

**Implementing our Title and Rights:  
Upholding Self-Determination through Nation-to-Nation, Consent-  
Based Negotiations and Agreement-Making**

**Summary Report**

June 17, 2019



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## Introduction

On May 21-22, 2019 the Union of BC Indian Chiefs (UBCIC) held a symposium on *“Implementing our Title and Rights: Upholding Self-Determination through Nation-to-Nation, Consent-Based Negotiations and Agreement-Making.”* (Symposium). The focus of the Symposium was on emerging developments in negotiations and agreement-making, and in particular, agreements with the BC government outside of the British Columbia Treaty Process. (BCTC Process)

The Symposium took place in response to three developments and lines of work.

Firstly, since 2016 the UBCIC, at the direction of the Chiefs Council through resolution, has been advancing a number of initiatives related to protecting the Title, Rights, and interests of First Nations outside of the BCTC Process. This work is realized through the *UBCIC Political and Legal Action Plan: Moving Beyond the BCTC Process and into Proper Negotiations Based on Recognition and Implementation of Aboriginal Title and Rights* that had been adopted by resolution in 2016 (Action Plan).

One aspect of the Action Plan involves the development of new negotiation approaches:

Strategy 5: Develop, announce, and advance the implementation of a new and detailed approach to negotiations and agreement-making grounded in the recognition and implementation of Aboriginal Title and Rights, and Proper Title and Rights holders, that can benefit all First Nations in British Columbia, including through a new reconciliation framework.

Secondly, a few First Nations have recently completed new models of agreements outside of the BCTC Process, and a number of other First Nations are at various stages of negotiations of agreements with innovative and cutting-edge elements. As such, it is an important moment for First Nations to take stock, share information and experiences, and strategize about new directions.

Thirdly, it was recognized that there are various legislative, policy, and procedural shifts being carried out by the federal and provincial governments, and more broadly we are in a moment of potential change where a focus is being placed on grounding relations in the minimum standards of the *United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)* and the recognition and implementation of Aboriginal Title and Rights. At the same time, however, it is broadly acknowledged that governments do not have clear strategies and knowledge about how to advance these transitions, and that it is essential for First Nations to lead the way and guide the pathway forward, particularly in regards to how new models of negotiations and agreement should look.

**Reflecting upon these developments and lines of work, a specific goal of the session was to inform the development of draft principles that may be considered by the Chiefs Council to be elements of new negotiations and agreement approaches outside of the BCTC Process.**

This report provides a brief thematic summary of the dialogue at the Symposium, including the key shifts, successes, and challenges that First Nations are experiencing in negotiations. It also provides a set of draft principles that may be considered in the work going forward. Attached to this report are: (1) the Symposium agenda; and (2) Summary notes of what was said at different sessions of the Symposium.

## Overview

The Symposium was unique. It was not a UBCIC Chiefs Council assembly where regular business was discussed. Nor was it arranged as part of a response to a particular legal development, or to an initiative or action by federal or provincial governments. The Symposium was not about the Chiefs considering, consulting upon, or evaluating an initiative the Crown had launched.

Rather, the Symposium was part of the integral collective work of sharing information and strategizing about how First Nations can accelerate progress in negotiations and agreements, while taking stock of the dynamics of the changing context we are in. It was about exploring one of the ways in which First Nations are leading the way in addressing colonization and building a future rooted in Indigenous self-determination.

The Symposium dialogue was constructive and dynamic. It was noted by many participants as particularly “open” and “honest”, as well as “practical” and “useful”. There was a clear consensus that more sessions of this nature were needed, including specific requests to organize a session focused on building and implementing, in practical terms, models of consent-based decision-making.

A centrepiece of the Symposium was the formal and informal sharing by leaders and Nations of where they are at in their agreements and negotiations. Two recent agreements were presented: the *shishalh* Foundation Agreement ([https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh\\_nation\\_foundation\\_agreement\\_-\\_final\\_-\\_redacted\\_-\\_signed.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted_-_signed.pdf)) and the agreement reached through a process with the ‘Namgis First Nation, the Kwikwasut’inuxw Haxwa’mis First Nations and Mamalilikulla First Nation regarding

aquaculture in the Broughton Archipelago (<https://news.gov.bc.ca/releases/2018PREM0151-002412>). The progress of negotiations, and agreements that are near completion, were also discussed including those of the Carrier-Sekani and Tsilhqot'in. Many other First Nations shared the current experiences they were having in negotiations with BC, including enduring challenges and issues, as well as potential shifts they were seeing.

Another centrepiece of the Symposium was the intense smaller dialogue sessions conducted with experts regarding particular issues important to the future of negotiations and agreements. These issues included: overlaps and shared territories, proper Title and rights holders, the *UN Declaration*, recognition and implementation of Title and Rights, Indigenous laws and legal orders, and free, prior, and informed consent. These opportunities to engage with experts and with each other were particularly useful as a means of reflecting on the diverse directions we may take in the future, and the potential principles that should guide negotiations.

An overarching context for the Symposium is that we are in a moment of emerging and transformative change – a moment that has been brought about by generations of relentless and successful advocacy by Indigenous peoples. The defining characteristics of this moment are increasing initiatives, efforts, and potentialities to shift the foundations of Crown-Indigenous relations from colonial denial to patterns of the recognition and implementation of inherent Title and Rights, including the fulfilment of the necessary roles and responsibilities of Indigenous governments, laws, and jurisdictions. At the same time, however, the opportunities that may be opening up are still in their early days, and there continues to exist substantial incoherence and lack of clarity about the full directions and actions that will evolve. As well, it was emphasized that it is vital for First Nations to consider seizing the day and define the directions they wish to see in negotiations and agreements through their aspirations and visions. Otherwise it is likely the federal and provincial government will adopt new relatively inflexible models and approaches which, while potentially new in certain ways, will not reflect the full directions Indigenous Nations see as fundamental.

## Themes from the Symposium

Six overarching themes from the discussion at the Symposium have been highlighted below. To reiterate, this is not a comprehensive statement of the issues and themes raised at the Symposium, but

rather a distillation of some of the broad ideas that kept being raised in the plenary and intense small group discussions. Important additional detail is provided in the appendices.

***Theme 1: While shifts we are seeing in negotiations are promising, they need to accelerate, acquire more transparency, and would benefit from a clear, principled, foundation***

The sharing by First Nations of the current status and experience of negotiations revealed that certain forms of progress had been made. Core matters such as the recognition and implementation of Title and Rights, consent-based decision-making, and structuring proper relations with Indigenous jurisdictions, governments, and legal orders are starting to be advanced through agreements outside of the BCTC Process. In addition, there is a sense that the real momentum and innovation in negotiations and agreements is significantly shifting to outside of the BCTC Process; no longer is the BCTC Process being held up to First Nations as a standard or limit on what may or may not be achieved. Indeed, the completion of long-term, comprehensive agreements outside of the BCTC Process is something that has not been achieved before – so in that regard new models such as the *shishalh* Foundation Agreement are promising.

At the same time, progress remains uneven and unclear. While certainly we have many political statements and commitments to negotiations and agreements being grounded in the *UN Declaration* and the recognition and implementation of Title and Rights, and this is evidenced in a few agreements, it is not clear how this is translating into a principled approach to negotiations across BC that First Nations can begin to pursue and advance. As well, if true self-determination is to guide this new era of negotiations and agreements – and the priorities and visions of First Nations are to be the basis for moving forward – then agreement approaches must be open, flexible, and adaptable. The Crown must stop its common, historic practice of establishing fixed or rigid models of agreements based on internal priorities and commitments. They must approach their work with Nations in a manner that allows for innovation and responsiveness to the directions set by First Nations and the co-development of new approaches to negotiations and agreements.

***Theme 2: Unity-building within and between First Nations is the foundation for a future based on recognition and implementation of Title and Rights, consent, self-determination, and the***

***inherent right of self-government, and the completion of principled agreements consistent with these foundations.***

“Unity” was the predominant focus of discussion throughout the Symposium. Unity was viewed as central in three ways.

First, unity within First Nations as collective proper Title and Rights holders, and between leadership and members, was emphasized as critical to any success in negotiations and achieving new standards of recognition and self-determination. The importance of this internal unity is grounded in both Indigenous legal orders, cultures, and worldviews. It is also a matter of practical necessity if agreements are truly, in a principled way, going to implement Title and Rights and be a vehicle for fully respecting the human rights of Indigenous peoples as articulated in the *UN Declaration*.

Second, unity between First Nations was emphasized as being key to recognizing that colonial approaches to negotiations get their strength from divide and conquer tactics imposed on First Nations, and that seeking to take advantage of this division continues today. While it is certainly not only First Nations that bear the burden of overcoming these Crown created divisions, it is accepted that only through Indigenous laws and customs can protocols, understandings, and patterns of unity be rebuilt, and that, of course, First Nations must lead this work. Indeed, the discussion about ‘overlaps’ and ‘shared territories’ was one of the most robust, honest, and purposeful sessions, underscoring the need to accelerate principled resolutions of these issues under leadership by First Nations.

Third, unity was emphasized amongst the collective First Nations as being part of advancing and advocating for approaches to negotiations and agreements that are recognition-based and respectful, and that overcome the limitations, denial, and colonial mindset of approaches that has predominated until very recently. In this regard, the information sharing, openness, and honest dialogue that took place at the Symposium was viewed as a positive step forward, and it was generally viewed that more sessions of this nature were needed.

***Theme 3: Issues of overlap and shared territories require a multi-pronged strategy, with practical solutions being advanced through new models of agreements as well as broader initiatives, guided by the principle that reconciliation with one Nation cannot occur through the infringement of the rights of another.***

A major impetus for the UBCIC Action Plan in 2016 was the threat posed to Title and Rights of neighbouring Nations from agreements completed in the BCTC process. At the core of this threat was the Crown's persistent and sustained disregard for whether and how modern treaties may impact or infringe the Title or Rights of others. As was stated in the Symposium, a typical practice of the Crown has been to "reconcile with one Nation on the back of another" – a practice which must stop.

Since 2016, no new modern treaties have been completed through the BCTC Process, and one proposed treaty was rejected by its membership. At the same time, however, many First Nations remain under duress and have legitimate concerns about potential agreements that are still being pursued through the BCTC Process.

It was noted in the discussion that some developments are forthcoming regarding overlaps and shared territories. The Commitment Document 2018 includes the following goal agreed to with BC:

Goal 1: Establish an Indigenous commission: designed, established and driven by First Nations, to provide certain supports to First Nations, respectful and reflective of, and consistent with, First Nations' rights of self-government and self-determination. The commission would provide a range of processes and options that First Nations may opt-in to use, from non-binding to binding outcomes. The commission would support First Nations upon request with respect to:

- i) boundary resolution, in accordance with First Nations' respective laws, customs, and traditions; and
- ii) nation and governance building including:
  - a. constitution development,
  - b. territory decision-making and land use/territory planning,
  - c. law-making,
  - d. policy development, and
  - e. development of political institutions, consistent with principles of the proper Title and Rights holder.

Once established, it is expected that both the federal and BC provide the necessary, sustainable resources/funding for the effective functioning of the independent commission.

The Commitment Document establishes a three-year time period for the creation of the independent Commission (circa 2021). The First Nations Leadership Council has begun preparatory background work to begin the dialogue with First Nations about the establishment of the Commission on this timeline.

Many First Nations also shared their own stories and experiences of dealing with neighbouring First Nations, and how through their own laws and protocols they have made progress or even resolved long outstanding matters. There is a growing body of contemporary approaches and insights that can be shared by and amongst First Nations about how they are approaching these issues.

While these developments are positive, it was also emphasized that the threats First Nations are experiencing are tangible today, and cannot necessarily wait for remediation through other processes, such as through a proposed Commission to be available in the future. It was also noted that no one wishes to see the Crown further exploit and use these issues – problems the Crown created – to further delay justice for First Nations, especially through agreements.

It was discussed how recent negotiations developments, and further development of certain approaches could help craft some interim approaches that are helpful. There are few paths that require further exploration. First, the model of the *shishalh* Foundation agreement includes a mix of substantial immediate benefits to a First Nation, detailed targets and milestones to be reached over time, and substantial investments in governance development and Nation-building. Such agreements could build milestones and targets, as well as supports, for dealing with issues with neighbouring First Nations, while still seeing First Nations complete agreements that will significantly advance their goals and priorities and ensure that their Title and Rights are not infringed upon when an agreement is entered into. Second, if the government is serious about recognizing Title and Rights, respecting the *UN Declaration* and accelerating negotiations and agreements, then it should support and invest now in First Nations leading the work of addressing overlaps and shared territory matters. It should provide funds and supports for First Nations to do this work and offer other appropriate forms of support as requested by First Nations.

***Theme 4: If negotiations are to be accelerated and agreements made to properly serve as vehicles for advancing the priorities and visions of Indigenous peoples, then an infusion of new capacity supports is needed.***

A theme that emerged throughout the Symposium was a lack of transparency about how negotiations are supported and funded, and how decisions are made to flow funds for Nations. There was also confusion regarding whether recent commitments and announcements of the provincial government, such as sharing of gaming revenue, may be used by the province as reason to not invest further in supporting negotiations based on the expectation that gaming revenue may be used for those purposes. At the same time, of course, it was noted that Canada is in the process of forgiving loans through the BCTC process and establishing a system so that Nations should not have to go into debt in order to negotiate agreements that advance a just reconciliation.

If acceleration of negotiations and agreements is to take place BC needs to be ready to dedicate the resources to it, and do so in way that is transparent, steady, and consistent. Recommendations were made to establish clear funds and protocols for how this capacity support occurs and to make significant investments in accelerating success in negotiations.

***Theme 5: There is the risk that substantive progress will not be made if First Nations do not set the negotiation agenda moving forward.***

It was emphasized throughout the Symposium that negotiations consistent with self-determination means that agreements are built around the priorities and visions of First Nations, and not dictated by the programs, models, or particular interests of the Crown. While there appears to be a moment in time that such innovation is possible, there remains a high risk that the Province will start adopting models, formulas, and approaches that are too rigid for success and not aligned with self-determination.

For this reason, it was emphasized throughout the Symposium that First Nations must lead and set the new direction. The Nations which presented at the Symposium, in various ways, expressed how the model of agreement they had completed, or were near completing, were based on their visions, models, and new approaches they had developed and advanced. First Nations need to lead directly at the Nation-to-Nation and Government-to-Government level of negotiations by collectively putting forth principles, approaches, and models that should inform and guide government approaches.

It was also noted that while the provincial government may be making efforts to retrain its people or explore new approaches, there has also not been much change in government personnel, and in particular there is no sign of shifts in the approaches from the Ministry of Attorney General. The

experience of First Nations has been that BC government legal positions, whether in court or in negotiations, remain static and rooted in denial. Change is needed now.

***Theme 6: Agreements are not a substitute for the necessary legislative and policy changes – changes in legislation, policy, and agreements are all needed, and need to reinforce each other.***

While negotiations and agreements are of central importance for First Nations, it was emphasized that they are not substitutes for necessary legislative and policy change. In particular, there are many necessary aspects of agreements, including consent-based decision-making, which cannot be implemented fully in most contexts where legislative change is absent. As such, a focus and pressure must continue to be applied to advance such changes, including through the proposed *UN Declaration* legislation that is planned for BC in Fall 2019.

It was also observed that legislative and policy obstacles should no longer hold back real, meaningful, and substantial agreements that reflect recognition and implementation of Title and Rights and the standards of the *UN Declaration*. In this regard, it was noted that models such as the *shishalh* Foundation Agreement anticipate policy and legislative changes and integrate this expectation into the agreement. As well, there are examples, such as the Broughton Archipelago, of designing and implementing a consent-based decision-making process.

## Draft Principles

One intended outcome of the Symposium was to develop a set of draft principles for First Nations to consider as part of developing new approaches to negotiations and agreements with BC. Throughout the Symposium the development of such principles was returned to, and ideas and suggestions were offered.

As a starting point, the Symposium reviewed the Four Principles that were developed by consensus of BC Chiefs on September 11, 2014 as part of a response to the *Tsilhqot'in Nation* decision. The Four Principles state:

1. 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 British Columbia.

2. Acknowledgement that Indigenous systems of governance and laws are essential to the regulation of lands and resources throughout British Columbia.
3. Acknowledgement of the mutual responsibility that all of our government systems shall shift to relationships, negotiations and agreements based on recognition.
4. We immediately must move to consent-based decision-making and Title based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements.

The *Draft 10 Principles that Guide the Government of British Columbia's Relationship with Indigenous Peoples* (which copied *Canada's Principles Respective the Government of Canada's Relationship with Indigenous Peoples*) were noted as well – though with the understanding that these were explicitly developed by the federal and provincials governments as part of providing some guidance to their own officials, and are not a replacement for First Nation principles and approaches to negotiations, or for the shared and joint work that must be done together. It was expressed, however, that we should be seeing more explicitly how governments are (or are not) applying the 10 Principles as well as the standards of the *UN Declaration* in their approaches to negotiations and agreements.

It was discussed that the Four Principles remain a foundation for articulating the shift that is needed. The main themes of the Four Principles, including recognition of inherent Title and Rights, the essential role of Indigenous governance and laws, and consent-based decision making and title-based fiscal relations, remain the basis for proper relationships. Of course, all of these themes are underscored by the centrality of self-determination. At the same time, the Four Principles remain quite broad and general, and a set of principles that specifically help guide negotiations and agreements will need to be more specific.

Based on the discussion at the Symposium, the following preliminary draft suggestions for consideration as negotiation principles, or topics to be expressed in a set of principles, is provided for further consideration by the Chiefs.

***These Principles have been confirmed by the UBCIC Chiefs Council as a collective expression of what should guide negotiations and agreements in 2019. They reflect the UN Declaration, the Four Principles adopted by the Chiefs of British Columbia in 2014, and Tsilhqot'in Nation. All of the***

*Principles are grounded in recognition and respect of Indigenous peoples' inherent Title and Rights, and their sovereignty and autonomy in establishing and advancing relations with the Crown.*

1. **Self-Determination:** Negotiations and agreements must be consistent with, support and advance the right of self-determination. This means that the model and substance of agreements should be grounded in the specific priorities and visions of First Nations. As such, all aspects of a negotiation process should be co-designed to ensure it is responsive to the directions that the First Nations at the table have determined as vital to building the future for its citizens.
2. **Indigenous governments, laws, and jurisdictions:** Negotiations and agreements should prioritize structuring proper relations between Indigenous governments, laws, and jurisdictions and Crown governments, laws, and jurisdictions. This includes recognizing the roles and responsibilities of Indigenous governments, and structures, processes, and mechanisms between Indigenous Crown and governments, including for the purposes of consent-based decision-making, dispute resolution, and regulating lands and resources.
3. **Recognition and Implementation of Title and Rights:** Negotiations and agreements should have as a priority the co-operative and systematic recognition and implementation of the fundamental aspects of Title including consent-based decision-making and title-based fiscal relations, such as revenue-sharing. Negotiations should focus on how these elements of Title will be fully reflected in the particular relationship between the Parties, and agreements should express this substantive commitment. An additional implication of recognition as the basis for negotiations and agreements is the rejection of models of legal certainty through the use of legal techniques. In addition to denial-based techniques such as extinguishment, modification or surrender language, the use of legal releases and limitations on use of the courts by First Nations are not consistent with the recognition of rights. While certainty and predictability are desired by all Parties, this is achieved through upholding rights, establishing clear structures, processes and mechanisms between governments, utilization of multiple forms of dispute resolution, and the establishment of deep relations grounded in trust.

4. **Nation and government re-building:** Nation and government re-building, determined and led by First Nations, must be appropriately supported and advanced through negotiations and agreements. This work must be led by First Nations on the terms they set, with governments playing supportive roles, including providing necessary capacity to see this work advance. First Nations will determine the pace and ways in which they will pursue this work – it is not for the Crown to dictate, shape, or influence. The Crown must support First Nations where they are at, not use the path First Nations are taking in this work to delay or avoid negotiations and agreements. They must have flexibility and adaptability to meet First Nations where they determine. Ultimately, a shared goal must be proper relations between Indigenous proper Title and Rights holders and their representative institutions, and the Crown, as part of the work of reconciling Indigenous and Crown sovereignties.
  
5. **Unity:** The historic practice of the Crown has been to promote division and conflict between First Nations, including through negotiations and agreements. Today, the Crown must actively make decisions and take constructive actions that support the building of unity between First Nations, including the work First Nations are leading and doing to resolve issues of territorial boundaries. This requires the Crown to act with transparency in to properly provide capacity and support to accelerate the work First Nations are doing to find solutions, to take positive steps with Nations to resolve matters and ensure that reconciliation with one Nation does not occur to the detriment of another, and to shift its internal priorities and culture of functioning to one where promoting unity overrides achieving self-interested goals. It also requires the Crown to recognize that stopping negotiations and agreements is not a valid response to issues of division – rather, it must actively take constructive action to resolve matters that arise to ensure that agreements are completed in ways that do not infringe the rights of others.
  
6. **Redress:** The right to redress must be respected as part of true reconciliation – building the future requires acknowledging and addressing the wrongs of the past. Consistent with articles 8, 11, 20 and 28 of the UN Declaration, negotiations and agreements must include pathways and

measures for redress. Approaches to redress through agreements will vary, reflecting the specific historic experiences of First Nations, the impacts those continue to have today, and how a First Nation has determined its future vision and priorities.

7. **Flexible and Adaptable:** The imperatives of recognition, respect and self-determination demand that approaches to negotiations and agreements be open, fluid, co-designed, adaptable and flexible. The status quo approach of government developing pre-determined models, limits, or approaches to negotiations and agreements which are then offered to First Nations is not acceptable. Prescriptive and unilateral approaches can never be aligned with the UN Declaration, and are not conducive to true reconciliation.
  
8. **Legislative Change:** Governments must explicitly recognize that legislative change is urgently needed to design and implement agreements that meet basic standards of recognition and the UN Declaration, and to meet Canada's commitment to have renewed relations with Indigenous peoples. Concrete legislative steps should be taken immediately to make space that facilitates successful actions in completing agreements.
  
9. **Transparency:** A perpetual challenge and obstacle to negotiations is transparency about how and why governments make decisions about negotiations and agreements. A culture of transparency needs to guide government approaches negotiations, and this could be supported by the government providing clear guidelines to negotiators about the importance of transparency and how to implement it. Topics that could be addressed include the government's internal decision-making process, issues and challenges that exist internally, issues and challenges with other First Nations that may impact negotiations, co-operative approaches to addressing the challenges, roles of lawyers and reliance on legal advice etc. Through such transparency, it is anticipated that greater trust and relationship-building will occur that facilitates better outcomes for all.

10. **Political involvement:** There has long been a disparity between the roles played by Indigenous leaders and those played by government ministers and senior executive officials in negotiations. While it is acknowledged that negotiators and staff have to do their work, all negotiations benefit from regular and focused discussion at the leader/Minister/senior official level to ensure issues and obstacles are being addressed, the process is continuing to advance, and understanding is being built. This should be systematized within the process and expectations for all negotiations and agreement implementation.

11. **Third Party Assistance:** There has long been a resistance to seeking help from experts, mediators, facilitators, and others to help guide, advance, and accelerate negotiations and achieve success in agreement implementation. There should be greater willingness, and resource support, to call on the appropriate expertise to help keep negotiations and agreement implementation on a constructive and successful track.

## Going Forward

The Symposium provided an important jumping off point for potential additional dialogue and work by the Chiefs' Council. In addition to the revision and finalization of a set of draft principles, a number of other actions could be contemplated:

- Development of a strategy for advancing and implementing the principles in negotiations through coordinated action to ensure governments respect them;
- Development of an action plan for transforming negotiations that in addition to the principles, includes models of agreements, steps and processes that may be applied, and standard tools that may assist First Nations (such as language identifying approaches to certainty that reject reliance on legal techniques) in negotiations; and
- Additional Symposiums on key negotiation topics, starting with consent-based decision-making.

Based on direction received from the Chiefs Council these and other work will be advanced.