	Discretionary Revenue Sharing based on Provincial Formulas
Inalienable Collective Ownership	Privatization of Indian Reserves
Indigenous Jurisdiction of Land, Resources & Water	Commodification of Land, Resources & Water
Indigenous Societies	Assimilation & Patriarchal Systems
Human Rights Protection for Indigenous Women & Children	Denial of Fundamental Human Right to Safety & Security
Strategy Development with Council of Indigenous Advisors	Consultation with Executive of the First Nations Leadership Council

Our hope is that Indigenous Peoples throughout British Columbia work together on a common Indigenous strategy to better the health and well-being of our communities and people through the exercise of our Indigenous Inherent Rights.