

Recognition and Implementation of Rights Dialogue Sessions: BC Chiefs' and Leaderships' Principles and Recommendations

(Draft dated July 18, 2018)

I. Overview

1. The federal and provincial governments are each proposing recognition and implementation of rights frameworks with the intent of honoring section 35 and fully implementing the UN Declaration on the Rights of Indigenous Peoples (the UN Declaration) and the Truth and Reconciliation Commission's (TRC) 94 Calls to Action. The denial of our inherent Title and Rights, laws and legal orders which extend throughout our territories, and the denial of Treaties and their full implementation must and will end.
2. With this in mind, Chiefs and Leadership in BC came together in dialogue on April 12, 2018 and June 28, 2018 at sessions held in Vancouver, BC and Richmond, BC and identified a number of initial, high-level recommendations regarding scope and minimum requirements of a federal or provincial recognition and implementation of rights framework. First Nations communities also offered written recommendations through submissions delivered to the Union of BC Indian Chiefs (UBCIC), the First Nations Summit (FNS) and the BC Assembly of First Nations (BCAFN). The recommendations received to date have been compiled into this rolling draft document. As Chiefs and Leadership bring this document to their respective communities and continue this important discussion, First Nations interested in doing so may provide additional input as the document evolves.
3. Further, the Chiefs and Leadership discussed the development of a proposal for recognition legislation and a recognition and implementation of rights framework that would create and compel a systemic alignment of Canada's and British Columbia's legislation, policy and practices to principles and standards which find expression in section 35 and the UN Declaration and Crown commitments arising from the TRC Calls to Action. This enabling legislation is a missing step to implement the promises and principles arising from section 35 and the UN Declaration, as statute binds the Crown, going beyond reliance of good faith implementation by the Crown. The only acceptable proposal for a recognition and implementation of rights framework is one that honours our constitutional partnership and is co-developed and co-drafted. BC Chiefs and Leadership are taking their rightful place in history by leading this dialogue.
4. In preparing this document of principles and recommendations, the First Nations Leadership Council (consisting of the political executives of the UBCIC, FNS and BCAFN) has clearly articulated to Canada and BC that the document is not be interpreted as a complete and final response from First Nations communities in BC, it is only intended to serve as a contribution to the development of a federal or provincial recognition and implementation of rights framework. This document is not intended to replace or override existing activities, engagement or input from respective First Nations.
5. With this in mind, the First Nations Leadership Council has informed Canada and BC that First Nations communities may choose to request their own respective meetings with Canada and BC and may choose to advance their own community-driven priorities and recommendations through stand-alone documents.
6. Members of the First Nations Leadership Council participated in the organization of this initiative, in accordance with resolutions adopted by the Chiefs in Assembly at meetings of the UBCIC, FNS and BCAFN. In doing so, the First Nations Leadership Council has consistently reiterated to Canada and BC that it is not a Title and Rights holder, nor does it speak on behalf of any community.

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II. FIRST NATIONS LEADERSHIP COUNCIL – KEY MESSAGES

7. The First Nations Leadership Council offered various key messages in support of the Chiefs and Leadership dialogue. A high-level summary of these messages includes:

Inherent Nature of Aboriginal Title and Rights

8. First Nations pre-existed the arrival of settlers, and continue to exist today with their own laws, governments, political structures, social orders, territories and rights inherited from their ancestors. Included among these are the inherent rights of self-determination and self-government. Aboriginal Title and Rights are:
- inherent, cared for and passed along to us by our ancestors;
 - unique, grounded in a deep connection to, and responsibility to care for, our respective territories, water and other resources;
 - includes an inescapable economic component;
 - not contingent on recognition by the Crown or others and are not dependent on the Constitution, court declaration or agreement for their existence or application. Rather, they are reflected in and supported by section 35 of the *Constitution Act, 1982* and other key instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) and the American Declaration on the Rights of Indigenous Peoples; and
 - the foundation for First Nations jurisdiction and authorities.
9. By virtue of these rights, First Nations freely determine their political status, organization and freely pursue their economic, social and cultural development.

The Meaning and Impact of a Recognition and Implementation of Rights Framework

10. Recognition has proactive and positive meaning and significant impacts. Positively, a Recognition and Implementation of Rights Framework may be the proactive, constructive and cooperative development of a true legal framework that affirms section 35 in all First Nations - Crown relations. Consequently, such a framework will make it illegal for the Crown to deny the existence of, scope and content of s. 35 Aboriginal and Treaty rights.
11. Recognition means Crown governments organizing themselves to properly and fully respect our inherent Aboriginal Title and Rights, and governance extending throughout our territories, treaties and their implement according to their spirit and intent, within the context of the human rights framework of the UN Declaration. It means an end to over a century of denial that exists in Crown laws, policies, and practices, and which continue since section 35 was enacted.
12. Recognition includes:
- implementing Aboriginal Title and Rights throughout our territories, without proof or strength of claim;
 - fully implementing historic and modern-day treaties consistent with their spirit and intent;
 - moving beyond the limitations of the duty to consult and accommodate which were interim

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- constraints on Crown sovereignty until Title was recognized;
- shifting into true relations based on free, prior and informed consent, joint decision-making, respect for First Nations laws, authorities and jurisdictions, and proper resource revenue-sharing and fiscal relationships.

International Instruments and Laws

13. There are numerous international instruments and international customary law that Indigenous Peoples rely upon and utilize as frameworks for reconciliation, including the UN Declaration and the American Declaration on the Rights of Indigenous Peoples. There must be full, and unqualified implementation of the UN Declaration, carried out in full partnership with Indigenous Peoples.

Partnership

14. All Crown legislative and policy reforms and processes that have the potential to impact our inherent Title and Rights must be co-developed with First Nations. In particular, any provincial and federal legislative frameworks for the implementation of the UN Declaration must be co-drafted with First Nations and fully implemented with the free, prior and informed consent of all impacted First Nations. This means that rights-holders must be directly and meaningfully represented in each stage of the process when new legislation, regulations, and policy is contemplated, including legislative drafting and Parliamentary processes. Meaningful participation will require adequate resourcing for technical review and community engagement, and that legislative and policy reform timelines are respectful and reflective of First Nations' processes and requirements.

Path Forward

15. We are at a point in our collective history – where the law has developed, and commitments have been made – to finally move into a new era of recognition and implementation of our inherent title and rights, and with First Nations' respectively operating fully as distinct orders of government within this country. Now is the time to work together in an entirely different way – with openness and transparency.
16. Over the years, First Nations in BC have consistently presented an agenda for reconciliation, inclusive of the key systemic and practical shifts required to achieve honourable reconciliation, to eradicate the poverty facing our communities, to implement the right to self-determination and to close the socio-economic gaps. Key elements of this agenda include:
- Creation of a shared principled framework for reconciliation, embedded in Crown recognition of our inherent rights of governance, including the implementation of our stewardship laws, and the right to self-determination, solemn and binding agreements, legislation, policy and practice, and the free, prior and informed consent of First Nations;
 - Support for the work of First Nations & governance building, and the recognition of our laws and legal systems and their implementation;
 - Legislation, policy and practice review and reform consistent with key documents such as the UN Declaration;
 - A new Crown-First Nations fiscal relationship based on Title recognition;
 - Development and support for a new jurisdictional relationship and responsibilities;
 - Co-development of a Dispute Resolution Mechanism for disputes regarding a recognition - based

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interpretation of statutes and related obligations and to assist in resolving disputes among First Nations;

- Co-development of an Independent Indigenous Human Rights Commission to monitor and report on the progress of the implementation of these principles;
- New approaches, to effective negotiations including changed negotiation mandates, consistent with recognition of our inherent rights and treaties;
- New approaches to litigation, including changed litigation mandates, consistent with recognition of our inherent rights and treaties;
- Investing in First Nations quality of life issues (social, cultural and economic);
- Reconciliation as a public and social responsibility, requiring cultural and attitudinal shifts, mutual understanding, and partnerships; and
- Achieving a national culture of awareness and reconciliation.

III. RECOMMENDATIONS

17. As an initial step in this important dialogue, First Nations Chiefs and Leadership engaged in plenary facilitated dialogue sessions on the recognition and implementation of rights from April 11 – 13, 2018 in Vancouver, BC and on June 26, 2018 in Richmond, BC. Resulting from those sessions, the following initial, high-level principles and recommendations were identified for discussion and consideration. Where it makes sense to do so, recommendations were grouped together for ease of reflection.
18. In preparing this document, it is reiterated that the First Nations Leadership Council fully acknowledges that as Chiefs and Leadership bring this information to their respective communities to continue this important dialogue, First Nations may choose to prepare their own stand-alone documents setting out community-driven priorities and recommendations, which may or may not include some parts or all of the following principles and recommendations set out below:

Principles #1 – 5: Reconciliation and Recognition

19. Principles and recommendations to guide the work of reconciliation that were identified from the dialogue sessions, as well as from reviewing the written submissions provided include:

Principle #1: BC Chiefs' and Leadership's "Four Principles" is the foundation for reconciliation

20. Commentary/Recommendation: On September 11, 2014, following the Supreme Court of Canada's decision in *Tsilhqot'in Nation*, First Nations Chiefs and Leadership in BC identified "Four Principles" as the basis of recognition and reconciliation work, which have been endorsed through resolution at the UBCIC, FNS and BC AFN meetings. The Four Principles must be the foundation for any recognition and implementation of rights framework, including a legislative initiative.
21. Commentary/Recommendation: New Crown legislation and policy regarding our rights must take the Four Principles as its foundation:
- 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.

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- 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.
 - d. We immediately must move to consent-based decision-making and title based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements.
22. Commentary/Recommendation: Essential to the implementation of the Four Principles is the acknowledgement that Aboriginal title includes a jurisdictional and an inescapable economic component. The existing Crown –First Nations fiscal relationship is inappropriate and does not support the aims and work of our communities. A new fiscal relationship must respect, acknowledge and be implemented upon the foundation that First Nations are owners of our territories, resources and waters, and reflect the acknowledgement that First Nations have a right to economic benefits generated from our territories, resources and waters, including compensation for historic economic loss. In this context, Canada and BC must work in collaboration with First Nations to identify and develop resource revenue-sharing opportunities and mechanisms. The relationship should include ensuring First Nations' governments have revenue streams necessary to fully support their work of self-determination, self-government and the full exercise of their rights.

Principle #2: Any principled recognition and implementation of rights framework must be collaboratively developed with First Nations and be fully implemented

23. Commentary/Recommendation: Free, prior and informed consent (FPIC). Consent will be defined by First Nations according to and pursuant to our legal orders. Consent must not only be a binding foundation of the proposed recognition and implementation of rights framework, the development of the framework itself must provide for FPIC to be secured. Relationships between Crown governments and First Nations must include a commitment to obtaining the free, prior and informed consent of First Nations on all matters impacting their inherent Aboriginal Title and Rights.
24. Commentary/Recommendation: At minimum, the framework must be developed through full collaboration in partnership with First Nations from design, function, implementation and ongoing monitoring of decisions. Any principled framework for reconciliation with First Nations must be embedded in Crown recognition of our inherent rights of governance, including the implementation of our stewardship laws, and the right to self-determination, solemn and binding agreements, legislation, policy and practice, and the free, prior and informed consent of First Nations and fully implemented in the spirit of and commitment to reconciliation.

Principle #3: Historic and Modern Treaty Rights will be affirmed and not prejudiced

25. Commentary/Recommendation: Historic and modern-day treaties are affirmed by section 35 and are positive recognition of the unextinguished sovereignty of the signatory Nations. The framework for recognition and implementation of rights must state in clear and explicit terms that treaty rights will be honoured, affirmed and restored as sacred contracts among sovereigns. There is a continuing need for the development of appropriate mechanisms to fully implement the spirit and intent of treaties including

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monitoring Crown conduct. Recognition legislation could legislate an First Nations-led institution to ensure treaty affirmation and implementation.

Principle # 4: First Nations legal orders and laws will be empowered and enabled

26. Commentary/Recommendation: First Nations legal orders and laws are inherent rights of governance, at the foundation of our Title and Rights. Our laws will be the binding source of consent-based decision-making, determine the criteria for consent according to the specific First Nations involved and will guide dispute resolution with Crown, among First Nations, in mechanisms that can be developed under a proposed *Recognition Act*, internally within our Nations and among other First Nations. The empowering and enabling of our legal orders and laws is fundamental to implementation of the inherent right to self-government recognized by the Courts and right of self-determination affirmed in the UN Declaration.

Principle #5: Trust is the foundation of any new Crown-First Nations relationship, and the rebuilding of trust in the existing Crown-First Nations relationship must be a Crown priority

27. Commentary/Recommendation: Currently, the Crown-First Nations relationship is plagued by a lack of trust in Crown governments. The Crown governments must demonstrate their commitment to this new era of recognition and implementation of First Nations rights by taking immediate steps to rebuild trust and set the table for a new relationship. Specifically, as one step in seeking to rebuild trust, it was recommended that the federal government immediately confirm in writing treaty loan forgiveness and contribution only funding approach. Others have suggested other steps including: the Crown cease engaging in litigation that denies our rights, undermines First Nations' protocols and laws, or that seeks to deny or escape federal fiduciary responsibilities; and to transform decision-making processes on territory-wide land use and marine planning and development projects such that they are respectful of First Nations' plans, resource needs, and decision-making.

Principles #6 – 12: Core Commitments, Mandate and Policy Transformation

28. Various principles and recommendations regarding core commitments and policy and mandate transformation were identified and include:

Principle #6: A new Crown-First Nations relationship includes openness and transparency regarding core commitments in building a new relationship with First Nations

29. Commentary/Recommendation: In isolation from First Nations input, Canada and BC have developed their core commitments and related actions in relation to establishing new Crown-First Nations relationship, including their respective announcements of the federal and provincial reconciliation initiatives. Canada and BC must be fully transparent and work collaboratively and in partnership with First Nations regarding the development of a new recognition and implementation of rights framework and legislative initiative.

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Principle #7: Nothing about us, without us. Transparency includes input into information and shaping of documents designed to inform and guide key decision-makers (e.g. Members of Cabinet and other key decision-makers)

30. Commentary/Recommendation: Transparency includes jointly designing and implementing engagement processes with First Nations; however, it also includes jointly reviewing input received and determining how input and recommendations will shape briefing documents and materials to inform any new framework impacting on First Nations. This may also include First Nations input into documents designed to inform cabinet decision-making (e.g. providing input into briefings and memorandum to cabinet). There should be nothing about us (First Nations) without us.

Principle #8: As a core commitment, Crown policies and mandates must reflect reconciliation and recognition

31. Commentary/Recommendation: Crown policies and negotiation mandates must be transformed to reflect and respect the recognition of inherent Aboriginal Title and Rights and governance existing throughout our territories, without proof or strength of claim. This transformation should be immediately reflected in all ongoing Crown negotiations with First Nations. As a minimum standard, necessary changes include:

- a. explicit affirmation of continuing First Nations' legal systems and the jurisdiction that carries in relation to our territories and resources, respect for and accommodation for legal pluralism;
- b. recognition of First Nations decision-making, including within a collaboratively developed processes;
- c. jointly and collaboratively identifying and sharing revenue streams, including First Nations access to various resource licenses arising from title;
- d. addressing Aboriginal Title and Rights infringements, including overhauling existing mechanisms which provide space for continued infringement and justification, establishing mechanisms for addressing disputes and for restitution;
- e. support for the development of other dispute resolution mechanisms established by First Nations; and
- f. supporting capacity development to support jurisdictional shifts and for the attainment of self-determination.

Principle #9: Terra Nullius and the Doctrine of Discovery are morally condemnable, socially unjust, legally invalid and have no place in Crown mandates and policies

32. Commentary/Recommendation: As a demonstration of the commitment to reconciliation with First Nations, the Crown must unequivocally denounce and reject colonial doctrines such as extinguishment, Terra Nullius and the Doctrine of Discovery, ensuring the discontinuation of reflecting such doctrines in Crown negotiation and litigation mandates, standards and practices. Specifically, Canada and BC must ensure that any federal or provincial recognition and implementation of rights framework or legislative initiative:

- a. denounce and reject the Doctrines of Discovery and Terra Nullius as "racist, legally invalid, morally condemnable and socially unjust";
- b. explicitly reject any existing federal and provincial policies, mandates and practice standards

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which are developed from these colonial doctrines [see: Truth and Reconciliation Commission (TRC) Calls 45, 46, 47, 52]; and

- c. reject extinguishment in all forms.

Principle #10: Reconciliation extends to informing Crown litigation mandates and approaches

33. Commentary/Recommendation: Crown litigation mandates must reflect reconciliation, which must inform the Crown litigation strategies. This may include key actions such as:
- a. the Crown recognizing the inherent Aboriginal title exists throughout BC and agreeing to consent orders where title is in litigation, provided that overlapping claims or issues regarding proper title and rights holder are not in issue; and
 - b. rejecting extinguishment expressed in Crown pleadings in litigation.

Principle #11: A new Royal Proclamation supports a new Crown-First Nations relationship and is consistent with a new focus of reconciliation

34. Commentary/Recommendation: Canada and BC, together with First Nations in BC must seek to develop a new Royal Proclamation for Recognition, Reconciliation, Redress and Peace that is reflective of and consistent with a "nation to nation relationship" and the Truth and Reconciliation Commission's Call to Action #45.

Principle #12: Non-Derogation of Aboriginal and Treaty Rights

35. Commentary/Recommendation: A recognition and implementation of rights framework, including proposed Recognition legislation must explicitly state that it will not abrogate or derogate against existing and continuing Aboriginal and Treaty rights, including affirmed rights in Government to Government Agreements (such as Reconciliation Agreements) and modern comprehensive claims, self-government and treaties, agreements and other constructive arrangements. The framework can only affirm Aboriginal and Treaty rights recognition and in no way prejudice those Rights and Title. The legislation can implement, and give expression to obligations and standards arising from the UN Declaration and section 35, but cannot contravene section 35 or the Canadian Constitution.

IV. Additional Recommendations

The following commentary and recommendations were also identified as follows:

Overlap and Shared Territory issues

36. Commentary/Recommendation: First Nations require that Canada and BC provide proper resources to our communities to comprehensively engage in nation-rebuilding as we see appropriate, including resources to address outstanding shared territory issues as resolution is creating social, political and economic challenges.
37. Commentary/Recommendation: as supported at the March 2014 All Chiefs' Assembly on overlap and shared territories, the First Nations Leadership Council host a follow-up All Chiefs' Assembly specifically to address shared territory issues and mechanisms for resolution, including the establishment

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of an Indigenous Nations Commission or Institution to support dispute resolution.

Territory-wide land and water use planning

38. Commentary/Recommendation: it was recommended that First Nations require that Canada and BC provide proper resourcing for First Nations to carry out territory-wide land and water use analysis and planning to assist in making informed decisions regarding access to or use of territories, resources and waters. It was noted that lands and resources, including water are sacred and decisions involving activities must be well researched and examined, which requires capacity and resources to undertake the work.

International activities and agreements

39. Commentary/Recommendation: It was noted that few, if any, of the Free Trade and Climate Change Agreements and other international agreements that Canada has entered into contain provisions setting out recognition or protection of Aboriginal Title and Rights, including treaty rights. It was recommended that Canada promptly review and amend any such international agreements it has entered into by adding provisions to recognize and protect Aboriginal Title and Rights and treaty rights from direct or indirect infringement.

V. A Federal Legislative Framework

40. The federal government has indicated its interest in developing some type of reconciliation legislation, the content and scope of which has yet to be identified. Any recognition and implementation of rights framework and legislative initiative must be directed at ending Crown denial of the existence of Aboriginal title throughout proper title and rights holders - respective First Nations - territories in BC. Denial must be replaced by recognition throughout Crown legislation.

41. Commentary/Recommendation: A broader recognition and implementation of rights framework, which may include Recognition legislation as one plank in the framework, must contain the following elements, recognizing that this will likely be achieved in stages:

- entrench the standard of recognition of inherent Aboriginal Title and Rights throughout BC;
- affirmation of historic and modern treaties including the full implementation thereof, consistent with their spirit and intent, as understood by the signatory Nations;
- provide legal mechanisms for the full implementation of inherent Aboriginal Title and Rights, and historic and modern-day treaties, agreements and other constructive arrangements, including rights affirmed in judicial decisions;
- confirm that any mechanism that in form or result, supports or leads to extinguishment of Aboriginal Title and Rights is illegal, with mechanisms to enforce that within the legislative initiative;
- serve to recognize agreements based on, or supportive of First Nations governance, laws and legal orders;
- establish a mechanism for restitution/compensation: to support First Nations in BC who have lost total or partial possession of their territories to have opportunity to preserve rights and have preferential rights to recover them, even lands in the hands of third parties.
 - Further, a framework for recognition and implementation of rights must address the issue that First Nations in BC have the right to restitution for infringements of our rights as a

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result of Crown or Industry activities and related environmental impacts and for loss of territories of which we have been deprived without our consent. Unless otherwise freely agreed upon by impacted First Nations, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress;

- require the Crown, including all agents of the Crown to fully implement and adhere to recognition principles and standards derived from the UN Declaration and section 35;
- require Canada, BC to work with First Nations in BC to jointly establish a structure and process to monitor the alignment of Crown action with recognition standards and Crown responsibilities to First Nations as identified in such a recognition and implementation of rights framework, including possible recognition legislation;
- comply with the minimum standards set out in the UN Declaration, and the Calls to Action of the TRC; and
- commit Crown governments to a full joint review with First Nations all legislative, policy and operational practices impacting on our inherent Title and Rights.

42. Commentary/Recommendation: In carrying out procedural steps in the development of a new recognition and implementation of rights framework, it is critical that the framework:

- be developed collaboratively and in partnership with First Nations in BC, based on free, prior and informed consent.
- provide space for First Nations in BC (through designated representatives) to be at the drafting table, and to be fully resourced to participate in the development of a legislative framework.

VI. BC Chiefs and Leadership: Recognition and Implementation of Rights Legislative Framework

43. At the June 2018 dialogue session, Chiefs and Leadership in attendance expressed common ground on the benefits of framing out a short recognition legislative framework for discussion.

44. Commentary/Recommendation: it was recommended that legal representatives for the First Nations Leadership Council prepare a short, basic draft conceptual framework for recognition legislation – setting out at a high-level legal issues to be addressed, accompanied by brief descriptions. This draft legislation is intended to be discussed further at a follow-up dialogue session for Chiefs and Leadership (possibly in July 2018). Recommended elements include:

- **A preamble**: which rejects denial and affirms recognition of inherent Aboriginal Title and Rights and treaty rights, the UN Declaration and the 94 TRC Calls to Action, especially the right to self-determination.
- **A purpose section**: to bind governments to recognition, aligning Crown legislation and discretion found in Crown legislation and policies, to recognition.
- **An interpretation section**: that would amend the *Interpretation Act* to ensure consistency of all legislation with the UN Declaration and to section 35 rights implementation.
- **Mechanisms**: create a new institutions, completely co-developed/co-designed with First Nations, to deal with (a) proper title and rights holder issues; (b) overlap and shared territory issues; (c) dispute resolution. To facilitate this in a timely manner, the scope of the commitment to create

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new institutions could be placed in the legislation, with the details to follow in regulations and policies.