First Nations Summit

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to the

House of Commons Standing Committee on Indigenous and Northern Affairs

Re: Study of Land Restitution to First Nations, Inuit and Métis

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First Nations Summit submission, dated June 30, 2023, to the House of Commons Standing Committee on Indigenous and Northern Affairs (Study of Land Restitution to First Nations, Inuit and Métis)

ABOUT THE FIRST NATIONS SUMMIT

The First Nations Summit was founded in 1990 by First Nations in British Columbia to support the establishment of a made-in-BC treaty negotiations framework (the "Treaty Process"). The First Nations Summit does not participate in treaty negotiations itself. Rather, its mandate is to engage in advocacy with Canada and BC to address obstacles to progress.

THE LEGAL CONTEXT FOR LAND RESTITUTION

United Nations Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* (the "Declaration") is the crucial starting point for any modern consideration of land restitution.

Article 28(1) affirms the right of Indigenous peoples to "redress, by means that can include restitution, or where that is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent" (emphasis added). Article 28(2) explains that "compensation shall take the form of lands, territories and resources equal in quality, size and legal status" or "monetary compensation."

Redress is a fundamental right not only under the UN Declaration but also in international human rights law and the law of state responsibility. As explained below, the Indigenous right to redress for lost lands, territories and resources has now been recognized in Canadian law.

Implementing the right to redress

Both Canada and BC have taken initial steps to implement the Declaration. BC enacted the *Declaration on the Rights of Indigenous Peoples Act* in November 2019. Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* in June 2021.

Less well known, but centrally important for this committee's current study, is the adoption of the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (the "RRR Policy") by the three Principals in the Treaty Process (Canada, BC and the First Nations Summit) in September 2019. Section 8 of the RRR Policy endorses the Declaration as a foundation for the Treaty Process. Sections 16(b) and 18(h) require that the negotiation of treaties, agreements and other constructive arrangements be guided by and provide for implementation of the Declaration. Section 18(h) also requires treaties, agreements and other constructive arrangements to address the right to redress. Section 43 enables federal and provincial negotiators to address redress and "just, fair and equitable compensation" in treaties, agreements and other constructive arrangements under negotiation.

Despite these provisions, many First Nations participating in the Treaty Process (the "Negotiating Nations") report that Canada and BC remain unwilling to implement the right to redress.

The Declaration Act and the Federal Action Plan

As noted, the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* (the "Declaration Act") has been in force since June 2021. Its purpose is to provide a framework for Canada's implementation of the Declaration.[1] This is to be accomplished through aligning federal laws with the Declaration[2] and preparing and implementing an action plan.[3]

Canada's first action plan (the "Federal Action Plan"), released in June 2023 refers to redress in actions 107-111. Disappointingly, however, the concepts of restitution and compensation for lands, territories and resources—concepts central to realizing redress under the Declaration—do not appear even once in the Federal Action Plan. The Declaration's requirement of redress in respect of First Nations lands, territories and resources is entirely neglected. The Federal Action Plan also says nothing about how negotiations under the Treaty Process or modern treaties can be used to achieve redress. This is particularly concerning since, as explained above, in the RRR

[1] *Declaration Act*, s. 4.
[2] *Declaration Act*, s. 5.
[3] *Declaration Act*, s. 6(1).

Policy, Canada affirmed that treaties are one means of implementing the Declaration and committed to providing redress through the Treaty Process.

ADDRESSING REDRESS, RESTITUTION AND COMPENSATION THROUGH THE TREATY PROCESS

Restitution

As noted, the Declaration affirms the right of Indigenous peoples to redress by means that can include restitution. BC is comprised of 94% provincial Crown land, 1% federal Crown land and 5% private land,[4] which cumulatively amount to 944,735 km^2.[5] The title of Indigenous peoples in BC remains largely unextinguished.[6] Thus, the right to restitution, as implemented through modern treaties in BC, should result in the return of significant amounts of lands, territories and resources to Negotiating Nations.

So far that has not been the case. The combined land quantum in the Tsawwassen, Maa-nulth and Tla'amin treaties is 335 km^2.[7] In the only declaration of title made to date in Canada, the Supreme Court of Canada declared that the Tsilhqot'in Nation holds title to 1,750 km^2 of land.[8]

Lands, territories and resources equal in quality, size and legal status

Article 28(2) of the Declaration provides that, if restitution is not possible, compensation must take the form of lands, territories and resources equal in quality, size and legal status.

Canada and BC rely on a 1993 Memorandum of Understanding Respecting the Sharing of Pre-Treaty Settlement Costs, Implementation Costs and the Costs of Self-Government (the "Cost-Sharing MOU") to determine the quantum and ratio of land and cash offers made to Negotiating

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[4] https://www2.gov.bc.ca/gov/content/industry/natural-resource-use
[5] https://www.hellobc.com/content/uploads/2019/04/TM_BCFactSheet.pdf
[6] Apart from 14 historic treaties concluded with Indigenous Nations on Vancouver Island (1850-1854), an adhesion to Treaty 8 concluded in 1900, and four modern treaties concluded with the Nisga'a (2000), (Tsawwassen (2009), Maa-nulth (2011) and Tla'amin (2016), the reconciliation of indigenous and Crown titles and rights remained largely unresolved in BC.
[7] This consists of 7 km^2 in the Tsawwassen treaty, 245 km^2 in the Maa-nulth treaty and 83 km^2 in the Tla'amin treaty: Douglas R. Eyford, A New Direction – Advancing Aboriginal and Treaty Rights, February 20, 2015, p. 23. The quantum of land in each of these treaties needs to be considered within the context of the entire treaty packages that were negotiated by each of these First Nations.
[8] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. The area over which the Tsilhqot'in sought a declaration of title represents only five percent of what the Tsilhqot'in regard as their traditional territory: Eyford at p. 39.

Nations. The formulaic approach of the Cost-Sharing MOU is not directed towards identifying lands and territories equal in size to those lost by Indigenous peoples. Moreover, this formulaic approach is rejected in the RRR Policy[9] and is not in keeping with the honour of the Crown, which is always at stake in the Crown's dealings with Indigenous peoples.[10]

The Cost-Sharing MOU was concluded around the same time that then-Premier Harcourt stated that the land quantum in treaties would be proportional to an Indigenous nation's population, and that all lands available for inclusion in treaties would amount to no more than 5% of the total area of BC. This so-called "5% solution" is inconsistent with the Declaration, the RRR Policy and the honour of the Crown.

Legal status is also an issue. Canada and BC currently require that lands transferred to Negotiating Nations through modern treaties be held in fee simple.[11] This is inconsistent with Article 28(2) of the Declaration, which requires compensation in lands of equal legal status. Fee simple is not equal in legal status to Indigenous title.

Valuation of lands and resources

Redress, including just, fair and equitable compensation, for Indigenous lands, territories and resources, requires valuation of losses. Indigenous peoples cannot know what they are owed without knowing what they have lost. At present there is nothing in the RRR Policy, the Federal Action Plan, or elsewhere, providing for valuation processes or methods.

RECOMMENDATIONS

The First Nations Summit recommends that Canada take the following actions to implement the right to redress for Indigenous lands, territories and resources:

1. Confirm its commitment to negotiate in the Treaty Process, as required by Declaration art. 28(1), restitution for lands, territories, and resources which First Nations have traditionally

[9] RRR Policy, s. 18(g).
[10] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 SCR 511, para. 17.
[11] Tsawwassen Treaty, ch. 4 and Tsawwassen Final Agreement Act, S.C. 2008, c. 32, s. 7; Maa-nulth First Nations Final Agreement, ch. 2, s. 2.1.1 and Maa-nulth First Nations Final Agreement Act, [SBC 2007], ch. 43, s. 7.; Tla'amin Final Agreement Act, [SBC 2013] ch. 2., s. 3.

owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Where restitution is not possible, confirm its commitment to negotiate in the Treaty Process, as required by Declaration art. 28(2) and section 43 of the RRR Policy, compensation in lieu of restitution.

3. Work to expeditiously conclude a policy annex to the RRR Policy on the constitutional status of lands and related jurisdictional issues with BC and Negotiating Nations. Work on this project began three years ago but remains incomplete.

4. Co-develop with Negotiating Nations, and fund, data gathering mechanisms for the valuation of lands, territories, and resources consistent with the commitment to co-development in the RRR Policy.