Prepared by Louise Mandell, QC (Hon. Dr.)
Draft dated July 18, 2018

CONCEPTUAL DRAFTING INSTRUCTIONS FOR RECOGNITION OF RIGHTS LEGISLATION: IMPLEMENTING A NEW RECOGNITION AND IMPLEMENTATION OF RIGHTS FRAMEWORK

I. PURPOSE

At the June 2018 dialogue session, Chiefs and First Nation Leadership in attendance expressed common interest in framing out a short legislative framework for the recognition of Indigenous rights ("recognition legislation"), for discussion.

It was recommended that legal representatives for the First Nations Leadership Council (FNLC) organizations prepare a short, basic draft framework for recognition legislation – identifying potential legal issues to be addressed.

The following format of conceptual drafting instructions (referred to as "the minute") is a style of document that is normally provided by government officials to technical legislative drafters. It sets out key concepts to guide the drafters as they work to fully develop the concepts into legislative language to be set out in a draft bill. This minute is reflective of the Chiefs' and Leaderships' principles and recommendations rolling draft paper.

It is hoped that, by using this format, Chiefs and Leaders will have a focused opportunity to consider at a high-level the scope and content of recognition legislation to determine appropriate instructions to the legislative drafters. Upon approval, this minute can be relied upon to guide negotiation with Canada for the purpose of drafting recognition legislation.

This document begins with the strategic considerations and recommendations, then moves into a draft of a minute, and concludes with reflections on implementation.

II. STRATEGIC CONSIDERATIONS, CHALLENGES AND OPPORTUNITIES

Core Commitments

There is a need to push the boundaries of Canada's recognition of Indigenous rights to align with the Four Principles. Specifically, Canada must align its legislation and policy to recognize and affirm existing inherent Aboriginal title and rights, including systems of laws and governance, throughout Indigenous territories – as legal rights, without any requirement of proof or strength of claim analysis.

Canada has made clear that it intends to pursue the development of recognition legislation as one piece of this recognition and implementation of rights framework. The Four Principles adopted by

First Nations Chiefs and Leaders in BC at their August and September 2014 meetings should govern and guide this approach:

(a) Acknowledgement that all our relationships are based on recognition and implementation of the existence of Indigenous Peoples' inherent title and rights, and pre-confederation, historic and modern treaties throughout BC;

(b) Acknowledgement that Indigenous systems of governance and laws are essential to the regulation of lands and resources throughout BC;

(c) Acknowledgement of the mutual responsibility that all of our government systems shall shift to relationships, negotiations and agreements based on recognition; and

(d) We immediately must move to consent-based decision-making and title-based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements.

While Canada has expressly adopted principles of recognition, to date, there has been a persistent denial of the fundamental reality of the existence of inherent Aboriginal title and rights, including systems of laws and governance, throughout Indigenous territories – as existing legal rights without proof or strength of claim.

In a number of instances, Canada has expressed its commitment to shift its relationship with Indigenous peoples to a relationship based on recognition of Indigenous rights. However, Canada's concept of recognition, as expressed through its *Principles respecting the Government of Canada's relationship with Indigenous peoples* (2017) ("the 10 Principles") falls far short of the recognition required by First Nations, or the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration). In particular, in Principle #6, the Government of Canada maintains a distinction between "recognized" Aboriginal Title lands "where consent is strongest" and lands that are "beyond title lands." The Principles indicate that the federal government continues to maintain that Aboriginal rights exist on a spectrum, and that Aboriginal title is a rare occurrence.

This distinction plays out in current Crown litigation positions, which continue to assert perfected Crown sovereignty, while denying that Aboriginal title extends throughout an Indigenous Nation's territory. Further, Crown governments continue to interpret section 35 as enabling Crown jurisdiction to reduce or limit Aboriginal title and rights, and treaty rights, and to override Indigenous jurisdiction in consideration of broader Canadian economic interests.

Crown recognition of Indigenous rights in legislation must go beyond the 10 Principles – it must be meaningful recognition. These are enforceable legal rights with legal implications and not undefined or undetermined "promises". Specifically, the Courts have held that Indigenous rights, recognized and affirmed under section 35 of the *Constitution Act, 1982*, are inherent legal rights to land and governance, which pre-existed and survived the assertion of Crown sovereignty. The Court has rejected all Crown extinguishment arguments and explicitly rejected the doctrine of *terra nullius*. The Court has imposed Crown obligations to honourably conclude and implement treaties. Further,

Indigenous rights set out in the UN Declaration must now be taken as “customary international law” rights and must be respected and applied as such in Canada.

These foundations in domestic and international law form a solid and enforceable legal basis for Indigenous peoples to engage Crown governments in order to determine the nature, scope and extent of future Indigenous-Crown relations and arrangements of co-existence, sharing and reconciliation, based on their respective rights, jurisdictions, authorities and sovereignties. This is legal pluralism, where different titles, jurisdictions, cultural narratives and knowledge co-exist on the same landscape - where both Crown and Indigenous governments make decisions on an equal plane about how the land is stewarded, protected, and how the resources and benefits are shared. This moves us to the point expressed by the Court in *Haida*, which is that treaties (historic and modern) serve to reconcile “pre-existing” Aboriginal sovereignty with “assumed” Crown sovereignty.

The path forward to achieve a systemic and transformative shift to new recognition based-relationships and the reality of legal pluralism requires Canada aligning federal legislation and policy to recognition, including the core commitment. New structures and dispute resolution mechanisms are necessary, including to assist in dispute resolution in the context of inter-Nation disputes.

This is achievable - it will benefit all Canadians who are affected by the ongoing tenure and economic uncertainty created by a century of denial of Indigenous rights including efforts to erase Indigenous laws from their territories and measures to displace Indigenous governments with “Indian Bands”.

Crown governments need the cooperation of First Nations to fix the existing problem. The Court has ruled that the Crown must engage with the proper Aboriginal title and rights holders when making decisions affecting Indigenous peoples’ territories. Crown governments will continue to risk granting tenures which suffer from a fundamental legal defect unless they can achieve reconciliation with the proper title and rights holder. Therefore, the cooperation of First Nations is essential for the Government of Canada to achieve what it seeks — which is to know who speaks for the Indigenous Nation in the “Nation-to-Nation” relationship.

This is a strong negotiation tool to achieve the core commitment of recognition, as well as to move the agenda forward for what needs to be in the recognition legislation and for engaging collaboratively and in partnership drafting and moving forward the recognition and implementation of rights framework.

Engagement with First Nations and Timing Considerations

Clarity is needed on how Canada will engage with BC First Nations for the purpose of this initiative. Equally important is considerations regarding timing, which is a key factor. A draft bill would need to be before the House in the fall, to make it through this window of opportunity before an election cycle. This necessitates finding common ground with Canada and targeting key core commitments

which are achievable in a short amount of this time. Some new mechanisms can be placed in the legislation, with the details of the implementation put in regulations.

BC Chiefs and leaders have identified a list of core commitments they would like to see entrenched in recognition implementation. In the short timeframe this will need to be a targeted approach. One option is to design a provision in the legislation which is Canada's commitment to a broader agenda for the recognition and implementation of rights framework, beyond the recognition legislation, stipulating a partnership process with Indigenous Nations.

Below is a first draft of a minute which could be the basis for negotiating the wording with Canada and sending it to the drafters in time for this election cycle.

III. FURTHER OBSERVATIONS

Bill C-262

An Act to ensure that the laws of Canada are in harmony with the UN Declaration passed the house and is before Senate. Even with the passage of Bill C-262 Recognition Legislation is needed to bring the UN Declaration into Canadian law and policy. This private members Bill repudiates colonialism and the doctrine of superiority, affirms that the standards set out in the UN Declaration have application in Canadian law, and calls on Canada, in consultation and cooperation with Indigenous peoples to take action to ensure that the laws of Canada are consistent with the UN Declaration and develop and implement a national action plan to achieve its objectives.

Bill C-262 will be helpful in litigation, eliminating arguments presently advanced by Crown governments that the UN Declaration is not binding in Canada and providing a framework for interpretation which compliments and adds to the section 35 jurisprudence. However, the Bill alone will not align Crown legation, policy, practices to the UN Declaration framework. Bill C-262 anticipates that other initiatives, such as this *Recognition Act*, are needed to implement the objectives of the UN Declaration.

National Initiative

The recognition legislation and implementation framework is a national initiative. This Minute brings focus to the National agenda - including both Aboriginal title and treaties issues, as well as new jurisdictional arrangements to establish Indigenous governments as an order of government within Confederation.

Support Resolutions

A resolution is highly recommended, to pursue legislative drafting with Canada in a timely way. What will be compelling is the Chiefs' support for the conceptual drafting instructions, in a situation

where internal matters are dealt with around representation, transparency and accountability, including:

- who has the authority to engage with Canada for the purpose of the drafting;
- how those engaging with the drafting will receive instructions in an on-going and time-sensitive situation; and
- articulates the process for those who represent the Indigenous Nations in matters pertaining to this Recognition Legislation and the implementation framework, to receive the consent of the Indigenous Nations.

*****

CONCEPTUAL DRAFTING INSTRUCTIONS FOR RECOGNITION LEGISLATION
(Draft #1 dated July 18, 2018)

The First Nations Chiefs' and Leadership [or through the FNLC] give the following instructions to guide the preparation of draft Recognition legislation:

Context

The struggle for justice among First Nations is shifting the colonial paradigm to recognition, mandated by the Supreme Court of Canada (SCC) decisions, by the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) and the Truth and Reconciliation (TRC) 94 Calls to Action and important commitments made by Crown governments, which have yet to be meaningfully implemented.

The SCC has recognized the inherent nature of Indigenous rights to their territories and to governance, including that Indigenous rights to their land, laws and legal orders are not contingent on Crown recognition, have not been extinguished in BC, and that these rights find expression in section 35.

First Nations' collective response to the SCC decision recognizing Aboriginal title in *Tsilhqot'in* was to endorse Four Principles supporting the shift to recognition:

a. Acknowledgement that all our relationships are based on recognition and implementation of the existence of Indigenous Peoples' inherent title and rights, and pre-confederation, historic and modern treaties throughout BC;

b. Acknowledgement that Indigenous systems of governance and laws are essential to the regulation of lands and resources throughout BC;

c. Acknowledgement of the mutual responsibility that all of our government systems shall shift to relationships, negotiations and agreements based on recognition; and

d. We immediately must move to consent-based decision-making and title-based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements.

In May 2016, Canada became a full supporter of the UN Declaration, without qualification, with the Province of British Columbia expressing support of the UN Declaration in 2017. The UN Declaration creates minimum standards for "the survival, dignity and well - being of the Indigenous people of the world," recognizing the right to self-determination and the doctrine of free prior and informed consent (FPIC). It is critical to note that the federal and provincial governments respectively exercise their own versions of FPIC in so far as they ultimately make decisions involving our territories and resources – they have the ability to say "yes", "yes with conditions" or "no". First Nations must determine what FPIC looks like to each of our communities and Nations and how that standard is to be implemented for our own purposes.

The TRC 94 calls for Action, among other things, speak to the need for:

- a new Nation-to-Nation relationship;

- a new Royal Proclamation, Indigenous sovereignty; and
- recognition of Aboriginal title and rights

The TRC identified the UN declaration as "the framework for reconciliation."

In 2015, all mandate letters from Prime Minister Trudeau to the Cabinet Ministers were made public for the first time, and all mandate letters included the language "No relationship is more important to me and to Canada than the one with Indigenous peoples. It is time for a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, co-operation, and partnership."

The Crown governments endorsed 10 principles that reflect a commitment to end denial, and to achieve reconciliation based on recognition of constitutional rights (the provincial 10 principles are still in draft).

On Feb 14, 2018, Prime Minister Trudeau announced Canada's intention to embark on a Nation-wide engagement strategy to develop a new recognition and implementation of rights framework ("the framework") in full partnership with Indigenous peoples – promising to make the recognition and implementation of rights the basis for all relationships between Indigenous peoples and the federal government.

Scope and content of a Recognition of *Indigenous Rights Act*

1. **Preamble**

A detailed preamble could be in the form of a narrative or modelled after the preamble in the UN Declaration. The preamble would:

- recognize the impacts of colonization and reject colonial doctrines in all forms, including extinguishment;
- affirm inherent Aboriginal title and rights, including systems of laws and governance throughout Indigenous territories, without proof or strength of claim;
- affirm historic and modern-day treaties and their implementation consistent with their spirit and intent;
- affirm the UN Declaration as the framework for Crown recognition and reconciliation;
- affirm a commitment to implement the TRC's 94 Calls to Action;
- affirm Canada 's commitment to re-align its laws, policies and practices to recognition; and
- affirm that the path to self-determination and to consent-based decision-making requires collaboration and partnership with Indigenous Nations.

2. **Definitions**

The following definitions are proposed for consideration as they are most challenging and arose from the discussion during the forums. Additional terms may be defined in the Act through the course of drafting:

- **Consent:** means the international standard of free prior and informed consent (FPIC) which must be collaboratively defined and implemented with affected Indigenous Nations, in accordance with Indigenous laws and legal orders, through a range of mechanisms that can be used to ensure the authority and autonomy of both governments are respected.

- **Indigenous Nation:** is composed of one or more First Nation governments that have a common language, customs, traditions, territory and history, and who, in accordance with the laws of their Nation, are recognized as holding Aboriginal title. For the purpose of Section 6 of this Act, this also includes representatives who have a mandate from Indigenous Nations acting collectively, to engage with Crown representatives.

3. **Purpose**

The purpose section sets out the legislative purpose:

a. to articulate principles and standards binding Crown officials based on recognition standards derived from Section 35 jurisprudence, the UN Declaration, the TRC's 94 Calls to Action;

b. to create over-arching interpretation provisions, that align federal legislation, including discretion within federal legislation, to these principles and binding standards;

c. to create mechanisms and institutions to support the exercise of Indigenous laws and governance, consent-based decision-making, the implementation of treaties; and

d. to commit Canada to work collaboratively and in partnership with Indigenous Nations to implement a recognition and implementation of rights framework for reconciliation based on the framework set out in the UN Declaration.

4. **Recognition Standards**

The Act would set out recognition principles and standards, based on the UN Declaration, *Bill C-262*, (assuming the passage of the Bill), section 35 of the *Constitution Act, 1982*, and the TRC's 94 Calls to Action. Without limiting this generality, the standards would include a recognition of inherent Aboriginal title and rights, including systems of laws and governance throughout Indigenous territories, without proof or strength of claim.

The Act would make clear, in principle that Crown governments would be required to recognize the Aboriginal title belonging to a particular Indigenous Nation, in respect to a particular territory, when there are no disputes regarding proper title and rights holder or overlapping issues with neighbours.

The recognition standards would also celebrate historic and modern-day treaties and mandate their implementation consistent with their spirit and intent. The standard of recognition would extend to the right to self-determination with consent-based decision-making as the norm.

5. **An Interpretation Section**

This section would harmonize non-derogation clauses and amend the *Interpretation Act* to ensure that federal legislation and policy, including the exercise of Crown discretion found within legislation, is consistent with the recognition standards. The drafting would also seek to bind Crown officials and entities in decision-making, making clear that if there is a conflict between this Act and other statutes, this Act will prevail.

6. **A Process for Engagement**

The Act would commit Canada, in collaboration and partnership with Indigenous Nations, to design and implement a framework and an engagement process to develop the mechanisms, tools, and processes to implement the recognition standards.

The framework would include pathways and supports for transitions out of the current system and new dispute resolution mechanisms. This includes supports for Indigenous Nations to move to self-determination. This section would recognize the need for new jurisdictional arrangements to create space for:

- the operation of Indigenous laws and legal orders as an order of government within Canadian federalism;

- new title-based arrangements about revenue and benefit sharing; and

- establishing mechanisms for restitution and compensation.

7. **Mechanisms**

The following are mechanisms recommended for inclusion in this Act (noting that the details will follow in regulations):

a. An oversight body, possibly through a Commission, whose members would be equally comprised of Indigenous and Crown appointments to determine if the Crown government is in compliance with this Act and also mandated to consider whether Crown policies, negotiation and litigation mandates comply with the recognition standards of the Act. Indigenous peoples would be central in appointments.

b. Further, establishment of a treaty oversight body, possibly through a Commission, whose members would be equally comprised of Indigenous and Crown appointments to monitor interpretation and implementation of historic and modern treaties consistent with this Act. Indigenous peoples would be central in appointments. This institution might be co-financed with the Provinces and territories.

c. An Indigenous institution, completely co-developed/co-designed with Indigenous peoples, to deal with proper title and rights holder issues, shared and overlapping territories, as a new dispute resolution mechanism. The institution would be under the control of Indigenous Nations, including the rules, procedures and principles for decisions about resolving disputes in accordance with Indigenous law. This institution might be co-financed with the Provinces and territories.

d. Indigenous institutions to support Indigenous nation and governance re-building, law making and Indigenous jurisdictions, including transitions out of the *Indian Act* regimes, and the attainment of self-determination. These supports would be non-prescriptive and voluntary. This would include obligations on Canada of support, including fiduciary and honour of the Crown obligations in transition. This institution could be co-financed with the Province and territories.

8. **Regulations**

The regulations will be co-developed in partnership to further implement the Act.

9. **Timeframe**

The Recognition Legislation will be drafted for presentation to the principals within 14 days of the date of instructions to drafters.