REPORT
1996 DECEMBER 16

CITY OF BURNABY

TO: BURNABY CITY COUNCIL

FROM: COUNCILLOR L.A. RANKIN,
COUNCIL APPOINTEE
LOWER MAINLAND TREATY ADVISORY COUNCIL

RE: SUBMISSION TO THE SELECT STANDING COMMITTEE
ON ABORIGINAL AFFAIRS

PURPOSE: To provide for Council's consideration, a set of recommendations for treaty making principles with Aboriginal peoples in British Columbia.

RECOMMENDATIONS:

1. THAT Council endorse the recommendations contained within the attached submission to the Select Standing Committee on Aboriginal Affairs.

2. THAT copies of the full submission be sent to the following for concurrence and endorsation of the principles and recommendations contained within the submission.

   - All British Columbia Members of Parliament
   - The Honourable Ron Irwin
     Minister of Indian Affairs and
     Northern Development
   - All Members of the Provincial Legislature
   - All Member Municipalities of the Union of
     British Columbia Municipalities
   - The Honourable Glen Clark, Premier
     Province of British Columbia
   - Honourable John Cashore
     Minister of Aboriginal Affairs
   - Mr. Gordon Campbell
     Leader of the Official Opposition

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- Mr. Gordon Wilson
  Leader of the Progressive Democratic
  Alliance Party
- Mr. Jack Weisgerber
  Leader of the Reform Party
- Union of British Columbia Municipalities
- Lower Mainland Municipal Association
- All Provincial Treaty Advisory Committees

REPORT

Submitted for Council's consideration is the report submitted to the Select Standing Committee on Aboriginal Affairs on Council's behalf. The submission was made on December 5th and with the Summary Report being read into the record and the full report copied for the Committee members and the media that were present. The Summary Report appears as part of this evening's Council agenda with the full report being forwarded to Council under separate cover. Copies of the full report can be obtained from the City Clerk's office.

I am therefore requesting Council's concurrence for the recommendations contained within the report and to endorse circulating the full submission to the above referenced individuals and organizations for concurrence and endorsation of the principles and recommendations contained within the report.

L.A. Rankin
Council Appointee
Lower Mainland Treaty Advisory Council

SUMMARY REPORT

SUBMISSION TO THE SELECT STANDING COMMITTEE ON ABORIGINAL AFFAIRS

"HOW CAN PROGRESS BE MADE TOWARD TREATY SETTLEMENTS WITH ABORIGINAL PEOPLES BENEFICIAL TO ALL BRITISH COLUMBIANS"

TOWARDS A JUST FUTURE:

RECOMMENDATIONS FOR TREATY MAKING PRINCIPLES WITH ABORIGINAL PEOPLES IN BRITISH COLUMBIA

Submitted by: Councillor Lee Rankin
City of Burnaby

December 5, 1996.

INTRODUCTION

In view of the terms of reference of the Select Standing Committee on Aboriginal Affairs, this report will advance treaty making principles and recommendations in the context of (i) an historical understanding of aboriginal and non-aboriginal relations and treaty history in British Columbia, (ii) Canadian legal interpretations of aboriginal rights and aboriginal title and, (iii) treaty principles informed by aboriginal and non-aboriginal sources and third-party concerns.

There is a broad consensus that the contemporary, that is pre-1993, government approach to aboriginal rights in British Columbia was simply untenable. Aboriginal communities are for the most part marginalized and impoverished and often have horrific rates of infant mortality, suicide, life expectancy, incarceration and unemployment. These statistics are often the harsh, visible reminder of a legacy of colonialism towards aboriginal peoples in British Columbia and throughout Canada. There is also a concurrent reality that aboriginal peoples refuse to be assimilated, and their cultures, existing since time immemorial, continue to survive. It is the position of this submission that through the treaty making process, aboriginal identities and cultures can be sustained and re-built. Treaties are a means for aboriginal peoples to preserve their culture and political and economic modes. At the same time they are also about other imperatives: self-esteem, empowerment, inclusion, redress and from the perspective of white society, affirming our commitment to the human rights of aboriginal peoples.

Treaties are also fundamentally about the historical fulfilment of a promise: a promise to share in the land's wealth. Treaties have been a part of the historical landscape between aboriginal and non-aboriginal peoples since the Gus-wen-tah or two row wampum treaty, between the British and the Iroquois. These documents stressed the **co- existence** and mutual understanding between white and aboriginal peoples. They created a place for aboriginal peoples in their own land. We must return to these roots and rid ourselves of the legacies of colonialism and bigotry. We must extend to aboriginal peoples in this province the basic human rights that non-aboriginal society cherishes and protects: the freedom to choose, preserve and govern in our communities. In doing so we affirm the rights of aboriginal peoples to self-determination and true citizenship in Canada, and we embrace our common humanity as equal peoples on this land.

ABORIGINAL AND NON ABORIGINAL RELATIONS IN HISTORICAL CONTEXT

The treaty process must be informed by an historical consciousness and accountability for the wrongs visited upon aboriginal peoples in B.C. This history must be understood in order to acknowledge the mistakes of the past and to break with it to forge new relationships with aboriginal peoples.

The aboriginal experience in Canada has been characterized as a holocaust, with the patterns of violence, disease, starvation and assimilation reducing aboriginal peoples in Canada from approximately 1[illegible] million people at the time of contact (with Europeans) to approximately 2 million today. Furthermore the land base through which aboriginal peoples live and define their identities has consistently been confiscated and eroded.

In 1849, the Governor of British Columbia, James Douglas recognized that aboriginal peoples had title to land that would have to be purchased. With the approval of the British Crown, Douglas concluded fourteen treaties over a small part of Vancouver Island (the "Douglas Treaties"). However future monies for successive treaties was never forthcoming and Douglas failed to conclude any subsequent treaties before retiring in 1864. Upon his retirement, Joseph Trutch was appointed to the position of Chief Commissioner of Lands and Works. Trutch believed aboriginal peoples were an obstruction to "progress" and "settlement", and he denied that aboriginal peoples had any claim to land. As a result, in the face of increasing frontier settlement in British Columbia, aboriginal peoples were dispossessed from their lands and forced onto small reserves without viable land or resource bases (aboriginal families were afforded 10 acres\family compared to 160 acres\family freely given to white settlers).

The enduring policies of the provincial government in B.C. were set in the years 1864 until union with the Canada in 1871; aboriginal title was denied, the Douglas Treaties were ignored as an expression of this title and aboriginal lands were taken for settlement and resource development without compensation or consent. The Terms of the Union in 1871 were silent on the issue of aboriginal title; the federal government assumed it had been solemnized through treaties, and Trutch believed it never to have existed.

Aboriginal reserve lands were further reduced in B.C. following the McKenna-McBride Commission in 1913. In addition under the *Indian Act*, a policy characterized as "coerced assimilation" was implemented against aboriginal peoples, with the establishment of residential schools, and the removal of aboriginal children from their communities to attend them, legal prohibitions on aboriginal cultural expressions such as the banning of the potlatch from 1885 until 1951, and the criminalizing of any attempt to fund aboriginal claims to title, in order to facilitate white settlement.

Thus, the history of treatment of aboriginal peoples in B.C. is in many ways monstrous and shameful and tarnished by the blights of imperialism and injustice. The past must be broken with and new perspectives advocated. Progress towards just treaty settlements in B.C. can only be achieved if we collectively, are willing to learn from the mistakes of the past. Therefore an historically sensitive approach to treaty settlements would mandate that contemporary treaties be built upon the following considerations:

(i) contemporary treaties must decisively break with the policies of the past, and bring with them a spirit and approach that seeks the reconciliation and inclusion of aboriginal people in British Columbia;

(ii) fundamentally, this approach must be rooted in the principles of equity and fairness towards aboriginal peoples;

(iii) the historic exclusion of aboriginal peoples from decisions affecting their own lives necessitates that the negotiation and treaty making process be undertaken in the ethic of true cooperation and consultation with aboriginal communities;

(iv) treaty making is not about giving aboriginal peoples special privileges. It is, in part about restitution, or restoring a party to the position they would have been save for the breach

of contract. Restitution is not fully quantifiable in the circumstances of aboriginal peoples; yet the principle is still appropriate. That is, aboriginal societies were, pre-contact, self-governing and thriving communities. Through the treaty making process they should be restored as such. This is simple restitution;

(v) undoing the centuries-old policies towards aboriginal peoples in B.C., requires that governments must make a commitment to **meaningful** and **systemic** change in the lives of aboriginal peoples and in provincial policies.

LEGAL PRINCIPLES TO INFORM THE TREATY MAKING PROCESS

Treaties must also take into account what the Canadian judicial system has stated about aboriginal rights. These principles act as established precedent and must be reflected in the treaty making process.

In the modern era aboriginal rights have been recognized at common law, under the *Royal Proclamation of 1763*, and under section 35 of the *Constitution Act of 1982*. It must be stated that taken together, Canadian jurisprudence on this matter constitutes a resounding rejection of the British Columbia government's historical approach to aboriginal rights. In 1973, the case of *Calder v. Attorney General of British Columbia*, determined that aboriginal title to the land was derived from their historic possession of the land from time immemorial. The case of *Guerin v. R.*, again recognized aboriginal title as deriving from historic occupation and characterized aboriginal property interest as unique or *sui generis*. Furthermore, the Supreme Court of Canada stated that governments in Canada have a fiduciary duty (a trust-like obligation) towards aboriginal peoples, and that legislation must be interpreted in this light. Finally, the Court advanced a flexible and evolutionary approach to aboriginal rights so that those rights are not seen as simply static and antiquated.

Aboriginal rights have also been given constitutional protection under section 35(1) of the *Constitution Act of 1982*. It states:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Content and meaning were first given to this section by the Supreme Court of Canada in the 1990 case of *Sparrow v. the Queen*., whereby the Court established that: extinguishment of aboriginal rights must be with a clear and plain intention, s.35 is to be interpreted in a liberal and generous manner, the exercise of all judicial power by the Crown is now subject to constitutional norms and finally aboriginal rights are to be dealt with in the context of the historical fiduciary relationship between the Crown and aboriginal peoples.

A brief synthesis of legal principles from the above-noted cases would mandate a number of approaches to existing and future treaties in British Columbia:

(i) a liberal and generous approach to treaties and to the process itself must be reflected by governments;
(ii) aboriginal rights in British Columbia must be recognized as existing and unextinguished. Aboriginal rights should not be extinguished as part of the treaty process;
(iii) aboriginal rights, as they are embodied in treaties, must be forward looking and evolutionary. They must be capable of modern implementation and afford the means to self-sufficiency for aboriginal peoples;
(iv) the treaty making process should be guided by a trust-like relationship. A relationship based upon honour and partnership, not an adversarial one.
(v) in a related way, any meaningful and solemn commitment to aboriginal rights as mandated by s.35(1) would necessarily include fair and just treaty settlements and must involve (and this will vary depending on the First Nation and their objectives), fair and just cash compensation and\or a sustainable land base and control over fundamental features of aboriginal society.
(vi) treaties must conform with Constitutional principles, as all legislation affecting Canadians must.

TREATY PRINCIPLES FOR THE BENEFIT OF ALL BRITISH COLUMBIANS

Treaties are the historic choice of aboriginal peoples and have been recognized by the Report of the Task Force to Review Comprehensive Claims Policy (the "Coolican Report") as providing:

(i) a legal and ethical relationship between governments and aboriginal peoples in Canada;
(ii) a recognition and affirmation of aboriginal rights;
(iii) a framework of certainty surrounding land and resources between aboriginal peoples and other Canadians;
(iv) an opportunity for economically viable aboriginal communities;
(v) preservation and enhancement of the cultural and social well-being of aboriginal societies;
(vi) aboriginal societies with self-governing institutions and an opportunity to participate in decisions that affect their interests.

The modern day realities of treaties also creates other obstacles that must be addressed in treaty settlements. These issues have been grouped under the headings.**cost, certainty and finality, and land and resource issues.**

(1) COSTS

The question of costs becomes one of "can we afford not to?" Price Waterhouse has estimated that B.C. loses $125 million a year in lost capital investment due to legal uncertainty surrounding land claims. Furthermore the federal government spends $1 billion a year and the B.C. government $85 million a year, in programs that target aboriginal peoples. The independent consulting firm of KPMG, has estimated that the negotiation and implementation of treaties will

cost between $1.4 and $2.1 billion over fourty years. This is $50 million a year, or .25% of the provincial budget. It is estimated that the average B.C. family will pay $35.00 a year towards treaties. Furthermore, KPMG estimates a $3.9-$5.3 billion net benefit of treaty settlements, higher annual incomes and increased employment for all British Columbians. The benefits to aboriginal peoples include increasing self-reliance and access to employment and less dependency on government expenditures. Clearly these treaties, on the terms of strict fiscal management, are affordable. The path of the past, including the cost to litigating aboriginal rights, the costs of social assistance to aboriginal peoples, the costs of centuries of aboriginal land and resource expropriation, and the social and cultural costs of dependency and powerlessness amongst aboriginal peoples, is equally and clearly unaffordable and unsustainable.

(2) CERTAINTY AND FINALITY

While it is important that jurisdictional uncertainties over land and resources be resolved through treaties, it is also important that treaties not attempt to permanently define aboriginal rights, nor extinguish those rights. The **permanent** inclusion of aboriginal people in the British Columbian social fabric, must leave room for the inevitable evolution of aboriginal rights which are more than simply land rights, but social, cultural, linguistic and political rights as well. Aboriginal rights cannot only be rooted in the past, thereby denying technological, political and cultural innovations to aboriginal peoples. Rights are flexible and evolutionary, the Canadian courts have said as much, and to cede this to aboriginal people, is only to confer the same rights on them, as non-aboriginal Canadians enjoy.

Secondly, it is unadvisable that treaties seek the extinguishment of aboriginal rights as a condition of settlement. Treaties are statements of **co-existence** between aboriginal and non-aboriginal people. Aboriginal rights are historic rights and culturally integral rights, they must be afforded respect and not bartered away as a simple quasi-property right. It is surely, at the least ironic and at the most unethical, that governments who have constitutionally entrenched aboriginal rights under s.35 of the *Constitution Act* would now seek to extinguish those very same rights. In addition, the fiduciary duty of the Crown to protect the interests of aboriginal peoples, as elaborated on in *Guerin v. R., and R. v. Sparrow*, would seem to clash with the Crown pre-condition that aboriginal peoples relinquish the very interests the Crown is duty-bound to protect in order to enter into treaties. Aboriginal rights in British Columbia for too long have been ignored as if they have already been extinguished. We know that this is not the case. The treaty process is one of historic reconciliation and mutual respect and it does not befit this process to insist on something (extinguishment), that is a relic of the past, and a policy that ignores Canadian jurisprudence and the long and painful struggle of aboriginal peoples just to sustain and assert these rights in the public context.

(3) LAND AND RESOURCE ISSUES

It is clear from the current Nisga'a Treaty Negotiations Agreement in Principle that the appropriation of fee simple land will not be a component of treaty settlements. This principle must be affirmed in successive treaties. Secondly, there should be no *a priori* preference given to

cash compensation over adequate land bases for aboriginal peoples, as requested by some third-party interests. While the size of the land base will vary from treaty to treaty, depending on the needs of First Nations and the reality of local circumstances, in most instances, land bases should be reasonable enough to build a solid social and economic foundation for aboriginal societies, in lieu of large cash settlements. Without this, the cycle of dependency of aboriginal societies will not be broken and the renewable resource base needed to sustain traditional aboriginal culture will not be available.

Third party concerns over access to resources on aboriginal lands, judging from past experience, seems misplaced. Under the *Inuvialuit Final Agreement* of 1984, Esso Ltd., was able to secure concession agreements with the Inuvialuit of the Canadian western arctic under terms that were mutually beneficial. Similarly, in British Columbia the Lax Kw'alaams Band and Dome Petroleum entered into a negotiated agreement to mitigate against project impacts of Dome Petroleum's proposed natural gas shipping plant near Lax Kw'alaam's land. A comprehensive study prepared by ARA Consulting Group Inc., and entitled *Social and Economic Impacts of Aboriginal Land Claims Settlements: A Case Study Analysis* found in 6 comprehensive claim areas including Canada, the United States, New Zealand and Australia, " in the post-settlement era, non-indigenous business leaders capitalized on new opportunities (often joint-ventures with aboriginal companies), and discovered a common interest in sustainable, mutually beneficial economic development." There is no reason to suspect that future treaties will not follow a similar path in allowing aboriginal peoples to manage forestry, fish and subsurface resources, while at the same time creating job opportunities for non-aboriginal businesses and increased employment in non-aboriginal communities near treaty settlement land. The consulting firm of KPMG has predicted that non-aboriginals living in these communities can expect an economic boom from settlement and resource monies on First Nation land under treaty. This can only enhance the socio-economic stability of these communities, not derogate from it.

CONCLUSIONS

The oppression of aboriginal peoples in B.C. and Canada is one of our most enduring and shameful legacies. Aboriginal peoples were here first. They helped the first Europeans survive in this harsh climate. They entered into trading and treaty relationships with us. Ultimately, they have been betrayed by us. Our taking of their land, our hunting of their game, our diseases, our reserve system, our neglect, our schools, our religions, and our attempts at assimilation, have all wreaked terrible havoc on aboriginal peoples. Treaties will not be a panacea for this, but neither can we morally afford to stay prisoners of centuries-old, begrudging policies towards aboriginal peoples based on notions of racial stereotyping and white supremacy. No longer can one race impose its ideas and institutions on another. No longer is it acceptable to exclude aboriginal peoples from the decisions that shape their lives, nor the decisions that shape this province or country.

Treaty settlements provide the best means from which aboriginal peoples can achieve and preserve their cultural distinctiveness. They have survived through it all, and the simple fact that treaties are being concluded today is a tribute to the tenacity of aboriginal cultures. They are also

a means for reconciliation and co-existence between aboriginal and non-aboriginal cultures and the means by which non-aboriginal culture extends the hands of inclusion, freedom and choice to aboriginal communities.

Perhaps fundamentally, treaties are about keeping our historic promises to aboriginal peoples as enshrined in the *Royal Proclamation of 1763* and the *Constitution Act of 1982* and in a multitude of treaties that lie strewn across Canada. The promises that recognize the rights of aboriginal peoples to their land, and recognizes their cultural uniqueness. In keeping these promises we reject the beast in ourselves. The beast that says because we have superior numbers or weapons, that we can subjugate another people. The beast that says history has proven that aboriginal peoples are a vanquished people. The beast that refuses to play by the rules of its own creation: the rules of human rights. Instead we must, as Thomas Berger has urged, open our hearts and minds to the discovery of aboriginal peoples rightful place on this earth and in this province, and in doing so anticipate, the re-birth of spirits, aboriginal and non-aboriginal that will surely follow.