Presentation by the
First Nations Summit
to the
Federal Standing Committee
on Aboriginal Affairs

Re: The First Nations Governance Act
(Bill C-7)

FEBRUARY 19, 2003
Nanaimo, BC

FIRST NATIONS SUMMIT PRESENTATION ON THE FIRST NATIONS GOVERNANCE ACT (BILL C-7)

February 19, 2003

The First Nations Summit welcomes this opportunity to appear before the Standing Committee on Aboriginal Affairs to provide our views on Bill C-7, the proposed First Nations Governance Act (the FNGA).

This proposal to amend the *Indian Act* will affect how we as First Nations carry out our day-to-day business and will impact on our ability to move towards our objectives of self-reliance and the exercise of our inherent right of self-government.

The two fundamental issues we wish to raise with you in this presentation are the need to ensure that this initiative does not:

- infringe, abrogate or derogate from our Aboriginal rights and title, including our inherent right of self-government; or
- prejudice or in any way limit treaty negotiations.

In our submission we emphasize the fact that the inherent right of self-government is a constitutionally-protected right that is recognized and affirmed by section 35 of the *Constitution Act, 1982* and we underscore the importance of supporting, rather than detracting from, the treaty negotiation process where the future relationship among federal, provincial and First Nations governments and

jurisdictions is being developed. We also highlight the significant costs associated with implementing this federal bill and the potential for exacerbating the already burdensome reporting processes imposed on First Nations by Canada.

WHAT IS THE FIRST NATIONS SUMMIT?

The First Nations Summit was formed in 1991 by First Nations in British Columbia to represent First Nations engaged in the process of negotiating treaties. The First Nations Summit also advocates on issues that are not related to the treaty process, such as day-to-day social and economic issues.

As one of the Principals (along with Canada and British Columbia) of the treaty negotiation process, the First Nations Summit plays a significant and ongoing role in ensuring that the process for conducting treaty negotiations is accessible to all First Nations. However, the Summit does not participate in negotiations at individual treaty tables. Each treaty table is autonomous in its negotiations.

The First Nations Summit is interested in this issue from the perspective of those First Nations participating in the treaty process who want to ensure that this initiative does not limit their options in negotiations on governance at the treaty negotiation table.

We support the submission put forward by the BC Region of the Assembly of First Nations (BC-AFN). Our submission is intended to complement this presentation and to focus on the larger political context of the governance discussions in the treaty negotiations process.

BC TREATY NEGOTIATION PROCESS

The blueprint for the British Columbia treaty negotiation process is set out in the June 1991 *BC Claims Task Force Report* (a copy of which will be provided to you). In response to this Report, Canada, British Columbia and the First Nations Summit agreed to create the British Columbia Treaty Commission, as the "keeper of the process", to facilitate the treaty negotiation process. To this end, the Prime Minister of Canada, the Premier of British Columbia and representatives of the First Nations Summit signed the British Columbia Treaty Commission Agreement in September 1992. This was followed up in 1995 with mirror federal and provincial legislation and a First Nations Summit resolution, which gave the Treaty Commission its status as a distinct legal entity.

The Treaty Commission opened its doors in 1993, with the first treaty negotiation sessions convening in 1994. The negotiated and completed modern-day treaties will form the basis of a new relationship which recognizes the unique place of Aboriginal people and First Nations in British Columbia.

The new relationship calls for recognition of, and respect for, First Nations as self-determining and distinct Nations with their own spiritual values, histories, languages, territories, political institutions and ways of life. The treaties that help define this new relationship will be unique constitutional instruments. As the BC Claims Task Force noted:

> [Treaties] will identify, define and implement a range of rights and obligations, including existing and future interests in land, sea and resources, structure and authorities of government, regulatory processes, amending processes, dispute resolution, financial compensation, fiscal

> relations, and so on. It is important that the items for negotiation not be arbitrarily limited by any parties… (p. 17)

The Task Force went on to state:

> Treaty negotiations in British Columbia provide an opportunity to recognize First Nation governments on their traditional territories. It is important that treaties, which will receive constitutional protection, be explicit on matters of jurisdiction… The subjects for negotiations will include the powers and responsibilities to be exercised respectively by First Nation, federal and provincial governments, as well as clarification of the political institutions which will exercise those powers. (p. 22-23)

From the start, it was envisaged that treaty negotiations would include matters relating to lands and resources, as well as governance. In this regard, the Task Force noted that:

> First Nations government, often referred to as self-government, will be an essential component of a new relationship. (p. 22)

As such, First Nations in the treaty process are engaged in self-government discussions in the course of their treaty negotiations.

For the last decade, First Nations have urged Canada, as well as British Columbia, to work with us to address the challenges we face – challenges such as providing clear and comprehensive mandates to government negotiators. We have proposed and continue to propose changes to government mandates and the negotiation process to ensure negotiations are conducted in good faith as the courts have urged and as was First Nations' hope when we entered the process in the early 1990s. First Nations and the courts have repeatedly insisted on the need for reconciliation, good faith negotiations, accommodation, respect and

recognition. These must be the cornerstones of our new relationship with the Crown and the basis for finding fair and workable solutions.

In the midst of our concerted efforts to make progress in treaty negotiations, it is inconceivable to us that so much of the federal government's energy is being spent on an initiative to address amendments to the *Indian Act*. We expect the implementation of the FNGA will very likely distract the federal government and First Nations from the more important longer-term objective of implementing the inherent right of self-government through treaty and other self-government negotiations.

Our experience in treaty negotiations has taught us that, while certain initiatives are said to be "without prejudice" to our negotiations, new government initiatives often establish bottom lines which government negotiators bring to the treaty negotiation table. As a result, treaty negotiations often appear designed to entrench the status quo. We would not wish this situation to be the outcome of Bill C-7.

Fifty-three First Nations (representing 122 *Indian Act* bands) are currently participating in negotiations at 42 tables. To date, these First Nations have borrowed in excess of $175 million, with none of them successfully concluding any agreement in principle (AIP) or treaty. A number of AIPs initialed in 2001 by negotiators for the parties did not receive the necessary political support in the First Nations communities. This was largely because the formula-driven land and financial resource packages were seen as insufficient to enable First Nations to achieve and maintain self-sufficiency. First Nations are being asked to make significant concessions, while receiving no assurance that the treaties would improve their standard of living.

Recently, the federal Chief Negotiators at 12 of the negotiation tables forwarded letters to the First Nations suggesting that they will recommend that the Minister

of Indian Affairs disengage from negotiations unless “concrete progress” is made at their tables within the next two months. This threat, contained in these 60-day letters, does not take into account the reasons why a table may not be progressing. In the view of First Nations, it may be because of federal or provincial government intransigence or because of the unacceptable or unilateral bottom lines that governments bring to the table. The First Nations Summit objects to this high-handed action on the part of the federal government negotiators.

ABORIGINAL RIGHTS AND THE CONSTITUTION

While progress has been slow on the negotiation front, First Nations have achieved a greater degree of success in litigation, beginning with *Sparrow* in 1990, through to the *Delgamuukw* decision in 1997 and the *Campbell* case in 2000. Most recently, the BC Court of Appeal in the *Council of the Haida Nation* case, building on the *Taku River Tlingit* case, found that both industry and government have a legal obligation to meaningfully consult with and accommodate the interests of First Nations. Both the federal and provincial governments have done little to implement these court decisions.

Following our review of the most significant of the recent court decisions, we have determined that there are six key enforceable principles of law that must guide any negotiation process or court proceeding:

1. Aboriginal title exists throughout British Columbia and is an exclusive interest in land itself, including the resources of that land;

2. Aboriginal title includes the right of a First Nation to choose how land can be used;

3. The Crown bears the onerous burden of justifying an infringement of Aboriginal title and must do so in light of its fiduciary duty towards Aboriginal peoples;

4. Aboriginal title has an inescapable economic component, such that among other things compensation will ordinarily be required when Aboriginal title is infringed;

5. The Crown and third parties, such as resource companies, have legal obligations to consult First Nations and to seek to accommodate their Aboriginal title and Aboriginal rights; this obligation arises before such rights are proven in the courtroom; and

6. If the Crown cannot justify an infringement of an Aboriginal right, such as Aboriginal title, courts have the discretion to nullify a related permit or approval granted to a third party affecting Aboriginal title lands.

Adding to these six principles, the Crown must recognize that First Nations have pre-existing inherent rights, responsibility and authority to govern within their territories and to be responsible for their citizens wherever they are. This inherent right of self-government exists and is protected under section 35 of the *Constitution Act, 1982*. In particular, the right to determine the form of leadership and governance regime is an Aboriginal right. The FNGA imposes requirements on First Nations with respect to leadership selection and governance which may infringe on First Nations' Aboriginal right of self-government.

The British Columbia Supreme Court, in the *Campbell* case, recognized the constitutional protection of the inherent right of self-government. This case was brought forward by then-opposition leader Gordon Campbell et al. to challenge, among other things, the governance provisions in the Nisga'a Final Agreement. In that decision, Justice Williamson found:

> The rights to Aboriginal title "in its full form" including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making these decisions, is, I conclude, constitutionally guaranteed by Section 35.

The inherent right of self-government exists quite independently of any recognition by the federal government and is not contingent on or subject to negotiations between First Nations and other governments. Nevertheless, negotiations to address the co-existence of the inherent right and the Crown's jurisdiction could facilitate a process of reconciliation between First Nations and the federal government.

COMMENTS ON BILL C-7

First Nations have long awaited the opportunity to rid themselves of the shackles imposed on them by the *Indian Act* and to move forward toward the implementation of their inherent right of self-government.

We understand the federal government's stated intent with respect to this governance initiative is not to address First Nations' inherent right of self-government. Rather, it is to provide an interim step towards the implementation of the inherent right of self-government that will provide First Nations operating under the *Indian Act* with the tools they need to foster good government and achieve sustainable growth. To this end, the federal government has provided assurances that its governance initiative would enable First Nations to engage more effectively in self-government negotiations and in viable, sustainable and long-term economic development.

We advocate the following principles with respect to the FNGA:

- Aboriginal and treaty rights, including the inherent right of self-government must not be infringed, derogated from or abrogated;

- The fiduciary relationship between First Nations and the Crown must not be altered; and

- First Nations must have the opportunity to move forward with the implementation of their inherent right of self-government.

In order to ensure that Bill C-7 meets these fundamental principles, we make the following recommendations. We also endorse the recommendations proposed by the BC-AFN in their submission.

Substantive provision with respect to intent

A substantive provision should be included in the body of the statute, rather than simply in the preamble, that makes it clear that neither the *Indian Act* nor the FNGA are intended to define the nature and scope of the right of self-government or to prejudge the outcome of any self-government negotiation. The rationale for this viewpoint is elaborated upon in the BC-AFN Research and Analysis Findings of Canada's First Nations Governance Initiative.

Non-derogation clause

A clear and effective non-derogation clause is an absolute requirement for this statute to ensure that the stated purpose of not infringing our Aboriginal and treaty rights is upheld. We support inclusion of the non-derogation clause commonly used in federal legislation between 1985 and 1996:

> For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the

aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982.*

We have been advised that the Department of Justice is considering a recommendation to remove all existing non-derogation provisions from federal legislation. We strongly oppose such a move. We believe it would amount to a significant and unjustified infringement of our rights.

Financial and human resources

The implementation plan for the FNGA will have to focus on securing the necessary financial and human resources to enable First Nations to meet the requirements of the Act. An analysis prepared by Deloitte & Touche for the First Nations Summit (see the attached Executive Summary) notes that the development of the three codes (leadership selection, administration of government and financial management and accountability) will require a significant investment of human resources, financial resources and time. The analysis estimates that the transition costs alone for each band to develop the three codes required by the FNGA will be in the range of $180,000 to $400,000. In addition to these costs, there will be considerable ongoing costs associated with implementing these codes and other aspects of the FNGA (such as the application of the *Canadian Human Rights Act* and the requirement to establish redress processes). An independent institution as proposed by the Joint Ministerial Advisory Committee could assist in building capacity and providing certain governance services at the request of First Nations.

The costs required to carry out these activities will be yet another example of an imposition on First Nations budgets, which are already stretched to the absolute limit, resulting in cuts to services to First Nations people. This is surely not the government's intention. First Nations may also not be able to comply with the statute.

Reporting requirements

In the Auditor General's December 2002 report (a copy of which will be provided to you), she notes at the outset:

> First Nations reporting requirements established by federal government organizations are a significant burden, especially for communities with fewer than 500 residents. We estimated that **at least 168 reports are required annually** by the four federal organizations that provided the most funding for major federal programs… We are concerned about the burden associated with the federal reporting requirements. Resources used to meet these reporting requirements could be better used to provide direct support to the community.

Rather than alleviate this burden, the FNGA is likely to further contribute to it.

CONCLUSION

Finally, while we welcome the opportunity to appear before you, we wish to note for the record that the Standing Committee process is designed to support the federal Parliamentary process and was not designed to, nor can it possibly fulfill, or be construed as fulfilling, the federal government's obligation to consult with and accommodate the interests of First Nations in a meaningful way. This process has from the start been primarily a unilateral federal government initiative and does not meet the high standard set by the courts for consultation and accommodation.

Deloitte & Touche

First Nations Governance Act – Bill C-7

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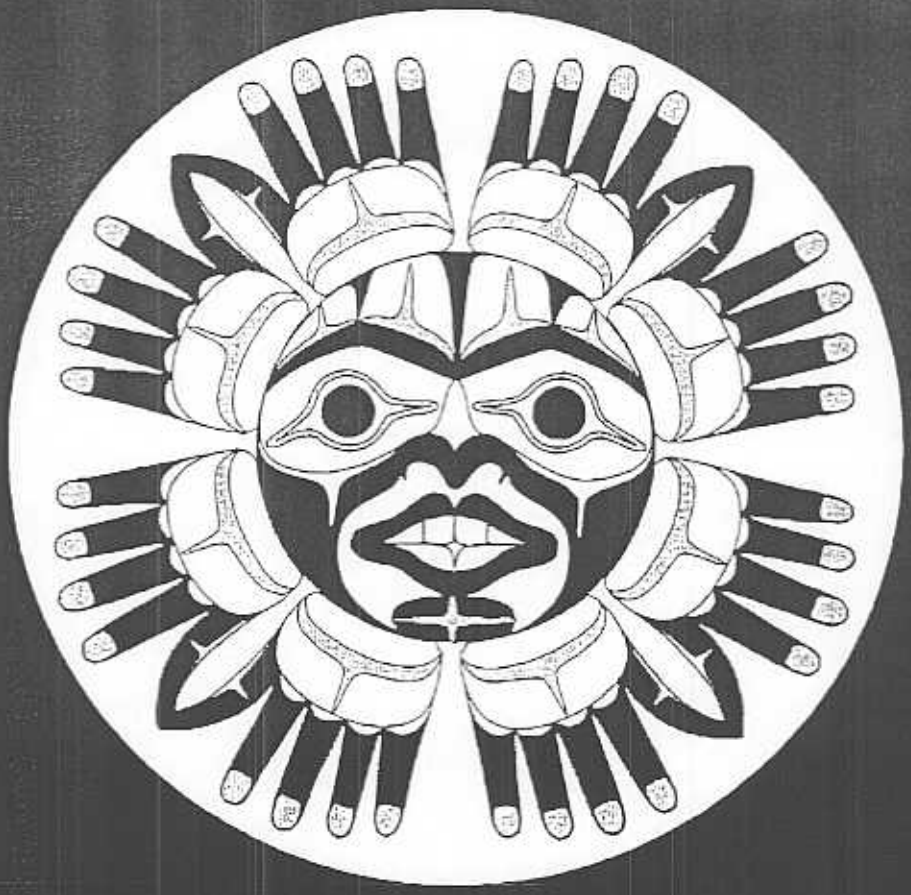

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Deloitte & Touche

Executive Summary

Deloitte & Touche has been commissioned by the First Nations Summit to prepare an analysis of what will be required to successfully implement Bill C-7. This is being done because it is important for First Nations to consider how Bill C-7 will affect them, what it will take to implement it, and what it will cost from a financial perspective.

The *First Nations Governance Act* ("FNGA") was introduced to Parliament as Bill C-7 on October 9, 2002. If this Bill receives Royal Assent in the time frame identified by the Minister, it will become effective for First Nations in late 2006.

The purpose of the FNGA is to provide bands with more effective tools of governance on an interim basis pending the negotiation and implementation of the inherent right of self-government. This Act does not replace the current *Indian Act* in its entirety; however, it does require bands to develop three separate governance codes, clarify the legal capacity of bands and provide provisions for redress. The FNGA also removes the Minister from election matters, financial matters (except in serious circumstances) and matters involving band laws.

In order to be prepared to successfully implement this Bill, First Nations need to:

- fully understand the requirements of the Bill;
- plan a process and set a timeline for the First Nation to follow in assessing the default regulations and develop appropriate codes within the two-year transition period;
- plan to incorporate community consultation; and
- plan for implementation/training where required.

The resources required to develop the codes identified in the FNGA are significant in terms of time, money and people. First Nations should ensure that they assess the cost benefit of developing their own codes versus accepting the default codes. The estimated costs range from $5,000 to $30,000 plus post-implementation costs for a Nation that assesses the default codes and decides to accept them, to $180,000 to $400,000 plus post-implementation costs for a Nation that decides to develop all three codes.

In addition to costs for developing the codes, First Nations can expect to incur ongoing costs as a result of complying with the requirements of the FNGA and implementing either the default codes or codes developed by the Nation, as well as costs associated with law making and enforcement activities. These costs will be subject to a number of factors and, therefore, are more difficult to estimate. It is important to note that most of these post-implementation costs are not one-time costs and will require ongoing annual funding.