FIRST NATIONS SUMMIT

SUBMISSION TO HOUSE OF COMMONS STANDING COMMITTEE ON NATURAL RESOURCES

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Introduction

This document provides a broad overview of some key issues for First Nations in BC and for the First Nations Energy and Mining Council. It is hoped these will provide an opportunity for dialogue between First Nations and the federal government.

Priority Recommendation: To establish a high level working table with First Nations Leaders (including the First Nations Leadership Council and the First Nations Energy and Mining Council) and federal government officials to consider each of the recommendations below.

About the First Nations Leadership Council

On March 17, 2005, the political executives of the First Nations Summit (FNS), BC Assembly of First Nations (BCAFN), and Union of BC Indian Chiefs (UBCIC) signed a *Leadership Accord* to affirm mutual respect amongst the three organizations and to formalize a cooperative working relationship to: address issues of common concern; develop strategies and actions to bring about significant and substantive changes to government policy that will benefit all First Nations in BC; create space and opportunity for First Nations to engage directly with governments on their priority issues; and engage in advocacy on behalf of First Nations to achieve these objectives. The Political Executives of the BCAFN, FNS and UBCIC work under the *Leadership Accord* as the First Nations Leadership Council (FNLC).

About the First Nations Energy and Mining Council

In 2008 First Nations leaders in BC created the First Nations Energy and Mining Council FNEMC to provide support and facilitate First Nations efforts to manage and develop energy and mineral resources in ways that protect and sustain the environment, while enhancing the social, cultural, economic and political well-being of First Nations.

Through the involvement and guidance from First Nations leaders two (2) key action plans were developed and adopted to direct the vision and purpose of the FNEMC:

- BC First Nations Mineral Exploration and Mining Action Plan (2007)
- BC First Nations Energy Action Plan (2008)

Priority Topics

This paper will focus on nine (9) key areas in the mining and energy sectors that impact First Nations.

1. First Nations "strategic level" plans for lands, territories and resources
2. First Nations Equity Fund
3. Environmental Assessments
4. Impact Benefit Agreements (First Nations Government and Industry)
5. Natural Gas Opportunities
6. First Nations International Desk
7. Revenue Sharing (Government to Government)
8. Mining Reforms
9. No Net Loss Policy & Metal Mines and Effluent Regulations reforms

1. First Nations "Strategic Level Plans" for lands, territories and resources

As set out by the Supreme Court of Canada in the Haida case, governments in consulting with First Nations should engage at the "strategic level" when land and resource development plans are being considered and not at "operational levels" when projects are ready to proceed.

RECOMMENDATION RE: FIRST NATIONS "STRATEGIC LEVEL PLANS":

A. To ensure First Nations have ongoing capacity, federal and provincial governments support the development of Strategic Level Plans by First Nations for lands and territories within their respective traditional territories to ensure that First Nations are in a position to fully address, respond to and make the necessary decisions on any and all proposed development initiatives.

2. First Nations Equity and Capacity Fund

First Nations in Canada are positioned to participate and invest in many of Canada's significant resource, energy and infrastructure projects, particularly in British Columbia. These opportunities include both self-sponsored projects as well as projects initiated and sponsored by corporations. With over $650 billion in proposed natural resource projects in the next 10 years there are exceptional opportunities if the tools for First Nations are made available.

Compared to other levels of government or industry, First Nations do not have the same access to capital and equity. In cases where First Nations partnerships with the private sector are being developed, there is the potential for significant mutual benefits. The most obvious benefit of a project is that if First Nations are partners, then the hurdle of obtaining their support is diminished. First Nations businesses are benefiting from the investment capacity, experience and business acumen of the broader private sector. In return, private sector companies recognize the value in strengthening ties with First Nations as partners to expedite project approvals in First Nations traditional territory, as a readily available and local labour force as well as customer base.

First Nations seek to build a unique partnership with governments to generate mutual success. The creation of a First Nations equity fund that can be utilized based upon the economically viable projects that are reviewed by an independent advisory panel.

This proposal consists of two components:

1. Create a Capacity / Relationship Fund to support the conditions for engagement; and

2. Create an Equity Fund to provide First Nations the opportunity for ownership in projects that are proposed in their traditional territories.

RECOMMENDATIONS RE: FIRST NATIONS EQUITY AND CAPACITY FUND

A. Provide direct loans to finance First Nations equity ownership in start-up or existing renewable or non-renewable energy projects in BC.

B. Make direct equity investments that provide for greater First Nations participation in the economic opportunities arising from major project proposals in the BC energy sector.

C. Leverage investment capital from other sources including conventional lenders, private investors or joint venture partners.

D. Stimulate economic activity throughout BC, especially in rural areas. Priority access to the equity investment fund will be given to:

- ***First Nations communities who are poised to respond quickly.***
- ***Those First Nations who have imminent opportunities as equity partners with projects that are in the approval process.***
- ***First Nations who seek to generate direct employment for their members as a result of their equity investment.***

3. Environmental Assessments

First Nations in BC, both individually and at the provincial leadership level, have called for reform of the BC environmental assessment process. There is increasing evidence on all fronts, including new legal challenges, that the system of project review and Crown consultation being applied by the BC Environmental Assessment Office (BCEAO) is seriously dysfunctional when it comes to ensuring that First Nations interests are effectively provided for in the assessment process, that the honour of the Crown is properly preserved in the consultation process used by the agency and, in the final analysis, and that meaningful accommodation to the potentially affected First Nations has been made.

Furthermore the federal omnibus Bill C-38 replaced the current Canadian Environmental Assessment Act with new legislation which decreases the opportunity for First Nations' involvement in Environmental Assessments as well as ending environmental assessments for minor projects, referred to as "screenings". This unilateral action, that directly impacts our Aboriginal rights, occurred without any consultation with First Nations.

A number of problems with the existing BC EA process can be identified. First, is the matter of the legislation itself. To summarize, the BC Environmental Assessment Act is silent with respect to a number of important aspects, such as First Nations involvement in the process, objectives, standards and principles for delivery for the EA process, and methodological content for the conduct of reviews.

Additionally, the BCEAO executive director has a wide range of discretion that is explicitly open to ministerial direction and influenced by government policy mandates. Far from being the independent, neutrally administered, technically robust, transparent and accountable process it needs to be, the Act is constructed to achieve the opposite of these characteristics in its implementation.

Another problem is the way the legislation is implemented by the EAO. Despite having complete discretion in designing and implementing the process, the EAO appears unprepared to adapt the process when required to meet the needs of First Nations. No stated objectives exist to guide the executive director and the process, and First Nations are not involved in determining the scope of the assessment or the terms of reference for the process. Any funding offered by the EAO to a First Nation is trivial compared to what is required. And the unilaterally designed consultation process now used by the EAO is somewhat cynically conducted and misleading in the result.

In short, the entire BC process for project assessment is ripe for reform. A significant number of First Nations have lost confidence in the process. This is unfortunate, because it is a fundamental inclination of Aboriginal people to promote economic development in their territories that they view as sustainable. There is, in other words, a common interest between BC and First Nations in seeing the right kinds of development projects materialize and, therefore, a common interest in an assessment process that will deliver the goods. We don't have one, and so it is important now to get on with the job of collaboratively designing such a process.

The BC First Nations Energy and Mining Council developed an environmental assessment solutions paper in 2009. This paper was brought to the Chiefs at the Union of BC Indian Chiefs and First Nations Summit sessions and resolutions were passed to support moving forward this solutions paper as a policy for provincial and federal reforms.

RECOMMENDATIONS RE: ENVIRONMENTAL ASSESSMENT REFORMS

A. The Federal and BC government commit to meeting with the First Nations Leadership Council and the BC First Nations Energy and Mining Council to discuss the First Nations EA solutions paper and commit to government-to government reforms.

B. Appoint a joint government – First Nations committee (that includes the First Nations Energy and Mining Council) to engage and provide feedback to the Chiefs and Cabinet on a new EA process.

C. ***Discuss immediate projects of concern that First Nations feel are not yet resolved. Ex. Prosperity Mine Proposal and the opposition by the TNG.***

4. Impact Benefit Agreements – must be a standard practice

There are numerous examples across Canada and in BC of resource companies coming into a First Nations territory, interfering with the practice of Aboriginal and Treaty rights, taking natural resources and leaving without any compensation or benefits accruing to the impacted First Nations.

First Nations have a right to be compensated for interference with their Aboriginal rights and where applicable, Treaty rights and they have a right to benefit from the resources in their traditional lands.

The few companies that as "good corporate citizens" adopted an internal Aboriginal relations policy did make efforts to contact and involve First Nation and other Aboriginal communities. However, even in most of these cases, the benefits were generally limited to a few short-term employment opportunities and some small business contracts. There are now some companies that share the profits and offer equity participation as part of their corporate practices.

Investors are increasingly knowledgeable about the risks of ignoring First Nation interests when projects are located within traditional territories. High profile protests such as the Tahltan, KI, Six Nations at Caledonia, and Clearwater River Dene on oil sands development, have alerted investors to the perils of ignoring First Nation interests. Simply put, projects which have not reached agreements with First Nations are a greater investor risk – and many corporations recognize this fact.

Some industry lawyers are advising their clients not to provide equity or profit sharing IBAs with First Nations as the "Crown is accommodating the First Nations interests". The First Nations Energy and Mining Council has reviewed a number of mining agreements across the country and the Crown revenue sharing portion (for those provinces/territories that share the revenues) add up to a small fraction of the economic benefits as compared to an industry impact benefit agreement (IBAs). These IBAs should be a standard way of doing business on any development on First Nation lands.

RECOMMENDATIONS FOR IMPACT BENEFIT AGREEMENTS (IBAs)

A. ***IBAs must be legally required. The provincial government should work with the FNLC and FNEMC to discuss how to legally ensure that IBAs are signed prior to a company commencing any work on a project. Ideally these IBAs should be negotiated prior to the commencement of the environmental assessment submission by a company.***

B. ***IBAs should include profit sharing and equity – not just jobs and contracts.***

C. ***The FNEMC has created a mining policy document titled, 'Sharing the Wealth'. This policy was brought to the Chiefs at the UBCIC and FNS meetings and a resolution was passed to create a policy that requires industry to enter into IBAs and that Crown revenue sharing is also required on all projects. There are various stages of agreements that companies are suggested to enter into with the impacted First Nation(s). The FNLC and FNEMC should receive commitments from the various provincial leadership candidates that changes will occur to ensure First Nations benefit from resource extraction.***

5. Natural Gas Opportunities

With the shale gas revolution occurring in northwestern British Columbia there has been a myriad of proposals to drill wells, build pipelines, and propose liquefied natural gas (LNG) terminals in central and northern BC. First Nations in the northeast of BC have raised concerns about the cumulative impacts of this development and the lack of clear regulations and policies on how the gas is to be developed. Huge amounts of water is required for the hydro-fracking and concern are being raised by First Nations about the impacts to the lakes and creeks and the seepage of the waste water as well as the impacts on plants and wildlife. Furthermore the shale gas developments – including but not limited to well sites, hydraulically fractured wells, gas and water pipelines, drilling waste disposal, forest clearances, borrow pits and water usage- continue to occur either without adequate consultation or in some cases (notably water assignments) with no consultation.

Other First Nations along the proposed pipeline routes have also raised concerns. In one case an agreement has occurred with some of the First Nations and a pipeline company/LNG partner. There are now up to 6 other pipeline and LNG proposals.

RECOMMENDATIONS RE: NATURAL GAS OPPORTUNITIES

A. ***Full regional baseline studies are completed in the role shale gas plays in British Columbia;***

B. ***Companies and the Province are required to submit multi-year predevelopment plans that identify all proposed water sources, well sites and other proposed infrastructure prior to any development permits being applied for;***

C. ***Mutually agreed, cumulative effects and environmental assessment processes are in place to ensure that gas industry water withdrawals are capped at ecologically acceptable levels and are not leeching into other water sources;***

D. ***Culturally significant land and water resources are protected and made off limits to industry activities;***

E. ***Industry water withdrawals and associated gas extraction activities are subject to rigorous monitoring and enforcement efforts by an independent body;***

F. ***Call on the Provincial Crown to convene a public commission of inquiry to investigate in an in-depth manner the cumulative effects of shale gas developments on the environment and public health and safety, and:***

- ***The commission composition shall include First Nation representation and have, as part of its mandate, a policy framework that would assess and mitigate cumulative impacts on the land, air, water and Aboriginal, Title, Rights and Treaty Rights, and First Nations' interests in territories affected by shale gas development; and,***

- ***That such an inquiry have the power to compel witnesses to testify, be open to members of the public, be required to publicly report its findings and make recommendations on how to mitigate cumulative impacts and ensure compliance in the oil and gas industry before continuing any work processes;***

- ***That First Nations be provided with financial resources from the Province to be meaningfully involved in the inquiry.***

G. ***First Nations to lead a cumulative impact study on the best routes for these pipelines and locations for the LNG terminals.***

6. First Nations International Desk

In August 2011 the First Nations officially launched the First Nations China Strategy: Transforming Relationships. This multi-faceted strategy is intended to proactively develop relationships with the Chinese government, State-owned enterprises, and private businesses that seek to partner with First Nations. For the most part Chinese organizations know little about the Constitutional Rights of First Nations in Canada.

In September 2011 Premier Clark announced the BC Jobs Plan: Canada Starts Here. That plan outlined a major agenda for resource development in the province, including eight new mines in the next four years and further expansion of nine existing mines by 2015 and an accelerated mining approval process. Earlier this week we read in the media that there will be changes to the BC Mining Act and there has been no consultation with our communities.

From October 22-31, 2011 the First Nations Leadership Council and the Assembly of First Nations participated in a mission to China to inform Chinese officials that investment in Canada must involve First Nations at the earliest stages. Without First Nations involvement projects will not proceed. Meetings were very positive and there is clear interest to build a stronger relationship.

RECOMMENDATIONS RE:FIRST NATIONS INTERNATIONAL DESK

- ***A. Creation of a First Nations International desk. Suggest 6 positions to be financed by the federal and provincial governments: 3 in China and 3 in BC.***

- ***B. Engagement on Asia-related matters with all of the sector councils and BC can be through this desk.***

7. Resource Revenue Sharing

Revenue Sharing Agreements are agreements between First Nations and the Province or Canada in which the revenues are collected by the Province or Canada with respect to resource projects in traditional territories and are shared with the First Nations. This includes but is not limited to taxes, royalties, penalties, permit and other fees.

While some First Nations have benefited from mining within their boundaries, in general, First Nations bear an unfair burden at every point in the mining process, from the registration of claims to exploration, production, and abandonment of closed sites. Urgent law reform is needed to shift at least some of that burden onto government and proponents.

In an effort to retain and enhance the industry, the BC government has introduced a number of tax and regulatory measures. For example, the Capital Tax was eliminated, Corporate Tax rates were reduced, the Mineral Exploration Tax Credit Program was introduced and a new policy of resource revenue sharing with First Nations was established. As a result, the Task Force reported in 2009 that the mining industry in BC "has responded with record exploration levels and the opening of new mines in the recent period of economic growth".

There are many options for the design of First Nation financial participation in mining and other resource based projects. Generally they fall within the following five types: Gross Overriding Royalty; Equity; Profit Share; Fixed Payments; and, Guaranteed Base with Upside.

Current law presumes that mining is an acceptable form of land use, but the presumption should instead be that Aboriginal and Treaty rights require a heightened scrutiny of all land-altering activities, especially environmentally destructive operations such as mining. To ensure a fair distribution of both the costs and benefits of mining, reform is needed to position the interests of First Nations and the greater society alongside those of multi-national development corporations.

In 2008 the BC government announced the sharing of the Mineral Taxes. It took nearly two years to receive information about this policy shift and we are now able to comment that it is a very poor attempt at revenue sharing. The Crown unilaterally imposed a sharing of up to 37.5% of the BC Mineral Tax on new or expanding major projects (gravel projects, placer miners and existing projects are exempt from this sharing). For a major metal mine this amounts to approximately $1 million per year to the First Nation. On average there is one new metal mine permitted in BC every 10 years. This "tax sharing" excludes all the other potential revenue sharing opportunities such as the capital gains tax, HST, corporate taxes, etc. Furthermore the First Nations must sign an agreement that they have been accommodated for this project and most communities are forced to sign them in this 'take it or leave it' approach by the Crown.

An even more concerning development regarding the Mineral Tax sharing policy, as noted above, is that some industry lawyers are advising their clients not to provide any equity or profit sharing with First Nations as the "Crown is accommodating the First Nations interests". The First Nations Energy and Mining Council has reviewed a number of mining agreements across the

country and the Crown revenue sharing portion (for those provinces/territories that share the revenues) add up to a small fraction of the economic benefits as compared to an industry impact benefit agreement (IBAs).

The First Nations Summit and the Union of BC Indian Chiefs have passed resolutions that required provincial revenue sharing and industry IBAs to both be in place before projects proceed. The resolutions also speak to the unfair decision of BC to unilaterally create a Mining Tax sharing policy that excludes existing mines and smaller projects that First Nations could benefit from.

RECOMMENDATIONS RE: RESOURCE REVENUE SHARING

A. A review of the BC Mineral Tax sharing policy should be undertaken. The FNEMC and the BC government should meet to discuss the policy and include sharing on capital gains, corporate taxes, etc. as they relate to mining projects.

B. The Province should be aware that both industry IBAs and provincial revenue sharing must both occur before projects proceed. To avoid the industry excuse that IBAs are not required by law the FNEMC will work with BC to draft legislation to require IBAs before projects proceed.

C. Natural resource revenue sharing should occur on all resource-based projects.

8. Mining Reforms (Free Entry) and a Mining Certification Standard

Free entry dates back to the gold rush period, when natural resources were considered infinite and wilderness should be tamed and is the foundation of British Columbia's mining industry.

Free entry assumes mining is the first and best use of land. All lands are open for mining unless specifically excluded. Mining prevails over private property interest and First Nations title and rights. Mineral tenures are granted on a first come, first served basis.

Free entry provides open access for any miner to any part of the provincial mineral zone to explore for minerals.

For more than 100 years mining has trumped all other natural resource industries in BC, such as oil and gas, forestry, fisheries and tourism. Miners do not apply for tenure or try to outbid a competitor for permission to access a resource. With a Free Miner's certificate, a credit card, and an Internet connection, mineral claims can be staked without the miner ever seeing the land or consulting with First Nations. Tenure is given regardless of the miner's history and accountability.

The free entry system does not recognize constitutionally recognized Aboriginal rights and title. Free entry hinders Crown and First Nations legal duties to consult. There is no requirement for consultation before a third party right is established for subsurface minerals.

First Nations rights and title are intricately linked with healthy ecosystems. Modern mining operations bring significant impacts to the environment and communities. First Nations are increasingly concerned with the environmental, social, and cumulative impacts of mining operations in the last 100+ years.

Conflict between First Nations governments, public government and the mining industry continues to escalate under the free entry regime. Blockades and legal battles are ongoing and increasing.

Free entry jeopardizes the future of a healthy mining industry in BC. A significant overhaul of mining policy is needed to decrease conflict, provide more benefits to First Nations, and provide certainty for government and industry investments.

It is therefore proposed that a certification standard for mining and mineral exploration projects be developed to help ensure the accountability and auditability of companies with respect to free, prior and informed consent (FPIC). It is hoped that such a tool would assist in breaking the cycle of conflict and confrontation which presently characterizes most FN-industry relations in the province.

Administered by a multi-party, independent entity with significant First Nation control and influence, the certification standard would include a concise set of principles which would be used to assess the extent to which a project and its proponent have achieved FPIC. Those who successfully achieve FPIC with their host First Nation(s) would be recognized and celebrated with the "BC First Nations Gold Standard in Mining".

The certification standard would be a voluntary initiative on the part of both companies and First Nations, and would be flexible enough to accommodate individual First Nation mineral exploration and mining processes, policies, and guidelines. It will allow a particular First Nation to negotiate the specifics of FPIC to suit their own particular circumstances. That being said, the standard will have to be consistent enough to be applied in a similar fashion across the province.

A fundamental characteristic of the "Standard" would be the audit function. Specific projects would be independently assessed throughout the "life of the mineral exploration program or the mine", insuring that best practices are being implemented not only during the early days of regulatory authorization, but also during operations and closure as well.

It is hoped that the certification standard approach will strongly encourage companies and governments to "raise the bar" with regards to achieving and maintaining FPIC with BC First Nations.

RECOMMENDATIONS FOR MINING FREE ENTRY REFORMS

A. Change the free entry system to a permitting system that includes the impacted First Nation(s) in the decision making process.

B. Create a legal requirement for mineral exploration agreements (See FNEMC policy paper titled, "Sharing the Wealth" – 2010).

C. Create a third party mining certification standard that is developed by First Nations in BC.

9. No Net Loss Policies & Metal Mines and Effluent Regulations

The Department of Fisheries and Oceans (DFO) is responsible for implementing the Policy for the Management of Fish Habitat. The primary goal of this policy is to "maintain the current productive capacity of fish habitats"; to achieve this, the principle of 'no net loss' is used. Briefly, this principle sanctions fish habitat replacement when habitat losses are unavoidable.

From the First Nations stewardship perspective, DFO's No Net Loss policy is an inappropriate and ineffective approach to fisheries management. It also fails to meet the Crown's obligations to First Nations.

The No Net Loss Policy is also closely related to Schedule 2 of the Metal Mining Effluent Regulation (MMER). In 2002, Schedule 2 was added to the MMER, which essentially allow for the re-classification of any natural water body that gets listed on it as a tailings impoundment area. Once a lake or river gets listed onto Schedule 2, it is no longer considered a natural water body and is then no longer protected by the Fisheries Act

First Nations and environmental groups have both expressed concern over Schedule 2, and have joined forces on several projects to save fresh water systems from becoming toxic tailings for mining projects. In both the Amazay Lake and Fish Lake projects, a fresh water system considered sacred by First Nations, was considered the cheapest alternative for a mining company to dump their wastes. The loophole created by Schedule 2 therefor places First Nations in an untenable position.

Reform of this regulation will prevent future costly battles between First Nations, government and industry.

RECOMMENDATIONS RE: NO NET LOSS POLICIES AND METAL MINES AND EFFLUENT REGULATIONS

A. ***Federal Members of Parliament be made aware of the concerns related to the federal No Net Loss policy and the Metal Mining Effluent regulations. Take steps to change these policies.***

B. ***FNEMC and the BC government officials should work together to understand all concerns related to the use of fish bearing fresh water lake and stream destruction.***