BC Assembly of First Nations

First Nations Summit

Union of BC Indian Chiefs

Information Package for ALL CHIEFS MEETING

Re: Proposed Federal Recognition and Implementation of Rights Framework

June 26, 2018

Musqueam, Xʷməθkʷəy̓əm, Territory,
Richmond Executive Inn, 7311 Westminster Highway,
Richmond, BC

BC Assembly of First Nations | First Nations Summit | Union of BC Indian Chiefs

AGENDA

Recognition and Implementation of Rights Follow-up Session
June 26, 2018

*Co-Hosted by the Union of BC Indian Chiefs, First Nations Summit and BC Assembly of First Nations

Where: Musqueam, Xʷməθkʷəy'əm, Territory, Richmond Executive Inn,
7311 Westminster Highway, Richmond, BC
Grand Ballroom

Facilitator: Debra Hanuse

Tuesday June 26, 2018, 9:00 am – 4:00 pm

8:00 am	**Registration at the Richmond Executive Inn**
8:00 am	**Buffet Breakfast**
9:00 am	**Welcome** • Facilitators' welcome • Opening Prayer [TBC] • First Nations Leadership Council opening comments
9:30 am	**Update – Current Environment** • Overview of April 2018 Recognition and Implementation of Rights Session Presentation regarding 10 Federal and Provincial Principles of Reconciliation • Overview of draft recommendations from April Summary Document
10:15 am	**Plenary Dialogue - Chiefs and Leadership** • Refine draft recommendations for a Recognition and Implementation of Rights Framework
12:00 pm	**Buffet Lunch**
1:00 pm	**Plenary Dialogue – Chiefs and Leadership** • Refine draft recommendations for a Recognition and Implementation of Rights Framework
2:15 pm	**Break**
2:30 pm	**Reflection on what we've heard and next steps** • Summary of Discussion, Desired Outcomes and the Path Forward
3:45 pm	**Closing Remarks** • First Nations Leadership Council (FNLC)

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First Nations Leadership Council

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May 18, 2018

To all First Nations Chiefs and Leadership:

Re: Recognition and Implementation of Rights Framework

Following direction provided by First Nations Chiefs and Leaders at the Recognition and Implementation of Rights Forum held in Vancouver on April 11-13, the First Nations Leadership Council (FNLC) is providing you with a rolling draft of the "Recognition and Implementation of Rights Forum Recommendations Generated by BC Chiefs and Leadership" document, which was generated from a Chiefs and Leadership dialogue session held on April 12.

As directed, we are providing the draft document to communities for feedback and additions. It is the intention of the FNLC to finalize the summary document with communities' feedback into a set of shared principles to inform a recognition and implementation of rights framework as well as a detailed appendix outlining the specific recommendations received from communities.

Once feedback is collected and incorporated, the document will be recirculated for review by First Nations.

We have prepared this document to ensure we have heard from First Nations leadership, in the spirit of contributing thoughts and suggestions in regard to the development of a recognition and implementation of rights framework. We are seeking a unified strategy and voice that must be guided by the Chiefs in BC; the federal and provincial governments have made significant political commitments which has created an opportunity for First Nations to secure further protections and affirmations of your title and rights.

Background/Context

On February 14, 2018, Prime Minister Justin Trudeau announced Canada's intention to embark on a nation-wide engagement strategy to discuss the development of a new recognition and implementation of rights framework. Since then, on behalf of the federal government, Minister Carolyn Bennett has engaged First Nations and their organizations throughout the country in group dialogue sessions, and in separate meetings with First Nations who have expressed an interest in doing so.

During the week of April 11-13, 2018, the Hon. Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs, the Hon. Scott Fraser, Minister of Indigenous Relations and Reconciliation and the BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs (working together as the FNLC) jointly hosted a two-and-a-half day gathering in Vancouver to provide information and an opportunity to discuss Canada's recognition and implementation of rights framework initiative.

As part of the Vancouver gathering, BC Chiefs and Leadership participated in a full-day First Nations internal dialogue session on Thursday, April 12, 2018. At the internal session, Chiefs and Leadership chose to focus on identifying the First Nations perspective of a recognition and implementation of rights framework and minimum starting points and requirements.

Although the federal questions set out in Canada's recognition and implementation of rights engagement guide were made available at the First Nations internal session, Chiefs and Leadership opted not to focus on those questions; rather, the focus shifted to a discussion about our own processes, priorities and recommendations for what a recognition and implementation of rights framework should look like, from a First Nations perspective.

Outcome

Chiefs and Leadership in attendance identified a number of initial, high-level recommendations regarding principles, minimum requirements and scope of what a recognition and implementation of rights framework must include. These recommendations were compiled into a rolling draft document which is appended to this cover letter. Please be advised that the attached document ***is a draft*** that requires further discussion and input by First Nations who are interested and able in doing so.

The FNLC has clearly articulated to Canada and BC that the document is not be interpreted as a complete response from First Nations communities in BC, but rather is an initial step which does not replace the requirement of the Crown to engage on a nation-to-nation level with First Nations in BC. Further, as Chiefs and Leadership return to their respective communities and continue this important discussion, additional recommendations and input may be generated. With this is mind, we have informed Canada and BC that First Nations communities may choose to request their own meetings with Canada and BC and may choose to advance their own First Nation-driven priorities and recommendations through their own stand-alone documents.

Members of the FNLC participated in the organization of this initiative, in accordance with resolutions adopted by the Chiefs in Assembly at meetings of the BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs which mandated us to do so. Further, the FNLC has consistently reiterated to Canada and BC that the FNLC is not a title and rights holder, nor does it speak on behalf of any First Nation or Nation.

Next Steps

1. The attached "Recognition and Implementation of Rights Forum Recommendations Generated by BC Chiefs and Leadership" document is being sent to you with the hope that you will review and consider providing feedback and additional recommendations. We will then work to update the draft by incorporating all proposed responses. A revised version will be available in advance of the Tuesday June 26, 2018 All Chiefs and Leadership Forum. The revised draft will recommend a set of principles derived from the recommendations and submission from First Nations in BC, as well as an appendix including the specific recommendations and actions provided by communities.

   We encourage all submissions be made by Tuesday June 19, 2018, to be included into the next draft for discussion at the All Chiefs and Leadership Forum.

2. We fully acknowledge that some, or all portions of this draft will benefit from further editing and constructive dialogue with Chiefs and Leadership. In this context, this document will be further reviewed and updated at the follow-up All Chiefs and Leadership forum planned in Vancouver for Tuesday, June 26, 2018, to be held at the Executive Airport Plaza Hotel and Conference Centre (7311 Westminster Highway, Richmond).

We look forward to your ongoing involvement, advice and direction on this matter. Should you have any questions about this document or the identified next steps, please do not hesitate to contact the following technical support staff:

- For BCAFN contact Jaime Sanchez, MCIP RPP – Jaime.sanchez@bcafn.ca; cell – 250-713-1129;
- For UBCIC contact Andrea Glickman, Policy Director. Email: andrea@ubcic.bc.ca; Phone: 604 684 0231 ext. 242
- For FNS contact Colin Braker, Communications Director – E-Mail: cbraker@fns.bc.ca; phone; 604-926-9903.

We look forward to your feedback and meeting soon to work together towards a common strategy and vision that honour your ancestors, and benefit current and future generations. In solidarity and support.

Sincerely,
FIRST NATIONS LEADERSHIP COUNCIL

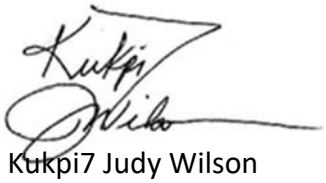
On behalf of the FIRST NATIONS SUMMIT

Grand Chief Edward John | Robert Phillips | Cheryl Casimer

On behalf of the UNION OF BC INDIAN CHIEFS

Grand Chief Stewart Phillip

Chief Bob Chamberlin



Kukpi7 Judy Wilson

On behalf of the BC ASSEMBLY OF FIRST NATIONS

Regional Chief Terry Teegee

RECOGNITION AND IMPLEMENTATION OF RIGHTS FORUM
RECOMMENDATIONS GENERATED BY BC CHIEFS AND LEADERSHIP

Thursday, April 12, 2018 7:30 am – 4:30 pm | Coast Salish Territories
Pinnacle Hotel Harbourfront – 1133 West Hastings Street, Vancouver BC

Chiefs and Leadership in attendance at this session identified a number of initial, high-level recommendations regarding principles, minimum requirements and scope of what a recognition and implementation of rights framework must include. These recommendations have been compiled into this rolling draft document. Be advised that this is considered to be a rolling draft for further discussion and input by First Nations communities who are interested in doing so.

The First Nations Leadership Council has clearly articulated to Canada and BC that the document is not be interpreted as a complete response from First Nations communities in BC. As Chiefs and Leadership return to their respective communities and continue this important discussion, additional recommendations and input may be generated. With this is 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 their own stand-alone documents.

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 BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs, which mandated us to do so. Further, 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.

I. SETTING THE STAGE

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

<u>Inherent Nature of Indigenous Rights</u>:

Our title and rights as Indigenous Peoples are inherent and have been cared for and passed along to us by our ancestors. Our title and rights are tied to our unique and deep connection to our homelands, water and other resources. Indigenous Nations and peoples 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.

Our rights are 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 and the American Declaration on the Rights of Indigenous Peoples.

By virtue of these rights, Indigenous Peoples freely determine their political status, organization and freely pursue their economic, social and cultural development.

Arising from our inherent rights and title to the lands is a solemn responsibility to care for the lands and resources. Further, the land held collectively includes jurisdiction and an inescapable economic component.

The Meaning of Recognition:

Recognition of rights means Crown governments organizing themselves to properly and fully respect our inherent Aboriginal title and rights, including our constitutionally-protected section 35 rights, and to end the denial that exists in Crown laws, policies, and practices.

This includes implementing Aboriginal title and rights without proof of strength of claim, and fully implementing historic and modern-day treaties consistent with their spirit and intent. It also means moving beyond the limitations of the duty to consult and accommodate about inherent rights and shifting into true relations based on free, prior and informed consent, joint decision-making, respect for Indigenous laws, authorities and jurisdictions, and proper resource revenue-sharing and fiscal relationships.

International Instruments and Laws:

There are numerous international instruments for us to rely upon and utilize as frameworks for reconciliation, including the United Nations Declaration on the Rights of Indigenous Peoples (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:

Co-development and partnership with Indigenous Peoples must guide all Crown legislative and policy reforms and processes. In particular, any provincial and federal legislative frameworks for the implementation of the UN Declaration must be fully co-developed with First Nations and fully implemented with the free, prior and informed consent of all impacted First Nations.

Path Forward:

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 Indigenous rights, and Indigenous Peoples operating fully as a distinct order of government within this country.

Now is the time to work together in an entirely different way – with openness and transparency.

Over the years, Indigenous Nations of BC have repeatedly built and presented an agenda for reconciliation, inclusive of the key systemic and practical shifts required to achieve honourable reconciliation, to eradicate poverty, to implement the right to self-determination and to close the socio-economic gaps. Key elements of this agenda include:

- A shared principled framework for reconciliation, embedded in solemn and binding agreements, legislation, policy and practice, and the free, prior and informed consent of Indigenous Nations;
- Indigenous Nations & Governance Building, and the application and recognition of Indigenous laws and legal systems;
- Legislation, Policy and Practice Review and Reform;
- A new Fiscal Relationship / new Jurisdictional Relationship and Responsibilities;
- Co-Development of a Dispute Resolution Mechanism;
- 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 and Dispute Resolution;
- Investing in Indigenous quality of life;
- 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.

II. RECOMMENDATIONS

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. As a result of that session, the following initial, high-level recommendations were identified for discussion and consideration. It was clearly articulated that as Chiefs and Leadership return to their respect communities and continue this important dialogue, additional recommendations may be generated over the coming weeks. And further, it was also made clear that First Nations communities 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 recommendations set out below:

Recommendations: Principles for Reconciliation

1. Four Principles as a foundation: 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. The Four Principles must be the foundation for any Recognition Framework, including a legislative initiative. New Crown legislation and policy regarding Indigenous rights must take the Four Principles as its foundation. The Four Principles state:

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

2. Rebuilding of Trust: There is a lack of trust between Crown – Indigenous Peoples. The Crown governments must demonstrate their commitment to this new era of recognition and implementation of Indigenous rights by taking immediate steps to rebuild trust and set the table for a new relationship. Specifically, it was recommended:
    a. to confirm treaty loan forgiveness in writing and overhaul treaty and other negotiation mandates to further support a contribution only funding approach;
    b. to change conduct of litigation; and
    c. that the relationships between Crown governments and Indigenous Peoples must include a commitment to obtaining the free, prior and informed consent of First Nations on all matters impacting their title and rights, must flow from open, transparent, and accountable dialogue and must respect the timelines and processes of Indigenous peoples.

3. Core Commitments and Policy and Mandate Transformation: Canada and British Columbia must clearly and promptly identify their respective core commitments in building a new Crown – Indigenous Relationship through a recognition framework and legislative initiative which is jointly and collaboratively drafted with Indigenous Peoples. In particular, policies and mandates must be transformed to reflect the recognition of rights, and this should be reflected immediately in all ongoing negotiations. Necessary changes include:

    a. explicit affirmation of continuing Indigenous legal orders;
    b. recognition of Indigenous decision-making within a collaboratively developed process;
    c. jointly and collaboratively identifying and sharing revenue streams;
    d. addressing title and rights infringements, mechanisms and restitution;
    e. support for the development of dispute resolution mechanisms established by First Nations; and
    f. supporting capacity development and jurisdictional shifts.

4. Denounce and reject colonial doctrines such as Terra Nullius, Doctrine of Discovery, including mandates, standards and practices premised upon such doctrines: That Canada and the provinces, consistent with the preamble of the UN Declaration ensure that any federal or provincial recognition 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 which are developed from these colonial doctrines [see: Truth and Reconciliation Commission (TRC) Calls 45, 46, 47, 52]; and
c. reinstate the papal bull, Sublimus Dei on the Enslavement and Evangelization of Indians.

5. Reference to the Supreme Court of Canada (SCC): That Canada, together with Indigenous Peoples, undertake a reference to the SCC for a consent order to include: a rejection of the Doctrines of Discovery and Terra Nullius; and a confirmation that Indigenous Peoples' original titles, rights and authorities, as legal and constitutional rights, to their respective homelands, territories, waters and resources exist in law without requirement of proof, strength of claim or Crown infringements.

6. Develop a new Royal Proclamation: That Canada and BC, together with Indigenous Peoples, and consistent with and building on the Royal Proclamation of 1763 (which confirms a "nation to nation relationship") and consistent with TRC Call to Action #45, develop a new Royal Proclamation for Recognition, Reconciliation, Redress and Peace.

Recommendations: Legislative Framework

7. Recognition Framework and Legislative Initiative: Denial must be replaced by recognition throughout Crown legislation. Any recognition framework or legislative initiative must:

a. entrench the standard of recognition of inherent title and rights without proof of strength of claim, and the full implementation of historic and modern treaties consistent with their intent;
b. provide mechanisms for the full implementation of inherent title and rights, and historic and modern-day treaties, agreements and other constructive arrangements, including rights affirmed in judicial decisions;
c. comply with the minimum standards set out in the UN Declaration, and the principles of the TRC;
d. be developed jointly and collaboratively with the free, prior and informed consent of First Nations;
e. First Nations must be at the drafting table and be fully resourced to participate in the development of a legislative framework.
f. recognize agreements based on, or reflective of Indigenous legal orders;
g. affirm what the Courts have already confirmed, that Aboriginal title exists everywhere in BC and return title lands within a reasonable time frame;
h. affirm that any mechanism that in form or result, supports or leads to extinguishment of Aboriginal title and rights is not acceptable and will not feature in any new recognition and implementation of rights framework or legislative initiative;
i. commit the Crown to full implementation of, and adherence to, common law and decisions;
j. establish joint structures and processes to monitor the alignment of Crown actions, as well as establishing a process for judicial oversight of court decisions;

k. Canada, BC and Indigenous Peoples jointly establish a structure and process to monitor the alignment of Crown action with rights and responsibilities to Indigenous Peoples;
l. establish a mechanism to support Indigenous Peoples who have lost total or partial possession of their homelands to have opportunity to preserve rights and have preferential rights to recover them, even lands in the hands of third parties. Further, that Indigenous Peoples have the right to restitution of homelands of which Indigenous Peoples have been deprived without their consent;
m. unless otherwise freely agreed upon by impacted Indigenous Peoples, 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;
n. commit Crown governments to a full review of all legislative, policy and operational practices impacting Indigenous title and rights.

8. Collaborative legal review: That as part of the new mandates of Canada and BC, and as part of understanding the historical political and constitutional foundations between the Crown and Indigenous Peoples, Canada and the provinces, together with Indigenous Peoples undertake a thorough legal review of the implications of the Doctrines of Discovery and Terra Nullius.

9. New Fiscal Relationship: Aboriginal title includes an inescapable economic component. The existing Crown – Indigenous 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 Indigenous Peoples are owners of our homelands, resources and waters, and reflect the acknowledgement that Indigenous Peoples have a right to economic benefits generated from our homelands, 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 Indigenous governments have revenue streams necessary to fully support their work.

10. Land Use Planning: The development of land use plans will assist First Nations in territorial planning of activities in our homelands, provide support for making informed decisions and addressing development activities. Land use plans are an ongoing priority for Indigenous Peoples to support us in meaningfully participating in and operationalizing free, prior and informed consent. The development of such plans requires predictable, sustained funding which can be included as a priority item within federal and provincial frameworks or legislative initiatives.

11. Regional sessions & All Chiefs Forum: Indigenous Peoples require regional engagement sessions and a follow-up All Chiefs Forum. Indigenous Peoples call on Canada and BC to provide the necessary funds for these activities.

12. Public education and awareness: Crown governments must establish an extensive and comprehensive public education program about the history and the inherent title and rights of Indigenous Peoples.

Recommendations - Indigenous Nation-to-Nation

13. Inter-Nation autonomy and respect: That each First Nation fully acknowledge and respect the inherent title, rights and autonomy of each other as First Nations in our respective homelands. This includes respect for the right of each First Nation in determining their own futures, governing structures, organization and arrangements. In doing so, First Nations require that Canada and BC support Indigenous Peoples in addressing key legal and political issues that may exist among neighbouring Nations; this includes seeking resolution of overlap or shared territory issues. Crown governments should similarly respect the priorities that Nations set, consistent with the right of self-determination.

14. Resources and support: Crown governments must adequately resource and support the development of First Nations' capacity to develop and implement their own governance, legal and citizenship systems necessary for the reconstitution of Nations.

15. Recognition of Legal Pluralism: Crown governments must recognize Indigenous legal systems and jurisdictions as a third order of government.

Recommendations - International Focus

16. Participation at the United Nations: That Indigenous Peoples and Canada work together to:

    a. advance Indigenous Peoples' increased participation as sovereign Indigenous Nations at the United Nations General Assembly, including in all UN agencies, funds and programmes as well as including with the following modalities;
    b. attend and participate as Indigenous governments, not as NGOs;
    c. full accreditation with the right to speak and; participate in resolutions which affect Indigenous Peoples.

17. International Commerce and Agreements: That Indigenous Peoples have a right to participate in and engage in international commerce and in negotiation and implementation of international agreements.

18. Lawsuits of foreign and domestic companies: That Canada and the provinces introduce federal and provincial legislation, regulations and policies that prohibit opportunities for foreign and domestic companies and governments from bringing lawsuits in pursuit of legal and economic remedies involving Indigenous Peoples' homelands, resources and waters.

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BRIEFING NOTE

To: BC Chiefs and Leadership
From: First Nations Leadership Council
Date: June 18, 2018
Re: Draft summary of the 2009 Recognition and Reconciliation Legislative Initiative

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PURPOSE

The purpose of this briefing note is to provide a high-level summary of the 2009 draft Recognition and Reconciliation Legislative Initiative for reflection of Chiefs and Leadership as 2018 discussions with the federal and provincial governments regarding the recognition and implementation of Aboriginal rights and title are currently underway.

BACKGROUND

This section provides a short background summary on the development of the 2009 recognition and reconciliation legislative initiative. A more comprehensive coverage of background events is set out in Appendix 'A'.

In March 2005, the provincial government and First Nations entered into a "New Relationship", with a commitment to recognize Aboriginal title and rights and to reconcile Aboriginal and Crown titles, legal systems and jurisdictions. The pathway to recognizing Aboriginal Title as an inherent right, which includes the right to make decisions about the land, was through recognizing this inherent right in principle, and establishing processes and institutions for shared decision making and revenue and benefit sharing.

From 2007-2008, the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations began initial steps to implement the New Relationship. By resolution, the First Nations Summit (#0907.20), Union of BC Indian Chiefs (#2008-12) and the BC Assembly of First Nations (#12/2008) were given mandates to begin organizing Chiefs and Leadership assemblies and engagements to work toward implementing the New Relationship through preparing draft recognition and reconciliation legislation (the "Proposed Legislation"), regulations and related tools.

The Province of BC and the First Nations Leadership Council (FNLC) worked jointly to develop a *Discussion Paper on Instructions for Implementing the New Relationship* (the Discussion Paper), which was released for consideration at a February 2009 All Chiefs' Assembly. The Province agreed to recognize Aboriginal Title existing throughout the Province without proof or strength of claim, but wanted recognition of co-existing titles and also implementation of a long term stable relationship with the proper title and rights holders. During the summer of 2009, the FNLC embarked on extensive regional engagement sessions with First Nations to review and discuss the draft Discussion Paper.

Many First Nations and their lawyers expressed support for implementing a new relationship, but not all widely supported legislative drafting based on the concepts set out in the Discussion Paper. Lawyers and

policy support representing First Nations formed a lawyers and policy caucus[1] and prepared their own "Concepts Paper" which they presented at the August 2009 All Chiefs' Assembly.

OVERVIEW OF THE PROPOSED LEGISLATION

In late 2009, the FNLC and the Province of BC agreed upon working toward implementation of the New Relationship through the enactment of Recognition and Reconciliation legislation (the "Proposed Legislation"), regulations, the development of template shared decision making and revenue and benefit sharing agreements and the issuance of a Proclamation.

Based on direction from First Nations, the FNLC and BC set aside certain elements of the 2008 Discussion Paper in favour of input from regional engagement sessions and from the Lawyers' and Policy Caucus representing First Nations and the FNLC.

However, the Discussion Paper included various key elements which remained of interest to First Nations, noted as having the potential to serve as core elements of potential Recognition and Reconciliation Legislation. Those elements included: recognition principles, a framework for shared decision making and revenue and benefit sharing, dispute resolution mechanisms, an Indigenous Nation Commission and an Indigenous Nation Council.

In December 2009, the FNLC and the Province of BC set to work on draft Recognition and Reconciliation Legislation (the "Proposed Legislation"), regulations, templates for shared decision making and revenue and benefit sharing agreements and a Proclamation. Ultimately, the parties could not reach consensus on the proposed 2009 Recognition and Reconciliation legislative initiative and it was therefore discontinued before the drafting had completed.

For ease of reference and reflection, following is a high-level summary of elements that the proposed legislation was intended to cover:

- **Preamble**: high-level statements, including reference to the new relationship founded on principles of recognition and reconciliation of respective rights, title and jurisdiction, and to the Proclamation

- **Definitions**: key definitions to be relied upon throughout the document

- **Recognition Principles:** high-level principles, statements regarding the recognition of Aboriginal rights and title and treaty rights, in particular, recognition that Aboriginal rights and title exist in British Columbia throughout the territory of each Indigenous Nation, without requirement of proof or strength of claim

- **Application of Principles:** recognition principles will apply to all provincial ministries and agencies involved in the management of lands and resources and will take priority over all provincial statutes dealing with these subject matters

[1] The Lawyers' and Policy Caucus consisted of: lawyers and policy support representing a First Nation or First Nations in BC; members of the Indigenous bar; the legal and policy team appointed by the First Nations Leadership Council to represent the FNS, UBCIC and BCAFN.

- **Indigenous Nations Commission:** establishment of an Indigenous Nations Commission to support Nation reconstitution, identification of Nations for the purposes of recognition and to assist with dispute resolution (e.g. assisting with disputes regarding the interpretation or implementation of legislation, regulations or any agreements concluded pursuant to the legislation which impact upon Aboriginal rights and title)

- **Shared decision-making and revenue and benefit sharing agreements:** to enable and guide the establishment of mechanisms for the development of minimum requirements and negotiation of such agreements

- **Policy framework:** support for the development of a framework that could be implemented to support shared decision making

- **Dispute Resolution:** support for the establishment of dispute resolution tools to assist in various disputes nation-to-nation, inter-nation issues and between Crown-Indigenous Nations

It is important to note that as identified in the Discussion Paper, the Recognition and Reconciliation legislative initiative was not intended to alter constitutional and common law of Aboriginal rights and title and treaty rights. Nor was it intended to impact upon the rights of First Nations to pursue broader implementation or remedy for purported violation or infringement of Aboriginal rights and title or treaty rights through litigation.

APPENDIX 'A' - BACKGROUND

The following sets out more detail regarding key background events that took place from 2005-2009 in regard to the Recognition and Reconciliation legislative initiative in BC.

(2005) NEW RELATIONSHIP VISION

In 2005, the First Nations Leadership Council (FNLC) and the Province of BC agreed upon establishing a New Relationship, including a vision statement. In the Vision Statement, the parties agreed to enter into a new relationship based on the recognition of Aboriginal title and rights and respect for each other's respective laws and responsibilities. The pathway to recognizing Aboriginal Title as an inherent right, which includes the right to make decisions about the land, was through recognizing this inherent right in principle, and establishing processes and institutions for shared decision making and revenue and benefit sharing.

(JAN 2008) LEGISLATIVE PROPOSAL

Resolutions of the First Nations Summit (Resolution #0907.20), Union of BC Indian Chiefs (Resolution No. 2009-12) and the BC Assembly of First Nations (Resolution No. 12/2008) provided those bodies, working together as the FNLC, with a mandate to pursue the enactment of provincial recognition legislation.

As a result, the FNLC tabled a Legislative Proposal with Premier Campbell on January 23, 2008. In his response dated February 23, 2008, the Premier confirmed his government's willingness to jointly develop the proposed Legislation.

(DEC 2008 – MARCH 2009) THE DISCUSSION PAPER

In furtherance of that work, the Province and the FNLC working together finalized a *Discussion Paper on Instructions for Implementing the New Relationship* (the Discussion Paper) in December 2008. The paper was released for consideration and discussion of Chiefs and Leadership in attendance at an All Chiefs' Assembly held on February 25, 2009. Following that session, the Discussion Paper was further considered at a Union of BC Indian Chiefs meeting on March 2, 2009 and a First Nations Summit meeting held March 4-6, 2009.

The framework for the Proposed Legislation set out in the Discussion Paper was endorsed by the First Nations Summit Chiefs in Assembly (Resolution #0309.04) and by the Chiefs Council of Union of BC Indian Chiefs (Resolution No. 2009-01) at their respective March 2009 meetings.

While the resolutions provided the FNLC with a mandate to pursue the development of the proposed Legislation based on the framework set out in the Discussion Paper, the resolutions required First Nations consideration and approval of any proposed Legislation before being introduced in the Provincial Legislature. Further, the resolutions also instructed the political executives of the respective organizations to engage with legal counsel for First Nations to review the proposed Legislation and consider their advice as the process moved forward.

(APRIL – AUGUST 2009) MANDATE AND ENGAGEMENT TO DEVELOP PROPOSED LEGISLATION BASED ON DISCUSSION PAPER

From June to August 2009, the FNLC hosted a series of regional sessions and community visits to explore the content of the Discussion Paper with First Nations across the Province. At these sessions, the FNLC received a considerable amount of valuable feedback and direction.

Many First Nations and their lawyers expressed support for implementing a new relationship, but not all widely supported legislative drafting based on the concepts set out in the Discussion Paper. Lawyers and policy support representing First Nations formed a Lawyers' and Policy Caucus and prepared their own "Concepts Paper" which they presented at an August 2009 All Chiefs' Assembly.

(LATE 2009) PROPOSED LEGISLATION

In late 2009, the FNLC and the Province of BC agreed to aim to implement the New Relationship through the enactment of recognition and reconciliation legislation (the "Proposed Legislation"), regulations, the development of template shared decision making and revenue and benefit sharing agreements and the issuance of a Proclamation.

Based on direction from First Nations, the FNLC and BC set aside problematic elements of the Discussion Paper in favour of input from regional engagement sessions and from the Legal and Policy Caucus. However, the Discussion Paper included various key elements which remained of interest to First Nations, noted as having the potential to serve as core elements of potential Recognition and Reconciliation Legislation. Those elements included: recognition principles, a framework for shared decision making and revenue and benefit sharing, dispute resolution mechanisms, an Indigenous Nation Commission and an Indigenous Nation Council.

In December 2009, the FNLC and the Province of BC set to work on draft recognition and reconciliation legislation, regulations, templates for shared decision making and revenue and benefit sharing agreements and a Proclamation.

Ultimately, the parties could not reach consensus on the proposed 2009 Recognition and Reconciliation legislative initiative and therefore, it was set aside before the drafting had completed.

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Department of Justice Canada
Ministère de la Justice Canada

PRINCIPLES

Respecting the Government of Canada's Relationship with Indigenous Peoples

Canada

ISBN 978-0-660-25093-9
Cat. No. J2-476/2018E-PDF

The Government of Canada is committed to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change.

Indigenous peoples have a special constitutional relationship with the Crown. This relationship, including existing Aboriginal and treaty rights, is recognized and affirmed in section 35 of the *Constitution Act, 1982*. Section 35 contains a full box of rights, and holds the promise that Indigenous nations will become partners in Confederation on the basis of a fair and just reconciliation between Indigenous peoples and the Crown.

The Government recognizes that Indigenous self-government and laws are critical to Canada's future, and that Indigenous perspectives and rights must be incorporated in all aspects of this relationship. In doing so, we will continue the process of decolonization and hasten the end of its legacy wherever it remains in our laws and policies.

> *[These Principles]* reflect a commitment to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights.

The implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) requires transformative change in the Government's relationship with Indigenous peoples. The UN Declaration is a statement of the collective and individual rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world, and the Government must take an active role in enabling these rights to be exercised. The Government will fulfil its commitment to implementing the UN Declaration through the review of laws and policies, as well as other collaborative initiatives and actions. This approach aligns with the UN Declaration itself, which contemplates that it may be implemented by States through various measures.

This review of laws and policies will be guided by Principles respecting the Government of Canada's Relationship with Indigenous peoples. These Principles are rooted in section 35, guided by the UN Declaration, and informed by the Report of the Royal Commission on Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission (TRC)'s Calls to Action. In addition, they reflect a commitment to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights. They will guide the work required to fulfill the Government's commitment to renewed nation-to-nation, government-to-government, and Inuit-Crown relationships.

These Principles are a starting point to support efforts to end the denial of Indigenous rights that led to disempowerment and assimilationist policies and practices. They seek to turn the page in an often troubled relationship by advancing fundamental change whereby Indigenous peoples increasingly live in strong and healthy communities with thriving cultures. To achieve this change, it is recognized that Indigenous nations are self-determining, self-governing, increasingly self-sufficient, and rightfully aspire to no longer be marginalized, regulated, and administered under the Indian Act and similar instruments. The Government of Canada acknowledges that strong Indigenous cultural traditions and customs, including languages, are fundamental to rebuilding Indigenous nations. As part of this rebuilding, the diverse needs and experiences of Indigenous women and girls must be considered as part of this work, to ensure a future where non-discrimination, equality and justice are achieved. The rights of Indigenous peoples, wherever they live, shall be upheld.

These Principles are to be read holistically and with their supporting commentary. The Government of Canada acknowledges that the understandings and applications of these Principles in relationships with First Nations, the Métis Nation, and Inuit will be diverse, and their use will necessarily be contextual. These Principles are a necessary starting point for the Crown to engage in partnership, and a significant move away from the status quo to a fundamental change in the relationship with Indigenous peoples. The work of shifting to, and implementing, recognition-based relationships is a process that will take dynamic and innovative action by the federal government and Indigenous peoples. These Principles are a step to building meaning into a renewed relationship.

01

The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.

This opening Principle affirms the priority of recognition in renewed nation-to-nation, government-to-government, and Inuit-Crown relationships. As set out by the courts, an Indigenous nation or rights-holding group is a group of Indigenous people sharing critical features such as language, customs, traditions, and historical experience at key moments in time like first contact, assertion of Crown sovereignty, or effective control. The Royal Commission on Aboriginal Peoples estimated that there are between 60 and 80 historical nations in Canada.

The Government of Canada's recognition of the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada is grounded in the promise of section 35 of the *Constitution Act, 1982*, in addition to reflecting articles 3 and 4 of the UN Declaration. The promise mandates the reconciliation of the prior existence of Indigenous peoples and the assertion of Crown sovereignty, as well as the fulfilment of historic treaty relationships.

This principle reflects the UN Declaration's call to respect and promote the inherent rights of Indigenous peoples. This includes the rights that derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, laws, and philosophies, especially their rights to their lands, territories and resources.

Canada's constitutional and legal order recognizes the reality that Indigenous peoples' ancestors owned and governed the lands which now constitute Canada prior to the Crown's assertion of sovereignty. All of Canada's relationships with Indigenous peoples are based on recognition of this fact and supported by the recognition of Indigenous title and rights, as well as the negotiation and implementation of pre-Confederation, historic, and modern treaties.

It is the mutual responsibility of all governments to shift their relationships and arrangements with Indigenous peoples so that they are based on recognition and respect for the right to self-determination, including the inherent right of self-government for Indigenous nations. For the federal government, this responsibility includes changes in the operating practices and processes of the federal government. For Indigenous peoples, this responsibility includes how they define and govern themselves as nations and governments and the parameters of their relationships with other orders of government.

02

The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982.*

Reconciliation is an ongoing process through which Indigenous peoples and the Crown work cooperatively to establish and maintain a mutually respectful framework for living together, with a view to fostering strong, healthy, and sustainable Indigenous nations within a strong Canada. As we build a new future, reconciliation requires recognition of rights and that we all acknowledge the wrongs of the past, know our true history, and work together to implement Indigenous rights.

This transformative process involves reconciling the pre-existence of Indigenous peoples and their rights and the assertion of sovereignty of the Crown, including inherent rights, title, and jurisdiction. Reconciliation, based on recognition, will require hard work, changes in perspectives and actions, and compromise and good faith, by all.

Reconciliation frames the Crown's actions in relation to Aboriginal and treaty rights and informs the Crown's broader relationship with Indigenous peoples. The Government of Canada's approach to reconciliation is guided by the UN Declaration, the TRCs Calls to Action, constitutional values, and collaboration with Indigenous peoples as well as provincial and territorial governments.

03

The Government of Canada recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.

The Government of Canada recognizes that it must uphold the honour of the Crown, which requires the federal government and its departments, agencies, and officials to act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous peoples. The honour of the Crown gives rise to different legal duties in different circumstances, including fiduciary obligations and diligence. The overarching aim is to ensure that Indigenous peoples are treated with respect and as full partners in Confederation.

04

The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

This Principle affirms the inherent right of self-government as an existing Aboriginal right within section 35. Recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.

As informed by the UN Declaration, Indigenous peoples have a unique connection to and constitutionally protected interest in their lands, including decision-making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.

Nation-to-nation, government-to-government, and Inuit-Crown relationships, including treaty relationships, therefore include:

developing mechanisms and designing processes which recognize that Indigenous peoples are foundational to Canada's constitutional framework;
involving Indigenous peoples in the effective decision-making and governance of our shared home;
putting in place effective mechanisms to support the transition away from colonial systems of administration and governance, including, where it currently applies, governance and administration under the *Indian Act;* and
ensuring, based on recognition of rights, the space for the operation of Indigenous jurisdictions and laws.

05

The Government of Canada recognizes that treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.

This Principle recognizes that Indigenous peoples have diverse interests and aspirations and that reconciliation can be achieved in different ways with different nations, groups, and communities.

This principle honours historic treaties as frameworks for living together, including the modern expression of these relationships. In accordance with the Royal Proclamation of 1763, many Indigenous nations and the Crown historically relied on treaties for mutual recognition and respect to frame their relationships. Across much of Canada, the treaty relationship between the Indigenous nations and Crown is a foundation for ongoing cooperation and partnership with Indigenous peoples.

The Government of Canada recognizes the role that treaty-making has played in building Canada and the contemporary importance of treaties, both historic and those negotiated after 1973, as foundations for ongoing efforts at reconciliation. The spirit and intent of both Indigenous and Crown parties to treaties, as reflected in oral and written histories, must inform constructive partnerships, based on the recognition of rights, that support full and timely treaty implementation.

In accordance with section 35, all Indigenous peoples in Canada should have the choice and opportunity to enter into treaties, agreements, and other constructive arrangements with the Crown as acts of reconciliation that form the foundation for ongoing relations. The Government of Canada prefers no one mechanism of reconciliation to another. It is prepared to enter into innovative and flexible arrangements with Indigenous peoples that will ensure that the relationship accords with the aspirations, needs, and circumstances of the Indigenous-Crown relationship. The Government also acknowledges that the existence of Indigenous rights is not dependent on an agreement and, where agreements are formed, they should be based on the recognition and implementation of rights and not their extinguishment, modification, or surrender.

Accordingly, this Principle recognizes and affirms the importance that Indigenous peoples determine and develop their own priorities and strategies for organization and advancement. The Government of Canada recognizes Indigenous peoples' right to self-determination, including the right to freely pursue their economic, political, social, and cultural development.

06

The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

This Principle acknowledges the Government of Canada's commitment to new nation-to-nation, government-to-government, and Inuit-Crown relationships that builds on and goes beyond the legal duty to consult. In delivering on this commitment, the Government recognizes the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent.

The Supreme Court of Canada has clarified that the standard to secure consent of Indigenous peoples is strongest in the case of Aboriginal title lands. The Supreme Court of Canada has confirmed that Aboriginal title gives the holder the right to use, control, and manage the land and the right to the economic benefits of the land and its resources. The Indigenous nation, as proper title holder, decides how to use and manage its lands for both traditional activities and modern purposes, subject to the limit that the land cannot be developed in a way that would deprive future generations of the benefit of the land.

The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands.

To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of Canada’s constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.

07

The Government of Canada recognizes that respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.

This Principle reaffirms the central importance of working in partnership to recognize and implement rights and, as such, that any infringement of Aboriginal or treaty rights requires justification in accordance with the highest standards established by the Canadian courts and must be attained in a manner consistent with the honour of the Crown and the objective of reconciliation.

This requirement flows from Canada's constitutional arrangements. Meaningful engagement with Indigenous peoples is therefore mandated whenever the Government may seek to infringe a section 35 right.

08

The Government of Canada recognizes that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.

The Government of Canada recognizes that the rights, interests, perspectives, and governance role of Indigenous peoples are central to securing a new fiscal relationship. It also recognizes the importance of strong Indigenous governments in achieving political, social, economic, and cultural development and improved quality of life.

This Principle recognizes that a renewed economic and fiscal relationship must ensure that Indigenous nations have the fiscal capacity, as well as access to land and resources, in order to govern effectively and to provide programs and services to those for whom they are responsible.

The renewed fiscal relationship will also enable Indigenous peoples to have fair and ongoing access to their lands, territories, and resources to support their traditional economies and to share in the wealth generated from those lands and resources as part of the broader Canadian economy.

A fairer fiscal relationship with Indigenous nations can be achieved through a number of mechanisms such as new tax arrangements, new approaches to calculating fiscal transfers, and the negotiation of resource revenue sharing agreements.

09

The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.

This Principle recognizes that reconciliation processes, including processes for negotiation and implementation of treaties, agreements and other constructive arrangements, will need to be innovative and flexible and build over time in the context of evolving Indigenous-Crown relationships. These relationships are to be guided by the recognition and implementation of rights.

Treaties, agreements, and other constructive arrangements should be capable of evolution over time. Moreover, they should provide predictability for the future as to how provisions may be changed or implemented and in what circumstances. Canada is open to flexibility, innovation, and diversity in the nature, form, and content of agreements and arrangements.

The Government of Canada also recognizes that it has an active role and responsibility in ensuring the cultural survival of Indigenous peoples as well as in protecting Aboriginal and treaty rights.

The Government of Canada will continue to collaborate with Indigenous peoples on changes to federal laws, regulations, and policies to realize the unfulfilled constitutional promise of s.35 of the *Constitution Act, 1982*.

10

The Government of Canada recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

The Government of Canada recognizes First Nations, the Métis Nation, and Inuit as the Indigenous peoples of Canada, consisting of distinct, rights-bearing communities with their own histories, including with the Crown. The work of forming renewed relationships based on the recognition of rights, respect, co-operation, and partnership must reflect the unique interests, priorities and circumstances of each People.

IN SUMMARY

THE GOVERNMENT OF CANADA RECOGNIZES THAT

01 All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.

02 Reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*.

03 The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.

04 Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

05 Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.

06 Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

07 Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.

08 Reconciliation and self-government require renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.

09 Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.

10 Distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

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Draft Principles
that Guide the
Province of British Columbia's
Relationship with
Indigenous Peoples

BRITISH COLUMBIA

Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples

The Province wants to renew its relationship with Indigenous peoples in B.C., and affirms its desire to achieve a government-to-government relationship based on respect, recognition and exercise of Aboriginal title and rights and to the reconciliation of Aboriginal and Crown titles and jurisdictions. We agree to work with Indigenous peoples to jointly design, construct and implement principled, pragmatic and organized approaches informed by the Supreme Court of Canada Tsilhqot'in decision and other established law, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Truth and Reconciliation Commission (TRC) Calls to Action.

Indigenous people have a special constitutional relationship with the Crown. This relationship, including existing Aboriginal and treaty rights, is recognized and affirmed in section 35 of the *Constitution Act*, 1982.

The Province's draft reconciliation principles are intended as bold statements to guide this new relationship and end the denial of Indigenous rights that have led to disempowerment and assimilationist policies and practices. The principles will assure the Province conducts itself in a way that reflects a clear shift in an often troubled relationship with Indigenous peoples to a modern government-to-government relationship that is strong, sophisticated and valued. These principles create the space needed to exercise our respective jurisdictions for the benefit of all British Columbians. We will recognize success when we know Indigenous peoples believe themselves to be self-determining, self-governing, self-sufficient and can practise their Indigenous cultural traditions and customs as an important and respected part of B.C. society.

B.C.'s principles are about renewing the Crown-Indigenous relationship. They are an important starting point to move away from the status quo and to empower the Province to fundamentally change its relationship with Indigenous peoples, a process that will take time and will call for innovative thinking and action. This is necessary to ensure a modernized Crown-Indigenous relationship in B.C.

1 The Province of British Columbia recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.

This opening principle affirms the priority of recognition in renewed government-to-government relationships. As set out by the courts, an Indigenous nation or rights-holding group is a group of Indigenous people sharing critical features such as language, customs, traditions, and historical experience at key moments in time like first contact, assertion of Crown sovereignty, or effective control. The Royal Commission on Aboriginal Peoples estimated that there are between 60 and 80 historical nations in Canada.

The Province's recognition of the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada is grounded in the promise of section 35 of the *Constitution Act*, 1982, in addition to reflecting articles 3 and 4 of UNDRIP. The promise mandates the reconciliation of the prior existence of Indigenous peoples and the assertion of Crown sovereignty, as well as the fulfilment of historic treaty relationships.

This principle reflects UNDRIP's call to respect and promote the inherent rights of Indigenous peoples. This includes the rights that derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, laws, and philosophies, especially their rights to their lands, territories and resources.

The constitutional and legal order in Canada recognizes the reality that Indigenous peoples' ancestors owned and governed the lands which now constitute Canada prior to the Crown's assertion of sovereignty. All of the Crown's relationships with Indigenous peoples are based on recognition of this fact and supported by the recognition of Indigenous title and rights, as well as the negotiation and implementation of pre-Confederation, historic, and modern treaties.

It is the mutual responsibility of all governments to shift their relationships and arrangements with Indigenous peoples so that they are based on recognition and respect for the right to self-determination, including the inherent right of self-government for Indigenous nations. This responsibility includes changes in the operating practices and processes of the provincial government. For Indigenous peoples, this responsibility includes how they define and govern themselves as nations and governments and the parameters of their relationships with other orders of government.

2 The Province of British Columbia recognizes that reconciliation is a fundamental purpose of section 35 of the *Constitution Act*, 1982.

Reconciliation is an ongoing process through which Indigenous peoples and the Crown work cooperatively to establish and maintain a mutually respectful framework for living together, with a view to fostering strong, healthy, and sustainable Indigenous nations within a strong Canada. As we build a new future, reconciliation requires recognition of rights and that we all acknowledge the wrongs of the past, know our true history, and work together to implement Indigenous rights.

This transformative process involves reconciling the pre-existence of Indigenous peoples and their rights and the assertion of sovereignty of the Crown, including inherent rights, title, and jurisdiction. Reconciliation, based on recognition, will require hard work, changes in perspectives and actions, and compromise and good faith, by all.

Reconciliation frames the Crown's actions in relation to Aboriginal and treaty rights and informs the Crown's broader relationship with Indigenous peoples. The Province's approach to reconciliation is guided by UNDRIP, the TRC Calls to Action, constitutional values, and collaboration with Indigenous peoples as well as the federal and other provincial and territorial governments.

3 The Province of British Columbia recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.

The Province recognizes that it must uphold the honour of the Crown, which requires the provincial government and its departments, agencies, and officials to act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous peoples. The honour of the Crown gives rise to different legal duties in different circumstances, including fiduciary obligations and diligence. The overarching aim is to ensure that Indigenous peoples are treated with respect and as full partners in Confederation.

4 The Province of British Columbia recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

This principle affirms the inherent right of self-government as an existing Aboriginal right within section 35 of the *Constitution Act*, 1982. Recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.

As informed by UNDRIP, Indigenous peoples have a unique connection to and constitutionally protected interest in their lands, including decision making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.

Government-to-government relationships, including treaty relationships, therefore include:

1. developing mechanisms and designing processes which recognize that Indigenous peoples are foundational to Canada's constitutional framework;
2. involving Indigenous peoples in the effective decision making and governance of our shared home;
3. putting in place effective mechanisms to support the transition away from colonial systems of administration and governance; and
4. ensuring, based on recognition of rights, the space for the operation of Indigenous jurisdictions and laws.

5 The Province of British Columbia recognizes that treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.

This principle recognizes that Indigenous peoples have diverse interests and aspirations and that reconciliation can be achieved in different ways with different nations, groups, and communities.

This principle honours historic treaties as frameworks for living together, including the modern expression of these relationships. In accordance with the Royal Proclamation of 1763, many Indigenous nations and the Crown historically relied on treaties for mutual recognition and respect to frame their relationships. Across much of Canada, the treaty relationship between the Indigenous nations and Crown is a foundation for ongoing cooperation and partnership with Indigenous peoples.

The Province recognizes the role that treaty making has played in building Canada and the contemporary importance of treaties, both historic and those negotiated after 1973, as foundations for ongoing efforts at reconciliation. The spirit and intent of both Indigenous and Crown parties to treaties, as reflected in oral and written histories, must inform constructive partnerships, based on the recognition of rights, that support full and timely treaty implementation.

In accordance with section 35 of the *Constitution Act*, 1982, all Indigenous peoples in Canada should have the choice and opportunity to enter into treaties, agreements, and other constructive arrangements with the Crown as acts of reconciliation that form the foundation for ongoing relations. The Province prefers no one mechanism of reconciliation to another. It is prepared to enter into innovative and flexible arrangements with Indigenous peoples that will ensure that the relationship accords with the aspirations, needs, and circumstances of the Crown-Indigenous relationship.

The Province also acknowledges that the existence of Indigenous rights is not dependent on an agreement and, where agreements are formed, they should be based on the recognition and implementation of rights and not their extinguishment, modification, or surrender.

Accordingly, this principle recognizes and affirms the importance that Indigenous peoples determine and develop their own priorities and strategies for organization and advancement. The Province recognizes Indigenous peoples' right to self-determination, including the right to freely pursue their economic, political, social, and cultural development.

6 The Province of British Columbia recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior and informed consent when B.C. proposes to take actions which impact them and their rights, including their lands, territories and resources.

This principle acknowledges the Province's commitment to a new government-to-government relationship that builds on and goes beyond the legal duty to consult. In delivering on this commitment, the Province recognizes the right of Indigenous peoples to participate in decision making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior and informed consent.

The Supreme Court of Canada has clarified that the standard to secure consent of Indigenous peoples is strongest in the case of Aboriginal title lands. The Supreme Court of Canada has confirmed that Aboriginal title gives the holder the right to use, control, and manage the land and the right to the economic benefits of the land and its resources. The Indigenous nation, as proper title holder, decides how to use and manage its lands for both traditional activities and modern purposes, subject to the limit that the land cannot be developed in a way that would deprive future generations of the benefit of the land.

The importance of free, prior and informed consent, as identified in UNDRIP, extends beyond title lands. To this end, British Columbia will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in public decision making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision making.

7 The Province of British Columbia recognizes that respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.

This principle reaffirms the central importance of working in partnership to recognize and implement rights and, as such, that any infringement of Aboriginal or treaty rights requires justification in accordance with the highest standards established by Canada's courts and must be attained in a manner consistent with the honour of the Crown and the objective of reconciliation.

This requirement flows from the constitutional arrangements in Canada. Meaningful engagement with Indigenous peoples is therefore mandated whenever the Province may seek to infringe a section 35 right.

8 The Province of British Columbia recognizes that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with the federal government and Indigenous nations that promotes a mutually supportive climate for economic partnership and resource development.

The Province recognizes that the rights, interests, perspectives, and governance role of Indigenous peoples are central to securing a new fiscal relationship. It also recognizes the importance of strong Indigenous governments in achieving political, social, economic, and cultural development and improved quality of life. This principle recognizes that a renewed economic and fiscal relationship must ensure that Indigenous nations have the fiscal capacity, as well as access to land and resources, in order to govern effectively and to provide programs and services to those for whom they are responsible.

The renewed fiscal relationship will also enable Indigenous peoples to have fair and ongoing access to their lands, territories, and resources to support their traditional economies and to share in the wealth generated from those lands and resources as part of the broader provincial economy.

A fairer fiscal relationship with Indigenous nations can be achieved by the Province, in concert with the federal government, through a number of mechanisms such as new tax arrangements and the negotiation of revenue-sharing agreements.

9 The Province of British Columbia recognizes that reconciliation is an ongoing process that occurs in the context of evolving Crown-Indigenous relationships.

This principle recognizes that reconciliation processes, including processes for negotiation and implementation of treaties, agreements and other constructive arrangements, will need to be innovative and flexible and build over time in the context of evolving Crown-Indigenous relationships. These relationships are to be guided by the recognition and implementation of rights.

Treaties, agreements, and other constructive arrangements should be capable of evolution over time. Moreover, they should provide predictability for the future as to how provisions may be changed or implemented and in what circumstances. The Province is open to flexibility, innovation, and diversity in the nature, form, and content of agreements and arrangements.

The Province also recognizes that it has an active role and responsibility in ensuring the cultural survival of Indigenous peoples as well as in protecting Aboriginal and treaty rights.

The Province will collaborate with Indigenous peoples on changes to provincial laws, policies and practices.

10 The Province of British Columbia recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of Indigenous peoples in B.C. are acknowledged, affirmed, and implemented.

The Province recognizes First Nations, the Métis Nation, and Inuit as the Indigenous peoples of Canada, consisting of distinct, rights-bearing communities with their own histories, including with the Crown. The work of forming renewed relationships based on the recognition of rights, respect, co-operation, and partnership must reflect the unique interests, priorities and circumstances of each people.


BRITISH
COLUMBIA

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First Nations Leadership Council

BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS
1004 Landooz Rd
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FIRST NATIONS SUMMIT
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UNION OF BRITISH COLUMBIA INDIAN CHIEFS
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The Four Principles
Developed by BC Chiefs Meeting
September 2014

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.

INSERT COLOUR SEPARATOR PAGE

TITLE:	Implementing Canada's Recognition and Implementation of Indigenous Rights Framework and clarifying the role of the AFN
SUBJECT:	Legislation
MOVED BY:	Chief Mike McKenzie, Innu Takuaikan Uashat mak Mani-Utenam, QC
SECONDED BY:	Chief Jackie Thomas, Saik'uz First Nation, BC
DECISION:	Carried; 7 Objections; 4 Abstentions

WHEREAS:

A. Since time immemorial the Indigenous Peoples of Turtle Island, as original sovereign nations, exercised their jurisdiction and authority over their lands, environments, resources and people with their inherent governmental authorities.

B. Indigenous Peoples and nations have never relinquished their jurisdictions, powers, authorities, identities, rights and Treaty rights through conquest, discovery, *terra nullius*, domination, force or acquiescence.

C. As original sovereign nations our ancestors in the past and into modern times, practiced their Treaty making rights to enter into Treaties, and other constructive agreements, among themselves and with the Crown.

D. As a result of Indigenous Peoples' nationhood and inextricable connection to the land, Indigenous nations possess a permanent sovereignty, while Canada occupies and enjoys a lesser established sovereignty.

E. Treaty First Nations possess and continue to maintain valid, legally enforceable Treaty and Treaty rights under international law.

F. Treaty First Nations are the original parties to Treaties, and Canada has successor state status as described in the United Nations' Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations released and adopted on July 20, 1999.

G. In accordance with international law, Canada cannot define, interpret, diminish or justify its failure to perform a Treaty or its legal obligations under Treaty.

H. Canada's engagement on the Recognition and Implementation of Indigenous Rights Framework (the Framework) is an internal process specific to the Government of Canada to reform its laws and policies.

I. Treaties embody the right to free, prior, and informed consent and the right to participate in decision-making at all levels and in all matters affecting and impacting Indigenous People.

J. The United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) states:

   i. Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

   ii. Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

   iii. Article 5: Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

   iv. Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

   v. Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

   vi. Article 26 (1): Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

   vii. Article 37 (1): Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with

States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

viii. Article 37 (2): Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

ix. Article 38: States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

K. The Truth and Reconciliation Commission of Canada Calls to Action states:

i. Calls to Action (45): We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*.

ii. Adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.

iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.

iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

L. On May 10, 2016, at the opening of the 15th session of the United Nations Permanent Forum on Indigenous Issues, Minister Carolyn Bennett announced, on behalf of Canada, that Canada is now a full supporter of the UN Declaration without qualification. Subsequently, on February 14, 2018, the Government of Canada reaffirmed its full support for the UN Declaration, without qualification, and committed to its full implementation, including government support for Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples.*

M. In September 2017, before the United Nations General Assembly, Prime Minister Justin Trudeau acknowledged that the UN Declaration is not merely “aspirational”.

N. Also, in his February 14, 2018, speech to the House of Commons, Prime Minister Justin Trudeau announced that the Government of Canada is launching a national engagement strategy to develop a Recognition and Implementation of Indigenous Rights Framework (the Framework). Specifically, Prime Minister Trudeau stated:

> "…that the government will develop, in full partnership with First Nations, Inuit, and Métis people, a new recognition and implementation of Indigenous rights framework that will include new ways to recognize and implement Indigenous rights. This will include new recognition and implementation of rights legislation. Going forward, recognition of rights will guide all government interactions with Indigenous peoples. The contents of the framework that we build together will be determined through a national engagement led by the Minister of Crown-Indigenous Relations and Northern Affairs with support from the Minister of Justice."

O. The current federal engagement materials regarding the Framework were launched without adequate participation and direction by First Nations rights holders. Additionally, through the inclusion of other partners and stakeholders, current engagement by the Government of Canada does not adequately respect First Nations rights holders.

P. Feedback from early engagements indicate that First Nations rights holders have:

   i. Expressed concern about the current process lacking accountability and transparency, with the Government of Canada acting unilaterally.

   ii. Reiterated that inherent Aboriginal and Treaty rights are constitutionally protected and guaranteed to First Nations, rather than political organizations and that it is the duty of the Crown to consult directly with rights holders in order to obtain their free, prior and informed consent when contemplating actions affecting them.

Q. Government engagement processes with non-rights holders and organizations, such as the Assembly of First Nations (AFN), do not constitute consultation and accommodation and cannot be used to obtain free, prior and informed consent.

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

1. Declare that the Assembly of First Nations (AFN), as an advocacy body, and any regional organizations cannot negotiate any binding changes to Canada's federal laws, policies and operational practices as part of the Recognition and Implementation of Indigenous Rights Framework (the Framework).

2. Call on Canada to work with First Nations before adopting and implementing any legislative or administrative measures that may affect First Nations in order to obtain their free, prior and informed consent.

3. Call on Canada to:
    a. Rename the Framework to “Protection and Affirmation of Rights and Title Framework”.
    b. Ensure that all phases of its process, in regard to its Framework, are guided by the standards set out in the United Nations Declaration on the Right of Indigenous Peoples (UN Declaration), the American Declaration on the Rights of Indigenous Peoples and the United Nations Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations.
    c. Work closely with First Nations to ensure that the engagement materials are informed, sufficient, accessible and transparent.
    d. Provide the necessary non-repayable financial contributions directly to First Nations as the rights holders, to support their ability and capacity to lead efforts to meaningfully and directly engage the federal government on the Framework, related activities and initiatives, including federal legislation.
4. Call on Canada to honour its constitutional obligations and commitments to the full implementation and affirmation of inherent rights, Treaty Rights and title.
5. Call on Canada to completely repudiate and abandon the inherent rights policy and any related operating practices.
6. Call on the Governor General to acknowledge its role as the sole representative of the Crown and to participate in First Nations-led agendas when requested by First Nations.
7. Direct the Assembly of First Nations (AFN) to take appropriate measures to ensure that its organization, executive and administration are in compliance with the UN Declaration in its relationships with First Nations, all levels of governments and international entities.

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First Nations Summit

RESOLUTION #0618.03

SUBJECT: SUPPORT-IN-PRINCIPLE FOR THE ROLLING DRAFT DOCUMENT "RECOGNITION AND IMPLEMENTATION OF RIGHTS FORUM RECOMMENDATIONS GENERATED BY BC CHIEFS AND LEADERSHIP"

WHEREAS:

A. On February 14, 2018, Prime Minister Justin Trudeau announced Canada's intention to embark on a nation-wide engagement strategy to discuss the development of a new recognition and implementation of rights framework. Since then, on behalf of the federal government, Minister Carolyn Bennett has engaged First Nations and their organizations throughout the country in group dialogue sessions, and in separate meetings with First Nations who have expressed an interest in doing so.

B. The First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations (working together as the First Nations Leadership Council [FNLC]), along with Canada and BC jointly hosted a two-day BC-specific Recognition and Implementation of Rights Forum held in Vancouver on April 11-13, 2018 to begin the dialogue on rights recognition and implementation.

C. Specifically, the aim of the forum was to hear directly from First Nations about:

- the various perspectives about the path of reconciliation, what does it look like, what are key interests, what are the elements that should be included; and
- the kind of strategies or models that can be advanced to go about implementing a recognition of rights approach.

D. The hope is that input and strategies arising from the forum may help to guide continued political discussion and policy development regarding a recognition and implementation of rights approach.

E. Chiefs and Leadership in attendance in an internal Chiefs and Leadership dialogue session held on April 12, 2018 identified a number of initial, high-level recommendations regarding principles, minimum requirements and scope of what a recognition and implementation of rights framework must include. These recommendations were compiled into a rolling draft document.

F. Following direction provided by First Nations Chiefs and Leaders at the forum, the FNLC circulated to First Nations for feedback and additions the rolling draft "Recognition and Implementation of Rights Forum Recommendations Generated by BC Chiefs and Leadership" document.

G. Comments or submissions should be made by Tuesday June 19, 2018, to be included into the next draft for discussion at a follow-up All Chiefs and Leadership forum planned for Tuesday, June 26, 2018 in Richmond. The document will then be further reviewed and updated.

H. It is the intention of the FNLC to finalize the summary document with communities' feedback into a set of shared principles to inform a recognition and implementation of rights framework as well as a detailed appendix outlining the specific recommendations received from communities.

I. The FNLC has clearly articulated to Canada and BC that the document is not be interpreted as a complete response from First Nations communities in BC, but rather is an initial step which does not replace the requirement of the Crown to engage on a nation-to-nation level with First Nations in BC.

J. The First Nations Summit Executive acknowledges that some, or all portions of this draft will benefit from further editing and constructive dialogue with Chiefs and Leadership.

THEREFORE BE IT RESOLVED:

1. That the First Nations Summit Chiefs in Assembly support in-principle the attached document titled, "Recognition and Implementation of Rights Forum Recommendations Generated by BC Chiefs and Leadership," recognizing that there will likely be further refinements to the document as a result of discussion and input by First Nations who are interested and able to do so.

2. That the First Nations Summit Chiefs in Assembly direct the First Nations Summit Political Executive to re-confirm with Canada and British Columbia that:

    a. engagement and dialogue on the federal initiative on a recognition and implementation of rights framework will not serve as a barrier to progress on any:

        i. work or approaches currently underway with individual First Nations or negotiating tables; or
        ii. potential work arising from Nation-to-Nation discussions.

    b. the participation of First Nations in the Recognition and Implementation of Rights Forum and follow-up session does not replace or constrict First Nations' opportunities to request their own respective meetings with Canada and BC, or their respective decisions to advance their own First Nation-driven priorities and recommendations through their own stand-alone documents.

3. That the First Nations Summit Chiefs in Assembly direct the First Nations Summit Political Executive to continue working with the Union of BC Indian Chiefs and the BC Assembly of First Nations to support the June 2018 follow-up All Chiefs and Leadership recognition and implementation of rights forum, including participation in related efforts.

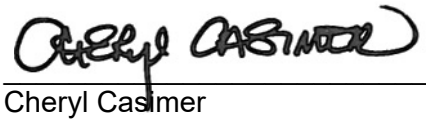
PAGE THREE
RESOLUTION #0618.03
SUBJECT: SUPPORT-IN-PRINCIPLE FOR THE ROLLING DRAFT DOCUMENT "RECOGNITION AND IMPLEMENTATION OF RIGHTS FORUM RECOMMENDATIONS GENERATED BY BC CHIEFS AND LEADERSHIP"

4. That the First Nations Summit Chiefs in Assembly direct the First Nations Summit Political Executive to provide a report about the outcome of this initiative and any work carried out as mandated by resolution at the October 2018 First Nations Summit meeting.

MOVED BY: Robert Morales, Hul'qumi'num Treaty Group
SECONDED BY: Kathryn Teneese, Ktunaxa Nation
DATED: June 8, 2018

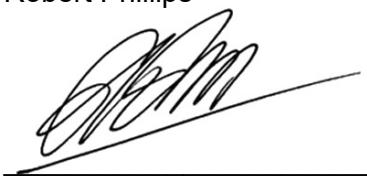
Passed by consensus.

ENDORSED BY:



Cheryl Casimer

Robert Phillips



Grand Chief Edward John

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First Nations Leadership Council

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Union of British Columbia Indian Chiefs
401 – 312 Main Street
Vancouver, BC
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Ph: 604-684-0231
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June 6, 2018

The Honourable Carolyn Bennett
Minister of Crown-Indigenous Relations
and Northern Affairs
Ottawa, Ontario K1A 0H4

Honourable Scott Fraser
Minister of Indigenous Relations and
Reconciliation
Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister Bennett and Minister Fraser:

Re: Recognition and Implementation of Rights Framework - Summary of Recommendations

We are writing in regard to the rolling draft, summary document of recommendations and input on recognition and implementation of rights, which was generated as a result of a Chiefs' and Leadership dialogue session held on April 12, 2018. We are aware that you have likely reviewed an initial draft of the summary document, we wish to be clear that the initial draft is currently undergoing review and revision by First Nations communities in BC.

To highlight pertinent background, during the week of April 11-13, 2018, the Hon. Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs, The Hon. Scott Fraser, Minister of Indigenous Relations and Reconciliation and the BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs (working together as the First Nations Leadership Council) jointly hosted a two-and-a-half day gathering to provide information and an opportunity to discuss Canada's recognition and implementation of rights framework initiative. As noted above, this two-and-a half-day session was only one opportunity among others taking place across the country, provincially, regionally and in communities. As part of that gathering, BC Chiefs and Leadership also participated in a full-day internal dialogue session on Thursday, April 12, 2018.

Although the federal questions set out in Canada's recognition and implementation of rights engagement guide and BC's one-page discussion paper were made available at the internal session, Chiefs and Leadership opted not to focus on those questions; rather, the focus shifted to a discussion about First Nations desired processes, priorities and recommendations for what a recognition and implementation of rights framework should look like, from a First Nations perspective.

In this context, the Chiefs and Leadership in attendance identified a number of initial, high-level recommendations regarding principles, minimum requirements and scope of what a recognition and implementation of rights framework must include. These recommendations were compiled into a rolling draft document for further discussion and input by First Nations communities who are interested in doing so. To be clear, that draft document is not to be interpreted as a complete response from First Nations communities in BC. As Chiefs' and Leadership return to their respective communities and continue this important discussion, additional recommendations and input may be generated. As directed by Chiefs and Leadership in BC, the aim is to host a follow-up all Chiefs and Leadership dialogue forum later this month to review and finalize that document for sharing with Canada and BC.

Further, it is important to highlight 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 their own stand-alone documents.

We also take this opportunity to reiterate that members of the First Nations Leadership Council participated in the organization of the Recognition and Implementation of Rights Forum initiative, in accordance with resolutions adopted by the Chiefs in Assembly at meetings of the BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs which mandated us to do so. Further, we affirm that the First Nations Leadership Council is not a title and rights holder, nor do we speak on behalf of any First Nations community in BC. We only work to assist in creating space for First Nations to directly engage with Canada and BC and to advocate for matters of common concern to First Nations communities.

Should you have any questions or wish to discuss this letter, please have your officials contact Colin Braker, Communications Director, First Nations Summit at cbraker@fns.bc.ca. to make the appropriate arrangements.

Sincerely,
FIRST NATIONS LEADERSHIP COUNCIL

On behalf of the FIRST NATIONS SUMMIT

Grand Chief Edward John | Robert Phillips | Cheryl Casimer

On behalf of the UNION OF BC INDIAN CHIEFS

Grand Chief Stewart Phillip | Chief Bob Chamberlin | Kukpi7 Judy Wilson

On behalf of the BC ASSEMBLY OF FIRST NATIONS

Regional Chief Terry Teegee

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Government of Canada / Gouvernement du Canada

2018

ENGAGEMENT TOWARDS A RECOGNITION AND IMPLEMENTATION OF RIGHTS FRAMEWORK

Public Engagement Guide

"Our efforts to build a better relationship with Indigenous peoples in Canada are not only about righting historical wrongs. They are about listening and learning and working together. They are about concrete actions for the future."

Prime Minister Justin Trudeau

Canada

Note to reader: This document may be updated throughout the engagement to respond to what we are hearing.

www.canada.ca/indigenous-northern-affairs
1-800-567-9604
TTY only 1-866-553-0554

QS-6390-000-EE-A1
Catalogue: R5-686/2018E
ISBN: 978-0-660-25055-7

PURPOSE

The Government of Canada is committed to renewing the relationship with First Nations, Inuit and Métis peoples based on the recognition of rights, respect, cooperation and partnership. To live up to this commitment, the Government of Canada is undertaking major reforms to its laws and policies to ensure the constitutional commitments made to Indigenous peoples are respected. The recognition and implementation of Indigenous rights is central to Canada's relationship with First Nation, Inuit and Métis peoples and to advance the vital work of reconciliation. We also know Indigenous communities that have control over the decisions affecting their communities have better socio-economic outcomes.

As part of the ongoing journey of reconciliation, the Government of Canada has launched a national engagement to help develop a Recognition and Implementation of Rights Framework.

WHAT DOES A RECOGNITION OF RIGHTS APPROACH MEAN?

All Canadians have rights and freedoms. *The Constitution Act, 1982,* including the Charter of Rights and Freedoms, outlines these rights. Indigenous rights are also recognized and affirmed in section 35 of the *Constitutional Act, 1982*. These refer to the collective rights held by Indigenous peoples under our Constitution.

First Nation, Inuit and Métis peoples are descendants of the first people who lived in what is now known as Canada. They have unique rights that are recognized and protected by the Constitution, but laws and policies are needed to support the exercise of those rights. The Government of Canada is working with First Nation, Inuit and Métis peoples to create the federal laws and policies needed to fully and clearly put those rights into practice.

The goal is to chart a new way forward for the Government of Canada to work with First Nations, Inuit and Métis peoples, and to end decades of mistrust, poverty, broken promises and injustices.

Recognition and Implementation of Indigenous Rights – A Framework

A Recognition and Implementation of Rights Framework will ensure that the Government of Canada respects constitutionally-protected Indigenous rights and provides policies and mechanisms for Indigenous peoples to exercise their rights. The Framework will support Indigenous peoples' treaty rights and their inherent rights, as recognized in section 35 of the *Constitution Act, 1982* while also meeting the objectives outlined in the *United Nations Declaration on the Rights of Indigenous Peoples*.

Part of this work means that new federal laws, policies and operational practices will be developed to support the rebuilding of Indigenous nations and governments, and advance Indigenous self-determination, including the inherent right of self-government.

Recognizing and implementing Indigenous rights is essential to achieve a strong, more prosperous and economically inclusive Canada. Prosperity for Indigenous peoples means prosperity for all of Canada.

Building on What We Have Heard

This work builds on decades of tireless advocacy by Indigenous leaders and communities, as well as several reports and studies, including the Royal Commission on Aboriginal Peoples, which have all called for a shift in the way the Government of Canada recognizes and implements Indigenous rights.

Indigenous partners have been instrumental in advancing the conversation around the recognition and implementation of rights through the negotiation of modern treaties, self-government agreements, and more recently through Recognition of Indigenous Rights and Self-Determination discussions. They have helped contribute to this shift in the Government of Canada's approach.

Focus of Engagement

Through the engagement process with First Nations, Inuit and Métis peoples, as well other partners and key stakeholders, Canada expects to formalize the recognition and implementation of Indigenous rights through new legislation and policies.

While specific components of this Framework will be based on the results of this engagement, legislative and policy elements of the Framework may include:

- Legislation to formalize the standard of recognition of Indigenous rights as the basis for all government relations with Indigenous Peoples;
- A new policy that reflects the unique needs of First Nations, Inuit and Métis peoples to replace the current *Comprehensive Land Claims Policy* and the *Inherent Right to Self-Government Policy*;
- Reforming government policies and practices to support the implementation of treaties and self-government agreements;
- Mechanisms to support the rebuilding of Indigenous nations and governments, and advance Indigenous self-determination and the inherent right of self-government;
- Creating new dispute resolution approaches to address rights related issues, including overlapping territories and treaty implementation, that move us from conflict to collaboration;
- Tools to strengthen a culture of federal government accountability and build greater trust between Indigenous peoples and the federal government; and,
- Legislation establishing the two new departments that will replace Indigenous and Northern Affairs Canada with a mandate that better serves the distinct needs of First Nations, Inuit and Métis peoples.

KNOWLEDGE TO BUILD ON:

- Report on the Royal Commission on Aboriginal Peoples, 1996
- *The Lornie Report on Acceleration of BC Common Table Treaty Negotiations,* 2011
- *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development* – Douglas Eyford, 2013
- The work of the Senior Oversight Committee on Comprehensive Claims, 2014
- *A New Direction: Advancing Aboriginal and Treaty Rights* – Douglas Eyford, 2015
- *A Matter of National and Constitutional Import: Report of the Minister's Special Representative on Reconciliation with the Métis: Section 35 Métis Rights and the Manitoba Metis Federation Decision* – Thomas Isaac, 2016
- Truth and Reconciliation Commission Calls to Action, 2015
- Multilateral Engagement Process to Improve and Expedite Treaty Negotiations in British Columbia, 2016
- The work of the Working Group on the Review of Laws and Policies Related to Indigenous Peoples, including the *Principles Respecting the Government's Relationship with Indigenous Peoples*
- The work of the Office of the Treaty Commissioner in Saskatchewan and the Treaty Relations Commission in Manitoba
- Collaborative Fiscal Policy Development Process with Self-Governing Groups
- The work of the Permanent Bilateral Mechanisms
- Over 50 Recognition of Indigenous Rights and Self-Determination Discussion Tables

Working Together to Build a New Relationship

For too long, Indigenous peoples in Canada have had to prove their rights existed and fight to have them recognized through costly court challenges. To truly renew the relationship between Indigenous peoples and Canada, the Government of Canada needs a comprehensive and far-reaching approach, which supports and empowers Indigenous communities as they shape their own future and find their own way forward.

Part of this work means new federal laws, policies, and operational practices will be developed to support the rebuilding of Indigenous nations and governments, and advance Indigenous self-determination, including the inherent right of self-government.

Led by the Minister of Crown-Indigenous Relations and Northern Affairs, the Government of Canada is engaging First Nations, Inuit and Métis peoples, as well as other partners and key stakeholders. Engagement will centre on the legislative and policy changes necessary to reform government policies and practices, to ensure the constitutional commitments made to Indigenous peoples are respected.

The Recognition and Implementation of Rights Framework will be introduced in 2018 and will form the basis for all relations between Indigenous Peoples and the Government of Canada moving forward.

"Reconciliation calls upon us all to confront our past and commit to charting a brighter more inclusive future. We must acknowledge that centuries of colonial practices have denied the inherent rights of Indigenous peoples. At last, we must work together with Indigenous peoples to design an approach in which inherent and treaty rights can be recognized and Indigenous peoples can be supported in implementing those rights. As we move towards the next 150 years of Canada, I envision a country that is more inclusive of First Nations, Inuit and the Métis peoples. Making this shift is fundamental to the growth and prosperity of Canada."

The Honourable Carolyn Bennett, M.D., P.C., M.P.
Minister of Crown-Indigenous Relations and Northern Affairs

QUESTIONS FOR ENGAGEMENT

The Government of Canada is undertaking a major reform of its laws and policies to ensure the constitutional commitments made to Indigenous peoples are respected. To achieve this, the government is launching an engagement process with First Nations, Inuit and Métis peoples, as well as other partners and key stakeholders, to develop a Recognition and Implementation of Rights Framework.

This engagement is an opportunity for us all to advance this work together. We look forward to embarking on this historic journey and hearing your perspectives on how we can advance true and meaningful change.

Engagement will take place through various means, including in-person meetings and by email at Indigenous-Rights@canada.ca as well as through www.canada.ca/indigenous-rights. More information about these opportunities to provide input is available at the end of this document.

Tell Us What You Think

Together, we need to explore practical ways to support Indigenous peoples to give effect to their jurisdictions and laws, in order to determine their own political, economic and social structures.

Policy Reforms and New Laws

1. The *Constitution Act, 1982* outlines the rights and freedoms of all Canadians. Canada also has laws, policies, and practices through which these rights are recognized and implemented. What are the legislative and policy changes that are necessary to reform government policies and practices in order to ensure Indigenous rights are fully implemented?

2. How can the Government of Canada improve the implementation of historic treaties and resolve historical grievances?

3. How can the Government of Canada improve the implementation of modern treaties and self-government agreements?

4. What distinctions-based approaches could replace the current *Comprehensive Land Claims Policy* and the *Inherent Right to Self-Government Policy*?

5. How would you define the role Provinces and Territories have in recognizing and implementing the inherent and treaty rights of First Nations, Inuit, and Métis peoples?

Nation Building

The Royal Commission on Aboriginal Peoples (RCAP) defined an Indigenous nation as a sizeable body of Indigenous people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories – the report estimated the existence of 60 to 80 nations.

6. How would you define an Indigenous nation? If it differs from RCAP, how so?

7. Who should determine who is an Indigenous nation and who is not?

8. When it comes to First Nations, do modern treaty groups, traditional governments or retribalization factor into defining nations?

9. What role does the re-empowerment of women play in defining and rebuilding Indigenous nations?

10. What functions and powers should Indigenous nations have?

11. How can the Government of Canada support nation (re)building and nation recognition?

Departmental Transformation - Indigenous Services Canada

12. How can the department ensure it addresses the distinct needs of First Nations, Inuit and Métis peoples?

13. What services should be included in the Department of Indigenous Services Canada?

14. How can the Department of Indigenous Services Canada help to address the socio-economic gaps affecting Indigenous peoples?

15. How can this department help First Nations, Inuit and Métis peoples build the capacity to run their own programs and services?

16. What changes can be made to ensure that the Department of Indigenous Services Canada works better to support Indigenous peoples in service delivery?

Departmental Transformation - Crown-Indigenous Relations and Northern Affairs Canada

17. What are the obstacles to exercising self-determination and / or self-government?

18. How can the Department of Crown-Indigenous Relations and Northern Affairs be structured and operate to best support Indigenous nations exercising self-determination and self-government? What could help you better exercise your community's self-determination? What tools or policies could support your community?

19. For those currently participating in Recognition of Indigenous Rights and Self-Determination discussions, modern treaty and / or self-government negotiations, what is your community seeking to achieve? How can we ensure youth and community members are engaged in the process?

20. Do you see a role for institutions to support and advance the exercise of self-determination and self-government? How can Crown-Indigenous Relations and Northern Affairs facilitate the establishment of institutions and work in partnership with them to advance self-determination and self-government (e.g., potential Indigenous-led institutions, arms length organizations, oversight institution)?

21. What role could an institution play to support dispute resolution? What type of disputes (e.g., historical grievances, disputes regarding the recognition and implementation of rights) could it work to resolve and between whom (Crown-Indigenous, Indigenous-Indigenous)?

22. Where do you see the two new departments needing to operate together? Where do you see their work overlapping?

Provide Us With Your Feedback

Additional information can be found at www.canada.ca/indigenous-rights. Please provide us with your input directly. Write to Minister Bennett at droitsautochtones-indigenousrights@canada.ca or:

Policy Development and Coordination Branch
Treaties and Aboriginal Government Sector
Aboriginal Affairs and Northern Development
10 Wellington, 8th Floor
Gatineau (Québec) K1A 0H4

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The Ghost Walks The Walk:
The Illusive Recognition and Reconciliation Legislation

This paper has been prepared by Louise Mandell, Q.C.
for the
40th Anniversary of the Union of B.C. Indian Chiefs ("UBCIC")
In Gratitude for the Honour of
Representing UBCIC for 32 of the 40 Years

Louise Mandell, Q.C.
Partner at Mandell Pinder, Barristers and Solicitors
Vancouver, British Columbia

Part 1: The Ghost[1]

There has been an obstruction which has prevented the Province of British Columbia from engaging in an honest, meaningful, respectful relationship based on recognition of unextinguished Aboriginal title and rights. As the Courts have repeatedly said, the concept seems pretty simple: "Canada's Aboriginal peoples were here when Europeans came, and were never conquered."[2]

Yet, there was something in the way. In spite of the recognition of Aboriginal title extolled in law and policy, and in spite of the New Relationship agreement "to establish processes and institutions for shared decision making about the land and resources and for revenue and benefit sharing", there was an invisible, yet palpable obstacle present at negotiation tables. We'd heard its voice expressed in Court by the Crown. I had thought its presence was going to be dispelled in the recent discussion in British Columbia about Recognition and Reconciliation Legislation (the "Recognition Legislation").

I will call this presence, this obstacle, "The Ghost". It is the thing from the past which is troubling the present, that continues to cause a disturbance and subvert our goals. It will do so as long as it is being fed.

In this paper I want to track, as best I can, the reasons why the Recognition Legislation has foundered, and how this initiative can be resurrected, without resurrecting the Ghost. At some points I will be expressing deeply personal beliefs which may be discomforting.

Spotting the Ghost

Most Ghosts begin their sojourn in fine fettle. This Ghost was a stowaway in the enterprise of European colonial imperialism. It landed in the newly claimed British Columbia with the first settlers. The Ghost created the kind of thing that a Ghost is really good at building: illusions. The first illusion: by planting the flag, the Crown claimed complete ownership and jurisdiction over everything.

The Ghost then began to spread lies about the Indigenous peoples who had stewarded the land beautifully and successfully for generations and centuries. As with all good lies, they came with many alternative fallbacks. The Ghost's mantra is denial and its favourite illusion is *terra nullius*: the land was unoccupied; or, if occupied, it was by people who were not really civilized; or, if civilized, they did not have concepts of land ownership; they did not have real laws; or, if they did have laws or rights, they were all extinguished; or, if not extinguished, the land they used was just small, spotty, postage-sized parcels (just the size of reserves, actually). And the Ghost was a boaster. The Crown represented a superior race of people with a real government which made real laws and had real state power. The Ghost whispered: "First Nations are primitive – without laws. The Crown is superior – worthy of the greatest respect and absolute deference."

There were, however, other voices that softened and ameliorated the hubris and manifest destiny extolled by the stowaway. The Queen would not take the land and then just turn her back on the Indigenous people. No, the Crown would bring great benefits to the natives, the Ghost proclaims. The Crown was committed to bringing civilization to these less evolved and less fortunate races. The benevolent goal of assimilation would take time. Meanwhile, the Crown would watch over her Indians and protect them. They were better off living on Indian reserves,

but the children should be separated from the regressive influence of their native communities, put in residential schools where they would be suitably educated. Until the natives were fully civilized, they could continue their hunting, gathering and fishing for food – as long as the Crown did not need the land and resources for development. The Crown would let them. The Crown was honourable.

A talented Indigenous scholar, Robert A. Williams, described what I have identified as the phenomenon of the Ghost as stereotyping "the savage Indian".[3] Williams traces its origins back several centuries ago, to the first colonizers – the Greeks and Romans and Medieval Christians – who saw all other peoples on a four-stage scale of social development – primitive, pastoral, agricultural and commercial – and of ascending stages of civilization, with Christian, European-derived nations placed at the very top of the scale, and Indigenous peoples at the very bottom. Embedded in this mindset was a noble vision: a commitment that distant territories and their inferior peoples should be subjugated, but the benefits offered by the superior dominion (Christianity, democracy, capitalism) would be provided to the subjects. It was a duty of the superior race, over and above the mere profit motive, to bring their knowledge, political institutions, superior economic structures, and the truth of Christianity, to less evolved races so as to promote their evolution. The cultural imagination of the Western powers believed it had a right, indeed an obligation, to rule.

The Ghost Has Friends In High Places

When it came to the dispossession of Indigenous Nations in British Columbia, the Province's method was simple. The Province asserted *de facto* control, ownership and jurisdiction over 100% of the lands and resources, while denying the existence of unextinguished Aboriginal title and its constitutional consequences (the "denial policy").

The denial policy was inspired by the Ghost. It was formulated early in the Province's history, and its favourite son was the first Lieutenant Governor of the Province, Joseph Trutch, who had served as Chief Commissioner of Land and Works in the Colony. He was a man in high places indeed; to control land policy in the colony was to control the fate of the native peoples:

> "The Indians really have no right to the lands they claim, nor are they of any actual value or utility to them; I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to Government or to individuals."[4]

The Ghost was pleased.

The Ghost Is An Outlaw

Of course being what it was, the Ghost never wanted the question to be called, or the lights put on - never wanted the higher authority of the Courts to determine the validity of its spectral illusions. This was because the Ghost was an outlaw, and the denial policy it fostered was illegal. The Courts have now said so.

By 1871, when British Columbia joined Confederation, a fundamental principle of the common law had taken root. It was first formally expressed in the *Royal Proclamation of 1763*, and given expression again by Justice McLachlin (now Chief Justice) in *Van der Peet,* when she stated clearly that "the maxim of *terra nullius* was not to govern here."[5] The Ghost apparently did not hear straight when, in 1888, in *St. Catherine Milling,* the highest British Court established that

provincial Crown title could not be complete unless Aboriginal title was dealt with. The Court went on to say that the "lands, mines, minerals and royalties" were available to the Province as a source of revenue only when Aboriginal title had been extinguished.

The Ghost whispered, "Ignore all of that". On B.C. went, taking up Indigenous land illegally.

The Ghost's continued existence required delay in having the land question answered. While the land question remained undecided, the Province assumed the resources were held within its sovereign hands. For years the Ghost had been fed by federal government policy and legislation. For years, it was illegal under the law for Indigenous Nations to go to Court to address the land question, or for others to help to do that. When the land question was finally brought to Court, beginning with the *Calder* case[6], the Supreme Court of Canada rejected the Ghost's ghastly logic.

In 1973, *Calder* showed that Aboriginal title, which pre-dated and survived the assertion of sovereignty, exists as a legal right, independent of Crown recognition.

The Ghost whispered "It's a split decision 3:3 - ignore all of that". On B.C. went, taking up Indigenous land illegally.

Finally, with *Delgamuukw*[7], the Supreme Court of Canada urged the Province to give up the Ghost; "We are all here to stay". Aboriginal title had not been extinguished in B.C. It had jurisdictional and economic components. The Crown was to honourably fulfill its obligations. The Court said:

> [The manner in which the fiduciary duty operates with respect to the second stage of the justification test -- both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take -- will be a function of the nature of aboriginal title.] Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to **exclusive** use and occupation of land; second, aboriginal title encompasses **the right to choose** to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable **economic component.**[8] [emphasis added]

Aboriginal Title was here to stay.

But the Ghost was not dispelled. "Prove your title in Court" was what the Crown declared. And until then, on we'll go, taking up your lands and using the resources. The old liar and illusionist was still on the ramparts, and like the Ghost of Hamlet's father, cried, "Remember me".

The Court in *Haida* was up to the challenge. It concluded: "To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefits of that resource. That is not honourable."[9] The *Haida* Court reminded the Ghost that "lands in the Province are available to [the Province] as a source of revenue, whenever the estate of the Crown is disencumbered of the Indian title."[10] Reconciliation of the prior existence of Aboriginal societies, with *de facto* Crown sovereignty was the fundamental objective of Section 35 of the *Constitution Act, 1982.*

And then *Campbell*[11] shone more light. We learned what the Elders have always said: "Indigenous laws exist and have weight". Jurisdiction was not exhaustively distributed between Canada and the Provinces. Indigenous laws are protected and sustained by the common law, and embodied as Aboriginal rights in Section 35.

Since *Haida*, there have been dozens of cases challenging illegal Crown conduct, the vast majority of which have been won by First Nations. The Courts have shown that the conduct of the Province, reinforced by current policies and legislation, falls below a legal minimum standard. This presents a problem not only for Aboriginal communities, in terms of the continued poverty, but the denial policy generates unacceptable uncertainty with respect to Crown granted third party tenures.[12]

Giving Up The Ghost

And so it came to be that the Province tried to give up the Ghost. It turned to the Aboriginal leadership (who had recently concluded the historic Leadership Accord). The First Nations Leadership Council ("FNLC")[13] was formed to help make the systemic changes that the law required.

This resulted in the New Relationship 2005, which framed a common vision about making systemic changes together:

> We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.
>
> **We agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to Aboriginal title "in its full form," including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations' historical and sacred relationship with their territories.** [emphasis added]
>
> The historical Aboriginal-Crown relationship in British Columbia has given rise to the present socio-economic disparity between First Nations and other British Columbians. We agree to work together in this new relationship to achieve strong governments, social justice and economic self-sufficiency for First Nations which will be of benefit to all British Columbians and will lead to long-term economic viability.[14]

While the New Relationship Vision was clear that the agreed to pathway to recognition would be through shared decision making and revenue and benefit sharing, the challenge was to make the necessary systemic shifts based on the recognition of aboriginal title.

To be clear, the New Relationship Vision was not intended to be only an implementation of the *Haida* decision, which the Court indicated was an interim step towards reconciliation.[15] The

New Relationship envisioned a relationship which implemented title recognition through shared decision making and revenue and benefit sharing.

Shared decision making is not consultation. Consultation is a process by which the Crown collects comments and incorporates First Nations' views in the unilateral decisions it makes. Shared decision making cannot be imposed unilaterally, and cannot be understood as a process of fitting First Nations into existing provincial processes and legislation. Rather, shared decision making is a process where decision makers with respective jurisdictions, authorities and laws engage in a joint process of decision making towards reaching compatible or common decisions. All models of shared decision making emanate from the recognition that there are Crown and First Nation(s) decision makers that must each make a decision with respect to land and resource decisions. Based on this recognition, the core question is: *How will Crown and First Nation decision makers interact in making their respective decisions?* There are many models of shared decision making. Key to all of them is the need for effective processes designed to harmonize decisions and to resolve disputes early and efficiently.

Shared decision making requires creating jurisdictional space to enable Aboriginal laws to be effective on the land; it requires a recognition by the Crown of the jurisdictional component of Aboriginal title.

Revenue and benefit sharing also flows from title recognition. Because Aboriginal title has an economic component, and because provincial Crown title remains encumbered until Aboriginal title has been dealt with, there is a need to identify the streams of revenue to be shared, as well as to agree on distribution principles.

Implementing the New Relationship

For four years the FNLC worked closely with the Province to forge a pathway to implement the New Relationship and give effect to Court decisions.

However the *status quo* continued.

To be clear – the denial policy remained the driver for government negotiation and litigation mandates – not the New Relationship Policy. Denial remained embedded in Provincial legislation. The Ghost was still in charge.

A Legislative Proposal, supported by Resolutions, was tabled by the FNLC with the Premier in January, 2008. Legislation was chosen because it is a strong tool in terms of controlling Crown conduct, including Ministers and government decision makers and it shapes the development of policy. It is a tool through which making systemic change in government conduct is made possible. Legislation could implement the decisions of the Court and this would result in changes to government negotiation and litigation mandates.

The core elements of the proposal included: **Recognition Principles**, reflecting court decisions, to guide Crown conduct when making decisions over lands and resources; a **Provision of Statutory Interpretation Which Would Create Space** for the fulfilment of Crown obligations; and a **New Relationship Implementation Agreement** which would establish a framework for respectful engagement, new tools and dispute resolution mechanisms for shared decision making and revenue and benefit sharing to proceed.[16]

The Province agreed to discuss the Legislative Proposal and a Recognition Working Group ("RWG")[17] was tasked to explore this option.

The Ghost Does Not Give Up

Meanwhile, while the FNLC was in discussion with the Province about implementing the New Relationship and about the Legislative Proposal, the Province proceeded unilaterally to develop policies which limited effective shared decision making or revenue and benefit sharing outcomes. Provincial Crown conduct on the ground bore little resemblance to the discussions which were ongoing with the FNLC about making systemic changes.

Shared Decision Making: While discussions continued about the legislative proposal, the Province's conduct made it clear that it was only consultation and accommodation- and not shared decision making - in which the Province would engage. The Province unilaterally rolled out "strategic engagement agreements", to be negotiated at the option of the Province, with selected First Nations. These agreements are a form of land use planning, which may include the identification and protection of certain priority areas, and perhaps include the identification of management objective (such as ecosystem based management "EBM"). Then, the Province wanted to decouple this strategic engagement from management and tenuring decisions. In other words, the plan was for no true shared decision-making but, rather, it was about preserving unilateral provincial decision-making for management and tenuring, while giving the Province 'consultation credit' for this strategic engagement.

Revenue Sharing: The Province's position on revenue and benefit sharing was tabled on October 24th, 2008 and essentially equated accommodation with revenue sharing. The Province was prepared to attach revenue sharing to First Nations' support for "new major projects" going forward, and then sought to tie the monies to targeted goals to close the economic gap. The money realized would be discounted from treaty settlements. The Province's position was to require First Nations communities to enter into an "Economic Community Development Agreement" ("ECDA").

The Globe and Mail article on Nov. 14, 2008 reported that B.C. received $115 million in its November auction of leases and drilling licences for new natural gas exploration. The take brings the 2008 total to $2.157 billion, well more than double the previous annual record of $1.05 billion set in 2007 – and far ahead of Alberta and Saskatchewan in revenue generated from the sale of exploration rights. These were not the kinds of revenues contemplated to be shared.

Provincial Government Litigation Mandates: Premier Gordon Campbell, in his address to the First Nations Summit on September 28, 2005, said:

> "... let me say to Chief John – he has raised this with me before but I should say it to all of you today – that we have heard the concerns of how we have approached the litigation in the courts. We understand that our litigative strategies in the past have been offensive, and that was certainly not what our intention was. I have instructed the Attorney General and the Minister of Aboriginal Relations and Reconciliation to review our litigation strategy and to come back with a report to us as soon as possible, so that when we are in court, if we are in court, we are able to argue in court in a way that is respectful to you, to First Nations, and to the history and the spirit of what we are trying to do as we build this new relationship."

Good words spoken, but, on the litigation front, the Province's litigation mandates continued to be about denial – a legal conversation funded by the public purse in two cases which were before the Courts on advance costs orders.

In the *Tsilhqot'in* case[18], in defence to declarations sought of Aboriginal rights and title by the Tsilhqot'in, the Province erected a new legal theory - new-speak for the Ghost's favourite doctrine, *terra nullius*. Relying on a narrow interpretation of *Marshall and Bernard*[19], the Province argued that Aboriginal title exists only in relation to small sites that were physically occupied, such as village sites. The effect of the argument is extinguishment by litigation: the onus is on First Nations to prove their small spots, one spot at a time; the argument goes that because First Nations have the onus to prove Aboriginal title, should they fail to meet this onus in Court, the lands and resources belong to the Province by default.

The Court rejected the postage-stamp theory:

> What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries.[20]

The Court also found that the Tsilhqot'in proved title to a large tract of land; however, because of a pleadings defect, no declaration was granted. Had a declaration been granted, the Court would have found that the Province's jurisdiction under the *Forest Act* was ousted by virtue of s. 91(24).

In the *Jules and Wilson* litigation[21], denial permeates every feature of the litigation - denial in the impugned statute; denial through pleadings; denial through litigation tactics; and ongoing denial through Crown conduct while the litigation continues. Regarding the pleadings, the Province continued to plead *terra nullius*: "significant areas within the Browns Creek Watersheds are vacant Crown lands and are not occupied or possessed by descendents of the Okanagan (or Secwepemc) people"; further, the Province pleads that the Okanagan and Secwepemc are not sufficiently organized or civilized to hold title; and that the Okanagan and Secwepemc never exclusively occupied or possessed Aboriginal Title territories, and if they did, their Title was extinguished when the Province issued fee simples, leases, licences and permits to third parties.

The first two of these defences are demeaning, and the last is a recycled version of an earlier argument which was defeated in *Delgamuukw*.

The Ghost was still in charge. While the FNLC, the RWG and the Province engaged in sincere and frank discussions about implementing the New Relationship, Indigenous Peoples on the ground continued to experience the obstacles of denial. While denial continues, so too does the devastating poverty in Aboriginal communities.

Premier Gordon Campbell, in his letter to the FNLC of February 20, 2008, was reassuring:

> "I would like to reiterate my government's position that we recognize the existence of Aboriginal rights and title as set out in the common law and the Constitution."

Frustrations Mount

It is a dangerous counsel of cynicism that ignores legal developments. One might ask, rhetorically: what kind of government systematically disregards the courts' interpretation of the country's laws?

Frustration was mounting in Aboriginal communities. Finally, the Aboriginal leadership saw that direct action was the only recourse. In November, 2008 the UBCIC (and later the FNS) passed a Resolution stating that they would use direct action during the upcoming provincial election and the Olympic Games to force systemic changes.[22] The public needed to know.

The Premier was given the UBCIC Resolution; it was followed by a strong letter. The Premier consented to having a meeting. The FNLC said that the "recognition legislation" discussions had to be elevated to the highest political level. The Premier agreed. He appointed a team to work with the FNLC and their advisors to explore concepts for a *Recognition and Reconciliation Act.* Discussions began.

Part 2: The Ground Shifts

On February 18, 2009, the B.C. Court of Appeal released Reasons for Judgment in two decisions, *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission).*[23] These decisions had a radical impact on what followed.

The BC Utilities Commission ("BCUC") had declined to rule on whether or not BC Hydro and the BC Transmission Corporation had fulfilled the Crown's duties to consult and accommodate in relation to two energy projects: one was an energy purchase agreement between BC Hydro and Alcan, and the second was the issuance of a certificate of public conveyance and necessity ("CPCN") for the Interior to Lower Mainland transmission project ("ILM"). The B.C. Court of Appeal found that the Commission not only has the power to decide issues concerning consultation, it has the **positive duty** to do so.[24] While the BCUC does not have the duty to conduct consultation itself, it is the forum within which any disputes regarding consultation and accommodation concerning an application before it must be resolved. The stakes were high; the defect in the Crown's obligation was passed to third party interests. BCUC's failure to assess the fulfillment of honour of the Crown obligations, in the case of the ILM project, resulted in the Court suspending the CPCN pending completion of the inquiry into consultation.

The Court also brought together for restatement some of the major principles which had been decided in the consultation cases - principles which the Province had not translated into practice, as well as new imperatives:

- consultation must begin at an early stage of a government plan and before the plan crystallizes, so that First Nations are not left to face a plan that is an accomplished fact.[25]

- timely access to a forum to determine consultation disputes is a corollary of the principle of timely, and early, consultation. Where there is a tribunal with the power to approve the plan developed by government, it must accept the responsibility to assess the adequacy of consultation and accommodation.[26]

- the Crown's duty requires "interactive consultation and, where necessary, accommodation at every stage of a Crown activity that has the potential to affect Aboriginal interests."[27]

- where a decision-maker is required to approve Crown activity that engages the duty to consult, the decision-maker's first task in assessing the adequacy of the Crown's actions is to determine the scope and content of the duty.[28]

- "if consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed."[29]

- the BCUC could not rely on the Environmental Assessment ("EA") process as sufficient to fulfil its consultation and accommodation duties. The current EA regime is "not the same process considered in *Taku*"[3031].

- the Court was not persuaded by BC Hydro's "no new impacts" argument, and stated that "the surface facts would seem to indicate that BC Hydro will at least participate in the infringement."[32] [emphasis in original]

The day after the decisions were released there was another meeting of the Province's and FNLC negotiating teams. There was a stunning arrival at consensus by leaders representing ancient, seemingly intransigent combatants. The Province agreed to recognize Aboriginal Title existing throughout the Province without requirement of proof or strength of claim, but wanted recognition of co-existing titles too. Even though not required (there were no signature lines on the document) representatives of the Province and the FNLC signed the Discussion Paper's birth certificate. There was hope in the room. With provincial recognition of Aboriginal title, a new era of reconciliation could begin. Finally, the long struggle by the ancestors looked like it was coming to a successful close, and a new conversation could be had.

What emerged from those discussions was a Discussion Paper on Instructions for Implementing the New Relationship, released in February, 2009. I refer to this Discussion Paper as "the Paper". The full text of the Paper is attached as Appendix "A" to this paper.

A map depicting tribal boundaries of Indigenous Nations (not Indian Bands) in B.C. was attached to the Paper. The map came into play later and caused enormous difficulties, which I will discuss.

The Proposed *Recognition and Reconciliation Act*:
Exploring the Provincial Interests in Recognition Legislation

In order to understand what developed it is necessary to set out what I understand the Province was trying to achieve in these discussions.

A key provincial interest was fixing the policy framework for Aboriginal/Crown engagement. The Province's consultation policy was developed unilaterally, and had been found deficient by the courts. The Province wanted to achieve process certainty. They wanted to fulfil their legal obligations and stop losing in court.

The vision was of long term stable relationships with far fewer than 203 First Nations, expressed through agreements covering large landscapes. Dealing with 203 Indian Bands was not only unwieldy, but also the Court in *Tsilhqot'in* said that the Province must engage with the proper

title and rights holders, which are not necessarily Indian Bands[33], and the Province needed First Nations' assistance.

To achieve these objectives, the Province was prepared to make certain commitments backed up by legislation. In particular:

The Province was prepared to assume greater than *Haida* obligations (although these were not yet defined) in its commitment to conclude comprehensive agreements with Indigenous Nations who had "reconstituted", in the areas of land use planning, management and tenuring and revenue and benefit sharing (all undefined terms). These four agreements were part of the Action Plan of the New Relationship. While the Province had concluded land use planning arrangements with some First Nations, the other three agreements largely had not materialized.

To assist Nation building, the Province was prepared to provide capacity, in the form of a commission, (whose terms of reference had yet to be defined) to assist First Nations resolving shared territory and overlap conflicts. The assumption was that by providing support mechanisms – which would be controlled by First Nations – for unity building, this could result in increasing clarity about who the Crown must engage with for the purpose of shared decision making and the discharge of Crown obligations, and increasing stability leading to agreements guaranteeing process certainty for third party granted Crown tenures. This required encouraging collaborative and co-operative arrangements between Indian Bands who might, as one example, be members of the same Tribe or Nation.

Until comprehensive agreements were in place, the Province would engage in shared decision making for specific projects (to be defined) and they agreed to work with the FNLC to fix the policy framework for consultation which would be better than the existing policy (with no discussion as to what that new policy framework might look like).

The Province wanted to make clear that any legislation which recognized title would not affect Crown granted third party tenures. To the degree that an existing tenure was legally deficient because it was issued in a manner which violated the honour of the Crown, it would remain legally deficient and the current legal avenues and remedies for First Nations to challenge such tenures would remain available.

A positive level of consensus was emerging from these discussions. This was reflected in the Speech from the Throne, on February 16, 2009, where the Honourable Steven L. Point, OBC (Xwĕ lī qwĕl tĕl) Lieutenant-Governor, announced the Recognition and Reconciliation Legislation.

> This government is working with First Nations to develop a Recognition and Reconciliation Act that will establish a new statutory framework to further the implementation of the New Relationship.
>
> It will acknowledge, and place in a provincial statutory context, that Indigenous people have long lived throughout British Columbia and that this fact does not require proof.

As the Lieutenant Governor said we had to try to "get it right" for "the generations that follow", for "the enduring health, strength and enrichment of our province". The stakes were high.

It is important to note that, in a most significant area, the Throne Speech reflected the place where no consensus had been reached since discussions began with the Province about implementing the New Relationship. The FNLC had a mandate to seek recognition from the Province of Aboriginal Title existing everywhere in the Province, without requirement of proof. The Province was then only willing to recognize that "Indigenous People have long lived throughout British Columbia, and this fact does not require proof."

We worried that this enduring obstacle would not be dispelled. With the Paper, perhaps now, the Ghost could be put to rest.

Personal Reflections on the Paper

I have given all of my creative energies, my youth and my middle age, to working with Aboriginal peoples to achieve the justice they deserve. I have been rewarded beyond measure. I have always considered myself ridiculously fortunate and privileged to be of service in the work which I do, for people I love and who love me too. I have been taught lessons about spirituality, love and respect, which has enriched everything else I do. I do not meet many lawyers who say, as I feel, that my livelihood has led to a transformation of self that I could not have imagined possible.

Having participated in the development of the Paper, I believed my work was at a turning point.

With the Province's position reversing from denial to a commitment to shift Crown behaviour based on recognition of Aboriginal Title, I anticipated a dramatic movement from the dysfunctional, demeaning, adversarial relationship that had been dominated by the Ghost for over 150 years. With recognition of Aboriginal Peoples and their title to their lands, the complex and on-going journey towards reconciled titles, laws, and jurisdictions could now occur.

Sometimes the only available transportation is a leap of faith. In my hopes and dreams, I saw in the Paper the transformative possibility in which First Nations and the Province would advance processes of reconciliation. Through legislation, the Province would provide clear instruction to government and to every civil servant, consistent with Court decisions, as to how they would act, based on the recognition, rather than the denial, of Aboriginal title.

The Paper set a baseline for provincial crown conduct, making clear and transparent the legal minimums that should result in changes to provincial negotiation mandates, to policies, and to other provincial legislation. First Nations had been calling for this kind of change for many years.

From the perspective of the legal conversation in the Province, the Paper had potential to be a Ghost buster. Provincial litigation mandates would need to change. No longer should First Nations be required to go to court, compelled to prove the obvious, spending millions of dollars taken from pure poverty, to obtain remedies to protect, manage and receive benefits from their ancestral homelands. The Province would have to give up the approaches they have taken in Court, including the small spots theory which was the Ghost's recent invention in the *Tsilhqot'in* case.

Without having to analyze the strength of a title claim, the Province's decision makers would instead enquire with First Nations about potential interferences by decisions which were being contemplated, and engage with them about finding accommodations. Ended would be court challenges by First Nations for the frequent errors by provincial decision-makers in assessing the

strength of claim. Ended would be the Province's first line of attack in Court against First Nations, which has been the overlap issue used to minimize a First Nation's strength of claim, in order to lessen the Province's obligations about accommodation.

The Paper promised new processes and agreements for implementing shared decision making to steward the land. New institutions would be established for better dispute resolutions. Revenue and benefit sharing, could help end First Nations' economic marginalization.

The land question looked like it was resolving. The **where** of Aboriginal title would be settled. The Paper recognized title existing everywhere in the Province. The **what** of Aboriginal title had been settled by the Court in *Delgamuukw*. The Paper provided a mechanism to address the **who** of title recognition.

The courts, which had been labouring under the burden of lengthy title and rights trials -- with often inconclusive results -- could be used for better purposes.

At last there could be a real conversation at a table of equals, finding a way to live together that was mutually beneficial, respectful and prosperous.

When I started working as a lawyer for the Union of B.C. Indian Chiefs in 1977, Grand Chief George Manual said to me: We want recognition of aboriginal title, from B.C. from Canada. I imagined soon being able to say to him: we've done it, and now another generation can continue to forge the way.

Unfortunately, as it turns out, I can't say that yet.

Part 3: The Ghost Meets The Paper

Initially, Resolutions were passed by First Nations' organizations by an overwhelming majority, encouraging the Paper, and directions were given to the FNLC to commence legislative drafting, subject to bringing back any draft legislation to First Nations for approval. Five Chiefs from the Secwepemc Nation abstained from the vote, expressing the need to move cautiously. Two Chiefs voted against the Paper.

And then, the eruption. The ground shook underfoot and debris scattered everywhere. In a few short months the Paper generated more press about the land question than had been generated in this province for years.

Strident legal commentary from Industry/Business and from First Nations' lawyers and advisors projected on the Paper their worst legal fears. The Paper was the target of legal speculation, interpreted as if it were an enacted statute.

As in any family when a change is proposed, alarm bells should sound if each declares a disastrous result but for opposite and opposing reasons. Here is a sampling of the responses:

Art Manuel, writing for "INET" (Indigenous Network on Economies and Trade) circulated a Memorandum[34] during the first week of the Paper's appearance, declaring the Paper an enemy to Aboriginal sovereignty. Quickly on the heels of the Memorandum was an attack from Industry/Business in a paper calling itself "Observations"[35], prepared by Thomas Isaac and Keith Clark, declaring the Paper an attack on democracy. Both papers were media events.

Art Manuel stated: "The Recognition Act does not offer more than what has already been judicially recognized by the courts." Isaac and Clark stated that the Paper "goes well beyond the decided jurisprudence."

Art Manuel stated: "The primary purpose of the Recognition Act is to provide economic certainty by giving the Province the power to establish an engagement framework for recognition of Aboriginal Title and Rights. This framework concedes that British Columbia can continue on with business-as-usual." Isaac and Clark stated: "In short, First Nations will have a veto over every aspect of resource development in B.C."

Both papers contained legal inaccuracies.

Art Manuel stated: "[The Recognition Act] would give the Province the power to define Aboriginal Title and Rights." In law, the Province has no power to define Aboriginal Title and Rights. Aboriginal Title has been defined by the Courts in the *Delgamuukw* decision.[36] The Supreme Court of Canada also said: "jurisdiction over aboriginal title must vest with the federal government", and: "Provincial governments are prevented from legislating in relation to ... aboriginal rights."[37]

The Isaac and Clark paper stated: "No final court decision has actually found aboriginal title anywhere in Canada." In fact, Mr. Justice Vickers found that the Tsilhqot'in had met the test to prove title to a vast area of Tsilhqot'in territory, some 200,000 hectares.

Isaac and Clark stated: "The Paper also states that aboriginal title includes a First Nations' jurisdictional component – we are unaware of any material case law that supports this assertion." In law, the jurisdictional element of Aboriginal title was found to exist in the *Delgamuukw* and *Campbell* cases.

The FNLC responded to both the Memorandum and the Observations, and they hosted Regional Forums and community meetings to introduce the Paper and to answer questions. A question and answer paper was widely distributed by the FNLC containing frequently asked questions, and addressing misconceptions about facts and the law which had taken on a life all their own.

In May, a Commentary[38], published by fourteen lawyers representing First Nations, was launched through the press, throwing many into a hundred doubts.

The Elders advised: "Go slowly. Go carefully. Get this right."

An irrational element was scrambling in what should have been -- what I'd hoped would be -- a rational conversation. Friends, colleagues and clients became intoxicated with suspicions. And I was caught within it in surprising and disturbing ways. Because of my participation in developing the Paper, I felt their attack against the Paper directed to me personally. I felt uprooted. I felt the topsy-turvy feeling of total vulnerability. As the weeks marched on, I was living under a cloud of sorrow. The messy, unfinished work of my heart showed up as my teacher. Attempting to respond, to put the discussion back on its proper footing, I was eventually told not to speak but to listen. I gradually realized that the Ghost, the stowaway in the enterprise of European colonial imperialism, hadn't just been sitting at the table, influencing successive governments for generations. It had also produced, in the First Nations peoples, a response. The response was fear. And, of course, fear engenders its own Ghostly projections.

The FNLC addressed the criticisms directed at the Paper – using a power point presentation at community meetings to explain what the Paper was and what it was not.

What the Paper Does

- The [proposed] legislation addresses the offensive Douglas proclamation and is the culmination of a long struggle to fight for land and rights we never relinquished.
- Recognizes that Aboriginal Title and Rights exist in B.C. without requirement of proof or strength of claim.
- Creates a process for shared decision-making over lands and resources.
- Enables revenue and benefit sharing agreements between Indigenous Nations and the Province.
- Seeks to work with First Nations communities to rebuild and strengthen Indigenous Nations, each with the right to determine their own political forms of governance.
- Establishes new dispute resolution processes.
- Title recognition applies to all provincial ministries and agencies involved in the management of lands and resources and will take priority over all other provincial statutes dealing with these subject matters.

What the Paper Doesn't Do

- Change the definition of Title established by *Delgamuukw* and other cases.
- Diminish constitutional and common law of Aboriginal Title and Rights and Treaty Rights.
- Prevent First Nations from going to Court for Aboriginal Title and Rights, Treaty rights or to enforce Crown obligations.
- Create any new constitutional rights or law-making authority.
- Give government or First Nations a veto.
- Change federal and provincial division of powers.
- Change the jurisdiction of the Province or any Indigenous Nation under the Canadian Constitution.
- Replace negotiations underway at existing tables.
- Force B.C. First Nations to reorganize their political structures against their will.
- Give the Province the power to determine what constitutes an Indigenous Nation.

The opposition to the Paper grew. Although there was wide support for title recognition, there was not support for the concepts expressed in the Paper.

By June, 2009, the FNS passed a Resolution resolving to develop a new mandate, and specifically rejecting the Indigenous Nation concept which was reflected in the Paper.[39] The UBCIC defeated a Resolution to move forward with the legislative initiative, and advised the Province that there was not support for the initiative.[40]

On June 25, 2009, the FNLC made a decision to set aside the Paper, and try to build renewed consensus among First Nation, and continue build relations with and Industry/Business.

Industry/Business had formed an alliance called the Industry Working Group ("IWG")[41] in response to the Paper. The Province's rules and regulations, which Industry relies on as they go about their operations, had created a flower bed of uncertainty. The FNLC met several times with this group, exploring areas of mutual interest and listening to Industry/Business' concerns.

In its profound wisdom, the FNLC decided not to respond publicly to the Commentary. It is unseemly and unwise to enter into a public debate with lawyers who are well respected for their work with First Nations. The basic point of the FNLC was that we had to use our talents to come together. The FNLC requested that a lawyers' caucus be formed of all lawyers representing First Nations who wished to participate. The RWG joined the lawyers' caucus. Many First Nations' lawyers, despite scheduling complexities, met many times over the summer and prepared a Concepts Paper[42] to assist the Chiefs in their deliberations at an All Chiefs' Assembly held August 25 to 28, 2009.

At that All Chiefs' Assembly, it was clear beyond doubt that the Paper was dead. Emotions were raw in the room. As Grand Chief Stewart Phillip said, "We have never been down this road before." Then, in their supreme wisdom and beauty, the Leaders and Elders went into ceremony, and a song was sung to mark the Paper's death, and ancient rhythms drummed the congregation back into primordial time, and we became one again. The Paper was respectfully buried.

Post-Mortem

So what was the cause of death?

I attended many of the Regional Forums and community meetings. They were profound experiences; I was deeply honoured to witness the conversation and moved, as one can be when listening to people talking who have a deep spiritual connection to their land. People spoke from their hearts. Even those who raised their voices in anger cared about the land question enough to come and show us their concern and their fury. We were on sacred ground. I began to be changed once again.

There were many reasons why the legislative initiative envisioned in the Paper failed. Included on the list was a strong lobby by some in Industry/Business. I believe that there was poor communication between the provincial leaders who supported the Paper and those working for the Province. From that group, I heard the Paper openly opposed, and many had not heard of the initiative. Canada was missing in action. The process leading to the Paper was not sufficiently inclusive – a concern which was expressed by First Nations' advisors and Business/Industry. The election created its own difficulties. I do not propose to discuss the whole political dynamic.

However, what I would like to address is what I heard at the Regional Forums. I began to hear, and to better understand, the obstacles that were preventing this initiative from gaining trust and support among First Nations.

1. The Map

The Province attached the map to the Paper. It was an old map; it showed approximately thirty tribal groupings. The Province latched on to it because maps create the illusion of certainty and simplicity. In many ways a map is dangerous because it displaces the reality of the geography and the people within it. In this situation, the boundaries on the map were inaccurate. There was no question about that and, indeed, the map came with a disclaimer. But, in spite of its inaccuracies, and over the objections of the FNLC, the Province insisted on using it and attaching it to the Paper. The map was the torch that set fire to the debris left by the chaos of the Ghost. First Nations felt their very existence and their place on the land was, once again, being redefined by an alien power.

Many First Nations traveled great distances to the Regional Forums and meetings to correct the map and to comment about it. The rock hurled at the Paper was that the Province would become involved in determining the "who" of title recognition, contrary to the fundamental principle of self-determination recently affirmed in the UN Declaration on the Rights of Indigenous Peoples, and case law here in Canada.

While every Indigenous Nation has its own creation stories, there are no creation stories about Indian Bands. The 203 Bands in B.C. is the legacy left behind by the Ghost, created by the assimilation policy enshrined in successive *Indian Acts*. This was Canada's doing. Ancient governments were broken up into *Indian Act* Band Councils. Nations were fractured and weakened, and hereditary systems of governance denied and disregarded.

The problem is complex. Many First Nations today choose to exercise their self-determination through an Indian Band governance structure, while others wish to re-build their ancient governments Meanwhile, the *Indian Act* remains in place.

Many people at the Regional Forums talked about the need to dissolve the pattern of aggression that overlap and shared territory conflicts generate, and to allow for the healing of the trauma caused by the destructive attack on traditional governments. There are overlap and shared territory conflicts, arising from ancient disagreements and also from the impact of the *Indian Act*. While there are traditional methods to resolving these disputes, there is a need for new dispute resolution processes which are adequately resourced. The courts have proven to be an ineffective and expensive dispute resolution mechanism. The process offered by the BCTC to resolve overlap issues is fundamentally flawed, as evidenced by the proliferation of court cases about overlap issues, either immediately before or following the conclusion of every modern Treaty in B.C.[43]

We heard at the Regional Forums that the "who" question of Aboriginal title recognition must be carefully removed from the Ghost's grasp. In addition to new dispute resolution mechanisms, it must be made clear that First Nations alone have the jurisdiction and capacity to create their own map, and the boundaries they determine need to be respected by the Crown. This is in order to make needed foundational shifts for decision-making arrangements to occur, and to settle revenue and benefit sharing arrangements. The costs to help First Nations sort out these questions should be borne by government because it is they who created the problem.

This issue presents an opportunity to engage Canada, since it is Canada's legislation which perpetuates the problem.

Left unresolved, this issue is a fire that will not be put out.

2. Core Commitments

The Paper was silent about what actually would change on the ground. I came to realize this was a fatal flaw. The Paper was a proposal for a framework with no details. The Province did not address core commitments with the RWG and the FNLC, notwithstanding requests to do so. Matters were not helped by the Province's refusal to discuss even a modest proposal for sharing gaming revenues in the interim, notwithstanding such agreements are in place with First Nations in many other provinces. There were no answers to questions about what would be in comprehensive agreements, or what was meant by shared decision-making processes, or what situations would trigger shared decision making. There had been no discussion about what the new policy framework would look like, or what revenues would be shared, or how impact and benefit and accommodation agreements, which have been so successful, would continue. There were no details about new dispute resolution mechanisms to address First Nation/Crown disputes or disputes among First Nations regarding overlap or shared territory issues. Without knowing what would change in practical terms, the First Nations who were in opposition to the Paper saw the initiative as a Trojan Horse, providing nothing better than the *status quo,* and perhaps something far worse.

A key obstacle to the Paper was the issue of the past. Much mud was flung at the non-derogation clause in the Paper. The scope of the Paper was often misinterpreted, and those opposed to the Paper promoted the view that the Paper meant that First Nations were perfecting Crown granted tenures. While these misunderstandings could be corrected, there was no answer to the fact that the Province had made no commitments to address past and ongoing infringements.

The issue of the past is volatile, and the failure to address it left the Ghost manipulating the event. Chief Don Moses asked the leaders at a UBCIC General Assembly held in August, 2009, how many acres of land they had gotten back over the last 40 years, and not one Chief raised their hands. The vast majority of tenures, particularly long-term tenures, have been issued in First Nations territories without the fulfillment of any Crown obligations about consultation and accommodation. Virtually the whole of the territory of Chief Moses' people has been taken up by Crown granted tenures, especially grazing leases. But the land is the culture; the land is the future. The Paper had no answers.

The key core commitments where understandings and solutions need to be advanced include:

(a) Shared decision making – what does it mean? What models are available? What dispute resolution mechanisms will be established so Crown and First Nations' governments' decisions can be harmonized? Will this mean a change to other key Provincial Acts, such as the Environmental Assessment Legislation where shared decision making is effectively precluded? What capacity will be provided for First Nations to engage in shared decision making?

(b) Revenue and benefit sharing – what streams of revenue will be shared? What will the distribution formula be for sharing between and among First Nations? How will the Impact and Benefit and Accommodation agreements be continued?

(c) Past and ongoing infringements - how will the past be addressed?

(d) Sharing lands and resources - how will First Nations access and control more land for the continuation and protection of their culture and their economies?

(e) Dispute Resolution Mechanisms to address overlap and shared territory issues and for Nation building – what will these mechanisms look like? Who will pay? What will be the role, if any, for the Courts?

Addressing these questions provides stepping stones to reconciliation. Further delay in addressing these questions feeds the Ghost.

3. Reconciling With the Province

At the Regional Forums, speakers spoke passionately, expressing a belief which has shaped their political outlook, which is that it is dangerous to acknowledge the Province's authority and jurisdiction, historically used to steal Indian lands "fair and square". Many questioned if First Nations are giving up by agreeing to the jurisdiction of the Province or by acknowledging it in any way. They said that the Nation to Nation relationship was with Canada, and Canada was nowhere to be seen.

I explained the impact of the Court's s. 35 jurisdiction on this question. While in the past, the direction from Aboriginal leaders was to not recognize the jurisdiction of the Province, the Court in *Haida* has now clearly stated that he Province may continue to manage the resources pending claims resolution, but must do so in keeping with the honour of the Crown[44], except where the Courts have found a provincial jurisdictional ouster has occurred in respect of treaties, in the context of a Douglas Treaty in the *Morris* and *Olsen* case.[45]

The Courts have also said that s. 35 contains two jurisdictions. The Court in *Delgamuukw*, *Haida* and *Campbell* has stated that s. 35 contains Aboriginal jurisdiction to support Aboriginal laws and the exercise of Aboriginal Title and Rights and Treaty Rights. As well, s. 35 contains Crown jurisdiction to infringe Aboriginal Title and Rights but only after meeting justification requirements including carrying out the honour of the Crown.[46]

Through legislation, the FNLC was attempting to push back and constrain the Province's claims through enforcing the honour of the Crown obligations so as to open up jurisdictional space to stand up Aboriginal laws. The rules governing the jurisdictional interplay can then be worked out through agreements.

Many said that they understood this legal reality, and saw the value of legislation which compelled honourable Crown conduct, but they could not bring themselves to co-operate in legislation with the Province in which First Nations would recognize Provincial Crown title. First Nations said this in different ways. Some said, "We'll recognize the Provincial Crown's title, once the Crown recognizes our title and engages respectfully with us." Many speakers said that the next move belongs to the Province, and that requires ending positions based on fettering arguments and final decision unilateralism. Others suggested that perhaps the question was a timing issue – was it time to recognize the Province?

Many others said that the conversation about reconciliation required Canada to be at the table. Canada's response to the Paper was a rather pathetic letter from the Deputy Minister of INAC

Canada to the Deputy Minister of the B.C. Ministry of Aboriginal Relations and Reconciliation, dated March 23, 2009, a copy of which is attached as Appendix "B" to this paper.

It is reasonably predictable (politically and economically) that in a s. 35 reconciliation process, all governments will need to recognize each others' existence – otherwise, what are we reconciling?

This discussion about reconciliation was not brought to closure.

4. Government Negotiation Mandates

In the early days of the Regional Forums, I believed that the initiative in the Paper was real, that it would lead to a better future. A leap of faith was required. I recounted the victories we'd had in the many court cases. The response from many was: but at home, on the ground nothing has changed. I persisted; then I listened; and then an important turning point came for me. This came on August 10, 2009, when I saw the response of both governments to the Common Table about government Treaty negotiation mandates.

By way of background, the Common Table was formed by First Nations in the British Columbia Treaty Commission ("BCTC") process whose negotiations were all at an impasse because of fixed government negotiation mandates. Working together, these First Nations asked the governments to respond to their questions about how government Treaty negotiation mandates would change so as to bring these mandates in line with Court cases, and break the systemic impasse.

Government Treaty negotiation mandates can be traced to the Federal Comprehensive Land Claims Policy of 1986[47], formulated 20 years ago before any of the modern jurisprudence which has shaped our understanding of Aboriginal Title and Rights and the Crowns' relationship with First Nations.

Government Treaty negotiation mandates have been the subject of criticism for many years. The 2006 Report of the Auditor General of Canada sounded an alarm that these negotiation mandates create a deep dysfunctionality:

> ... Other officials observed that this process is structured as if the main risk faced by the federal government in treaty negotiations is that of deviating from existing mandates, rather than that of not signing treaties. (para. 7.60)
>
> ... There are fundamental differences in views between many First Nations of the B.C. treaty process and the federal government. For example, the federal government does not recognize aboriginal rights unless they are proven in court. B.C. First Nations consider that aboriginal rights and title should be acknowledged before negotiations begin. At some negotiation tables, First Nations believe that they are owed compensation for past denial of their rights. The federal government considers that there is no basis to establish such compensation since negotiations are not based on rights. Another critical difference is the federal government's expectation that treaty constitutes full and final settlement with respect to the aboriginal rights and title claimed by a First Nation, while First Nations see treaties as evolving documents recognizing their rights and title. (para. 7.27)

The Auditor General's Report speaks to the fundamental differences between the Indigenous participants and Canada. These three points of impasse - recognition of Title and Rights, the nature of Title and Rights, the extinguishment of Title and Rights – are the signposts of division, pointing the negotiators in irreconcilably different directions.

The human and financial cost of such dysfunction is high. First Nations in the BCTC process have spent over 400 million dollars since 1993 – money borrowed from their children and grandchildren to engage in negotiations. Estimates exceed a billion dollars in total funds spent on this process.

The Common Table waited. Then on August 10th, 2009, they received a response from both Canada and B.C. The response was Ghost-speak. There would be no real change on fundamental issues of impasse.

I started to understand, more completely than ever, the distrust and hopelessness being expressed in the communities about the Paper. I felt my wings of hope atrophy.

The response to the Common Table had been released as the Lawyers' Caucus Report was being completed, and the analysis of the response by First Nations' lawyers and advisors was reflected in the Report. The Report cited some of the key areas where First Nations have identified concerns with current provincial and federal Treaty negotiation mandates:

- requiring a "modification and release" model, where once a Treaty is concluded, First Nations can only rely on the rights included in the Treaty;
- unwillingness to negotiate a meaningful reconciliation between Aboriginal title and Crown title, by limiting land offers to a range from 2% to 5 % of a First Nations' territory, and insisting that this "Treaty Settlement Land" must be held as fee simple land rather than under the constitutional status of s. 91(24) or s. 35;
- refusing to recognize First Nation ownership of foreshore and submerged lands;
- refusing to negotiate with respect to private lands;
- refusing to include method, location and timing and other aspects of Aboriginal harvesting rights in Treaty harvesting rights;
- forcing First Nations to accept that Crown granted extraction activities and tenures can limit Treaty harvesting rights without having to meet requirements for justified infringements;
- refusing to negotiate compensation for past infringements of Aboriginal Title and Rights;
- refusing to recognize the implications of First Nations' inherent governance rights and laws, including insisting on a concurrent law model which means that First Nations lose their constitutional protection against the application of provincial laws, harvesting rights are subjected to provincial regulations, and there is no exclusive First Nation jurisdiction;

- excluding First Nation law making on their own lands in key areas such as some aspects of mining regulation;

- unwillingness to negotiate secure revenue streams or economic generating capacity in Treaties and insisting that taxation and other fiscal matters be dealt with principally in non-constitutionally protected side agreements;

- insisting that Canada be allowed to claw back transfer dollars if First Nations generate their own source revenue beyond a certain level.[48]

In short, many of the government Treaty negotiation mandates remained out of alignment with the Court decisions and the aspirations of First Nations, notwithstanding the many discussion between the FNLC and the Province in the context of the New Relationship, or about Recognition and Reconciliation Legislation.

I realized that, rightly so, the governments' response to the Common Table fueled the suspicion that the Province was not prepared to banish the Ghost.

Some Parting Thoughts

In the end, the Paper was burned up in the fire of the debris and fuel left behind by the Ghost, enflamed by the map. The FNLC showed brilliant leadership, worked tirelessly and with great love and extreme kindness and patience on this initiative. The Premier, together with the talented and dedicated people who worked with him, showed great leadership, courage and vision. They talked the talk, but the Ghost walked the walk.

It has been a most humbling and enlightening journey to work on this initiative, with hope, and see it fail, with reason. I am indebted to those whom I work with, and I offer my deepest gratitude for their wisdom and kindness, and for the stories shared by many, and the help provided by those whose paths crossed mine during this difficult personal journey.

With the sincere desire to see a solution emerge, I put out these observations.

To First Nations, I honour your important dialogue about reconciliation, which needs to continue. Systemic change can only be made from a point of unity. The Province believed that a point of unity had come together amongst First Nations, because of the resolutions which were passed to drive this legislative initiative. This was a key factor in the Premier agreeing to take the leadership he did, to move forward with this controversial legislation.

First Nations' unity has been expressed in the beautiful document, *"All Our Relations", A Declaration of the Sovereign Indigenous Nations of British Columbia*, signed by First Nations leaders on November 29, 2007, a copy of which is attached as Appendix "C" to this paper. All Our Relations expresses the kind of deep unity I am referring to. It is based on a common world view, which is an ethic and guiding law about respect and a spiritual connection to all living things. These teachings from your ancestors are a true gift to humanity. Your law teaches humans how to live symbiotically with all forms of creation, and to find unity in diversity as the central feature of the universe. These teachings and laws can help all humanity save Mother Earth.

This unity was fractured by political fear and fury on the issues that divide. Regional Leaders vs. Bands; Nations vs. Bands; your lawyers vs. our lawyers; lines on a map. Ruptures exploded the unity which had formed.

To UBCIC, I acknowledge your forty year anniversary. Forty is a big year. It was forty years that Moses wandered in the desert. Forty years ago, the Eagle, which was the name of the space shuttle that landed on the moon, mirrored an Indigenous prophesy: "When the Eagle lands, the Nations will rise again." Forty years ago, your Leaders and Elders planted the seed to work to answer the land question together in a good way. You have been nurturing this seed. your visioning now is fundamentally important for the future of the land and for all of our children yet unborn.

Over the last four decades, your leaders have fought hard and successfully, using the Courts and international forums to achieve standards and principles to guide Crown conduct. These standards are toe-holds in the hard climb to a better future. These standards were summarized in the Lawyers' Caucus Report, which I set out again here:

- Indigenous peoples have the right to fully exercise and implement self-determination. This includes the right to determine their own identity and membership in accordance with their customs and practices.[49]

- Aboriginal Title has not been extinguished in British Columbia, including on privately held fee simple land. It is an interest in land, is held collectively and includes a jurisdictional and economic component.[50]

- Meaningful accommodation includes addressing the legal elements of Aboriginal Title, including exclusive possession, the jurisdictional and economic component and the sharing of lands and resources.[51]

- Unilateral Crown decision-making is not honourable and does not provide certainty.[52]

- In making decisions about the lands and resources, the Province must recognize and honourably engage First Nations whose rights pre-existed and survived the assertion of Crown sovereignty, and who continue to exist today, with laws, governments, political structures, territories and rights inherited from their ancestors.[53]

- The relationship between a First Nation and the Province is a government to government relationship.[54]

- The objective of Crown Engagement must be to effect reconciliation, including creating space for the respectful operation of First Nation laws, jurisdictions, and governing authorities.[55]

- Any infringement of Aboriginal Title or Rights or Treaty Rights must meet the legal requirements for justification.[56]

- Past, existing, and ongoing infringements must be addressed as part of reconciliation.[57]

- Shared decision-making, through government-to-government agreements between the Province and First Nations, must occur for effective land use planning, management and tenuring.[58]

- Engagement with First Nations must occur for strategic-level, administrative, and operational decisions.[59]

- Treaties and agreements with First Nations must be honourably negotiated and implemented.[60]

Once a renewed, unified vision for reconciliation emerges, the strength amongst First Nations will be so powerful that the Crown will need to find their place within this reconciliation framework.

To the Province, I identify the great need for your governments to own that one of the main reasons this initiative did not succeed was the deep mistrust of the Province amongst First Nations. While misguided colonization policies have caused a breakdown in relations, these have been exaggerated by the smaller injustices and indignities which are ongoing. The day to day actions of Crown decision makers, guided by policies that are out of alignment with Court decisions, are impediments to reconciliation. There is a great anger and frustration in Indian country.

To build the trust that is lacking, the Province must change in deeds, not words. Small and important steps can be taken tomorrow by the Province to make changes which could be monumental.

I provide a short list of what the Province can do now to create a foundation of motivation and a sense amongst First Nations that there is sincerity to go down the path of reconciliation.

Here are some small steps which will produce a subtle paradigm shift:

1. Change government litigation mandates to eliminate egregious denial pleadings.

2. Change government negotiation mandates to align with court decisions. There are many who are available to assist in this task, if there is the will. I encourage independent oversight.

3. Amend the *Interpretation Act* to eliminate fettering arguments and make clear, notwithstanding what is said in other Crowns' Statutes, the Crown can and must implement its honour of the Crown and fiduciary obligations.

4. Encourage co-operation amongst First Nation governments, who are part of the same Nation, rather than exploiting differences. Avoid raising overlap and shared territory conflicts as part of a strength of claim analysis, but provide capacity to First Nations to address these conflicts. Provide capacity for First Nations' controlled dispute resolution mechanisms.

5. Both for those First Nations inside or outside of the BCTC process, expand the use and scope of interim measures agreements.

6. Take a flash point area and work collaboratively such as amending the *Environmental Assessment Act.*

7. Acknowledge and address the past - take what steps are possible.

8. Share revenue - take what steps are possible.

9. Honour existing Treaties. I encourage independent oversight.

10. Settle the *Tsilhqot'in* litigation honourably.

Only when perceptions change, can we expect to see a successful attempt at systemic change.

To Canada, I say show up for the discussion. Stop sitting on the fence. You may think it is safe because you built the fence, but the walls are crumbling. Take all of the steps suggested for the Province, above, which are within federal jurisdiction to address. In addition:

1. Remove the provisions of the *Indian Act* which were enacted as part of the assimilation policy, and which need to change to make way for self-determination. Give up the Ghost.

2. Ratify the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). Canada's position has been shameful. The UNDRIP was passed with a vote of 143 with only 4 against - Canada being one, along with Australia, New Zealand and the United States. Since then, Australia has adopted the UNDRIP, and New Zealand announced its intention to support the UNDRIP. There are great hopes that the Obama Administration will support the UNDRIP, leaving Canada standing in isolation. Article 43 states that the rights reflected therein "constitute the minimum standards for the survival, dignity and well-being of the Indigenous people of the world." Canada should be proud to uphold these minimum standards – not to avoid them.

As the lesson from South Africa teaches us, we must travel "the difficult path of confession, forgiveness and reconciliation".[61] All sides need to do that so that reconciliation can happen. Let us begin.

[1] This section is adapted from an article by Louise Mandell, Q.C., "The Ghost" in Maria Morellato, Q.C., ed., *Aboriginal Law Since Delgamuukw* (Aurora, ON.: Canada Law Book, 2009) 55.
[2] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 ("*Haida*"), at para. 25.
[3] Robert A. Williams, Jr., "The Savage as the Wolf: The Idea of the Indian on the Frontier Borders of the American Racial Imagination" (2006) 60 Western Humanities Rev. 9. Parts of his essay are adapted from his book, *Like a Loaded Weapon: The Relinquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005).
[4] Joseph Trutch, Commissioner of Land Works for the colonial government in British Columbia, 1867.
[5] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 270.
[6] *Calder v. British Columbia (Attorney General),* [1973] S.C.R. 313.
[7] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ("*Delgamuukw*").
[8] *Delgamuukw, supra*, at para. 166.
[9] *Haida, supra,* at para. 27.
[10] *Haida, supra,* at para. 59.
[11] *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123.
[12] For example, see: *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 BCSC 1505; and *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642.
[13] The FNLC is comprised of Executives from the B.C. Assembly of First Nations, the First Nations Summit and the Union of B.C. Indian Chiefs ("UBCIC").
[14] New Relationship Vision, Online: "http://www.gov.bc.ca/arr/newrelationship/down/new.relationship.pdf" www.gov.bc.ca/arr/newrelationship/down/new.relationship.pdf at p. 1.
[15] *Haida, supra.*
[16] A Legislative Proposal: The Indigenous Nations Recognition Act.
[17] The Recognition Working Group ("RWG") is comprised of Louise Mandell, Q.C., Debra Hanuse, Stacey Edzerza-Fox, Nancy Morgan, Jim Reynolds, Roshan Danesh and Melissa Louie.
[18] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 ("*Tsilhqot'in*").
[19] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 ("*Marshall and Bernard*").
[20] *Tsilhqot'in, supra,* at para. 1376.
[21] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 ("*Jules and Wilson*").
[22] UBCIC Resolution No. 2008-52, dated November 20, 2008.
[23] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA05800 68 ("*Kwikwetlem*"); and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 ("*Carrier Sekani*").
[24] *Carrier Sekani, supra,* at para. 51.
[25] *Carrier Sekani, supra,* at para. 52.
[26] *Carrier Sekani, supra,* at para. 53.
[27] *Kwikwetlem, supra,* at para. 62.
[28] *Kwikwetlem, supra,* at para. 65.
[29] *Kwikwetlem, supra,* at para. 70.
[30] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 ("*Taku*").
[31] *Kwikwetlem, supra,* at paras. 51-54.
[32] *Carrier Sekani, supra,* at para. 63.
[33] *Tsilhqot'in, supra.*
[34] Memorandum to Indigenous Peoples from Arthur Manuel, INET, re: First Nation Leadership Council British Columbia Recognition Legislation, dated February 28, 2009, responded to originally on March 18, 2009 (with a revised response on April 14, 2009).
[35] Legal Observations Concerning the "Discussion Paper on Instructions for Implementing the New Relationship", by Thomas Isaac and Keith Clark, dated March 9, 2009.
[36] *Delgamuukw, supra.*
[37] *Delgamuukw, supra,* at paras. 176 and 178.

[38] Recognition Act Commentary (A Submission to the Recognition Working Group (RWG) by First Nation Lawyers: Allan Donovan, Peter Grant, Micha Menczer, Greg McDade, John Rich, James Tate, Mike McDonald, Robert Janes, Murray Browne, Jack Woodward, Robert Morales, Renee Racette, Darwin Hanna, Michelle Good, dated May 26, 2009.
[39] First Nations Summit Resolution #0609.02, re: Recognition and Reconciliation Legislation, dated June, 2009.
[40] UBCIC Chiefs' Council in Vancouver – June 3 and 4, 2009.
[41] The Industry Working Group was comprised of the Aggregate Producers Association of BC, Association for Mineral Exploration BC, BC Cattlemen's Association, BC Chamber of Commerce, BC Federation of Woodlot Associations, Business Council of BC, Canadian Association of Petroleum Producers, Canadian Energy Pipeline Association, Central Interior Logging Association, Council of Tourism Associations, Guide Outfitters Association of BC, Interior Logging Association, Mining Association of BC, North West Logging Association, Truck Loggers' Association.
[42] Recognition Implementation Concepts Paper, prepared by the Lawyers' Caucus, dated August 19, 2009.
[43] *Chief Allan Apsassin et al. v. Attorney General (Canada) et al*, 2007 BCSC 492; *Tseshaht First Nation v. Huu-Ay-Aht First Nation*, 2007 BCSC 1141; *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722; *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 BCSC 1505; and *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712.
[44] *Haida, supra,* at para. 27.
[45] *R. v. Morris*, [2006] 2 S.C.R. 915.
[46] *Haida, supra,* at para. 27.
[47] One of the characteristics of a ghost is that its presence can be felt but not seen. The Comprehensive Claims Policy could not be found on Canada's website.
[48] Recognition Implementation Concepts Paper, supra, at pp. 11-12.
[49] *The United Nations Declaration on the Rights of Indigenous Peoples*, Articles 3-5, 18, and 20.
[50] *Delgamuukw, supra,* at paras. 111-112, 115, 119, 166, 169, 189; *Campbell, supra,* at paras. 134-135, 137, and 180.
[51] *Delgamuukw, supra,* at para. 203; *Haida, supra*, at paras. 47-50; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 54.
[52] *Mikisew, supra,* at para. 49; *Haida, supra,* at para. 27; *Van der Peet, supra,* at para. 310.
[53] *Haida, supra*, at para. 20; *Campbell, supra*, at paras. 135-137.
[54] *Taku, supra,* at para. 42; *New Relationship Vision, supra,* at p. 1.
[55] *Mikisew, supra,* at para. 1; *Van der Peet, supra,* at paras. 31-43; *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 626 at para. 22; *Haida, supra,* at paras. 16-17; *Taku, supra,* at para. 42.
[56] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at paras. 81-83; *Tsilhqot'in, supra,* at para. 1113; *Mikisew, supra*, at para. 64.
[57] *Delgamuukw, supra*, at para. 203; *Little Salmon/Carmacks First Nation v. Yukon,* 2008 YKCA 13 at para. 91.
[58] *Delgamuukw, supra*, at para. 167; *Tsilhqot'in, supra*, at para. 1113; *Mikisew supra*, at paras. 54-55, 64.
[59] *Haida, supra*, at para. 76; *Dene Tha' First Nation v. Canada*, 2006 FC 1354 at paras. 106-110; *Squamish Indian Band v. British Columbia*, [2005] 1 C.N.L.R. 347, at paras. 73-74.
[60] *Mikisew, supra*, at paras. 33-34; *Haida, supra,* at paras. 19-20, 25; *Little Salmon/Carmacks, supra,* at paras. 63-71, 90-91.
[61] Desmond Tutu, "Let South Africa Show the World How to Forgive", Knowledge of Reality Magazine, 1996-2006.

Discussion Paper on Instructions for Implementing the New Relationship

Context

In 2005 the Province and the First Nations Leadership Council entered into a New Relationship based on respect, recognition and accommodation of aboriginal title and rights; respect for each others respective laws and responsibilities; and for the reconciliation of Aboriginal and Crown titles and jurisdictions. The parties agreed to establish new processes and institutions for shared decision-making regarding land and resources and for revenue and benefit sharing.

The Parties wish to further implement the commitments of the New Relationship. This will be accomplished through the enactment of a legislative package which includes the development of regulations, template shared decision-making and revenue and benefit sharing agreements and the issuance of a Proclamation.

The parties propose to move forward on the following basis:

Legislation

The Province will enact legislation consisting of the following elements:

Purpose

The purpose of the legislation will be to:

- recognize that Aboriginal rights and title exist in British Columbia throughout the territory of each Indigenous Nation that is the proper title and rights holder, without requirement of proof or strength of claim;
- enable and guide the establishment of mechanisms for shared decision-making in regard to planning, management and tenuring decisions over lands and resources;
- enable and guide the completion of revenue and benefit sharing agreements between Indigenous Nations and the Province;
- set out a vision of re-building Indigenous Nations and establish a new institution to support and facilitate the process;
- establish processes, mechanisms or a new institution to assist in resolving any disputes than may arise regarding the interpretation or implementation of the legislation, regulations or any agreements concluded pursuant to the legislation.

Implementation of the Act is intended to foster reconciliation, cooperation and partnership and contribute to certainty for Indigenous Nations and third parties.

Scope

The Act will apply to all ministries and provincial agencies, in particular those that have any direct or indirect role in the management of lands and resources in the province and will take priority over all other provincial statutes dealing with these subject matters.

The Act would make clear that:

- constitutional and common law of Aboriginal rights and title and treaty rights, including available remedies, are unaffected by the Act.
- the Act is not intended to affect the status of existing provincial crown granted interests or tenures in land or resources, including fee simple title;
- nothing in the Act creates any new constitutional rights or law-making authority; and
- nothing in the Act alters, or can be interpreted to alter, either negatively or positively, the federal and provincial division of powers or the jurisdiction of either the Province of British Columbia or any Indigenous Nation under the Constitution of Canada.

Recognition Principles

The Province would adopt as a guiding standard for all of its conduct and negotiations with Indigenous Nations, including the creation and implementation of all enactments, policies and mandates affecting lands and resources, the following recognition principles:

- That Indigenous Nations and peoples pre-existed and continue to exist today and have their own laws, governments, political structures, territories and rights inherited from their ancestors. The Crown recognizes this without requirement of proof;
- That Aboriginal rights and title exist in British Columbia throughout the territory of each Indigenous Nation that is the proper title and rights holder. The Crown recognizes and affirms this without requirement of proof or strength of claim;
- That Crown title exists with Aboriginal title throughout British Columbia;
- That both Aboriginal and Crown title come with obligations and responsibilities;
- That Aboriginal title is a pre-existing interest in land, is held collectively and includes a jurisdictional and economic component;
- That there are existing treaty rights that exist in British Columbia and these must be honourably implemented; and
- That the relationship between Indigenous Nations and the Crown is a government-to-government relationship in which both parties exercise authority to make decisions including about how the lands and resources will be used and the resources shared.

Indigenous Nation-Rebuilding

The reconstitution of Indigenous Nations and the identification of the proper title and rights holders are keys to achieving certainty and the effective functioning of the framework for shared decision-making and revenue and benefit sharing contemplated by this Act. In the Tsilhqot'in decision, the Court identified the proper title and rights holder by reference to the four common threads of language, customs, traditions and shared history. In that case, the proper title and rights holder was the Tsilhqot'in Nation and not an Indian Band. Where the proper title and rights holders of an Indigenous Nation are represented by one political structure with a mandate to enter into shared decision-making and revenue and benefit sharing agreements with the Crown, the Indigenous Nation will be considered to be reconstituted for the purposes of this Act.

The Act will support and facilitate the reconstitution of Indigenous Nations by providing for the establishment of an Indigenous Nation Commission.

Indigenous Nation Commission
The legislation will establish the Indigenous Nation Commission, developed collaboratively with the First Nations Leadership Council.

The Commission will facilitate the identification, formation or reconstitution of the political structures of Indigenous Nations and confirm that such political structures have mandates from the proper title and rights holders to enter into shared decision-making and revenue and benefit sharing agreements with the Crown. The Commission could also work with Indigenous Nations to resolve issues of overlaps and shared territories.

Shared Decision-Making and Revenue and Benefit Sharing
The Act would enable three levels of engagement between the Province and Indigenous or First Nations: Comprehensive, Interim, and Default. The three levels would have different elements in terms of: statutory triggers, forms of Indigenous Nation building, shared decision-making outcomes and revenue-sharing outcomes.

(a) Comprehensive

The Comprehensive Level of engagement would involve the comprehensive application of recognition principles through shared decision-making and revenue-sharing agreements throughout an Indigenous Nation's territory. Engagement at the comprehensive level would be triggered by reconstitution of an Indigenous Nation and put into affect by agreements respecting planning, management, tenuring and revenue and benefit sharing.

The purpose of the agreements would be to achieve the harmonization of Crown and Indigenous Nation processes and decisions. Agreements will be based on templates/models to be adopted by regulation and collaboratively developed.

(b) Interim

Prior to comprehensive agreements being in place with an Indigenous Nation, the Interim level of engagement would involve the application of the recognition principles through shared decision-making and revenue-sharing agreements to certain specified categories of development projects and defined "strategic decisions". The categories of decisions which will trigger this level of engagement will be agreed upon by the First Nations Leadership Council and the Province, and listed in regulation. The agreements will be guided by the principle that processes and mechanisms for making decisions will be designed to accommodate and not compromise the interests of the parties.

At the interim level statutory decision makers will be enabled to exercise their discretion in accordance with agreements with an Indigenous Nation.

The Province is committed to revenue-sharing for sharing portions of provincial revenues related only to the specific projects or decision.

(c) Default

The Default Level would apply in all other cases where the courts would now apply honour of the crown principles. In this level the Province would engage on the basis of a consistent cross government approach to the application of the recognition principles respecting Aboriginal rights and title and treaty rights. The objective is a clear improvement in the status quo.

A Policy Framework would be jointly developed with FNLC representatives. The Framework would prescribe how provincial engagement would focus on analyzing impacts on aboriginal rights and title and treaty rights, and not on the strength of rights or title claims.

Enabling Statutory Decision Makers to Honour the Engagement Principles
Notwithstanding any other enactment, statutory decision makers can enter into agreements or take any actions to give effect to the recognition principles in making agreements and acting within agreements. Statutory decision-makers may enter into agreements with other statutory decision-makers who have authority respecting related subject matters connected to a land or resource development so that the decision-makers can together carry out a unified decision-making process with, or enter into a decision-making agreement with, an Indigenous Nation or other First Nation entity respecting the matters.

Council of Indigenous Nations
The BC Constitution Act will be amended to enable the Lieutenant Governor in Council to create a Council of Indigenous Nations. The Council of Indigenous Nations would have a mandate agreed by the FNLC and the Executive Council and implemented by regulation. The Council of Indigenous Nations would be comprised of leaders of reconstituted Indigenous Nations and initially may include representatives of the member political organizations of the First Nations Leadership Council.

Dispute Resolution
The legislation would enable dispute resolution. Dispute resolution processes should reflect the mutual expectation that most disagreements would be resolved through informal or political discussions. In the event that formal mechanisms are required the parties should undertake a graduated approach from local to more senior levels of authority until resolution is achieved. Mediation of a dispute arising from the interpretation and implementation of the Act, any regulations or agreement made hereunder may be undertaken, including establishing a tribunal for such purposes.

Proclamation

A Proclamation will be issued that speaks to the history of the Province of British Columbia, from pre-contact times through to the implementation of colonial policies that have had longstanding negative impacts and have served to create adversarial provincial Crown-Indigenous Nation relations.

The Proclamation would describe how we are at a point in our collective history where there is huge opportunity to turn the page of history and establish a new relationship of respect and recognition.

The Proclamation would serve to set out a joint vision of the future and future Crown-Indigenous Nations relations. As well, it would envision the rebuilding of Indigenous Nations as a key part of the decolonization process, and as a necessary element of improving Crown-Indigenous Nation relations. Appended to the proclamation would be a listing and description of key historical events. (An attached map portrays the Indigenous Nations of British Columbia.)

The Proclamation should be eloquent and poetic. It should serve the purposes of fostering reconciliation and educating the broader population.

Ratification of Instructions

This Discussion Paper on Instructions for Implementing the New Relationship is the result of work undertaken by representatives of First Nations political organizations and senior representatives of the Government of British Columbia. The two parties must now take it to their Principals for review and consideration.

Affaires indiennes et du Nord Canada
Sous-ministre

Indian and Northern Affairs Canada
Deputy Minister

Ottawa, Ontario
K1A 0H4

MAR 2 3 2009

Mr. Bob de Faye
Deputy Minister
Aboriginal Relations and Reconciliation
PO Box 1900 STN PROV GOVT
VICTORIA BC V8W 9B1

Dear Mr. de Faye: Bob

I would like to congratulate you on your appointment as Deputy Minister of Aboriginal Relations and Reconciliation. As you are well aware, this is an area that holds great possibility for historic change in relation to some of the most important public policy questions in the Canadian context. I look forward to working with you on continuing the excellent relationship that our governments and departments have had in this area for many years.

We have recently learned through media reports that the Government of British Columbia is considering landmark legislation dealing with questions that are at the core of many initiatives, such as treaty negotiations, litigation and policy development. It is also our understanding from these media reports that First Nations leaders, business leaders, and others have been provided detailed briefings on these proposals. I am aware of your government's announcement to postpone further consideration of the legislative proposal until after this year's provincial election.

As you know, British Columbia and the Government of Canada have a long collaborative relationship in the area of First Nations policy which has led to several historic milestones in treaty making and other areas of interest to Aboriginal communities. This relationship has always recognized the ability of British Columbia and the Government of Canada to make their own decisions in accordance with their public policy objectives, jurisdictions and responsibilities. That being said, because of our strong relationship and commonality of First Nations policy matters, any decision by either the Government of Canada or British Columbia that represents a significant change of direction will necessarily have an impact on the other party.

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It is in this context that I would like to express our concern regarding British Columbia's decision to inform the British Columbia Supreme Court recently of its decision not to file written submissions nor to make closing arguments in the *Ahousaht* case. Again, while we respect British Columbia's right to make such a decision, you will understand that such an unprecedented, unexpected and last-minute decision founded explicitly on the legislative proposal raises many questions as we think forward to what the province is signaling in relation to the *Roger William* appeal, the conclusion of existing British Columbia Treaty Commission negotiations and any number of other matters. The Government of Canada has received no explanation or briefing to help us understand better your intentions or the implications that this decision may have on many other critical files before us.

With respect to the recognition and reconciliation initiative, the Government of Canada has already received a number of enquiries seeking our comments to various media reports dealing with this important initiative. We have already received several media enquiries and anticipate that others, including parliamentarians and First Nations members themselves, will ask pointed questions on the Government of Canada's reaction to and level of support for this legislative proposal. We do not expect that the postponement will alter this fact. A key question that will almost certainly be asked is whether or not the Government of Canada believes federal legislation is required or desirable. Regardless of what specific answers the Government of Canada offers to this or other questions, they will not go unnoticed and are likely to create at least some controversy from within the broad range of interested players who will follow our reactions. Given this context, having a better understanding of and appreciation for this initiative by means of a briefing will allow the federal government to provide answers that avoid unnecessary misunderstandings and wrong impressions.

I would conclude by reiterating that, while the Government of Canada fully respects British Columbia's ability to take whatever legislative and litigation steps that it sees fit, the federal government has played and wishes to continue playing a key role in resolving Aboriginal issues of critical importance to all concerned. Being briefed in the short-term future on these matters and the apparent significant shifts in longstanding approaches, such as is the case with *Ahousaht*, will be critical in ensuring that this remains the case.

Yours sincerely,

Michael Wernick

APPENDIX "C"

"ALL OUR RELATIONS"

A DECLARATION OF THE SOVEREIGN INDIGENOUS NATIONS OF BRITISH COLUMBIA

We, the Indigenous leaders of British Columbia, come together united and celebrate the victory of the Tsilhqot'in and Xeni Gwet'in peoples in securing recognition of their Aboriginal title and rights – and all those Indigenous Nations and individuals that have brought important court cases over the years resulting in significant contributions in the protection and advancement of Aboriginal title and rights, including the Nisga'a, Gitxsan, Wet'suwet'in, Haida, Taku River Tlingit, Musqueam, Heiltsuk and Sto:lo - shining light on the darkness of years of Crown denial of our title and rights. After pursuing different pathways, we now come together to make this solemn Declaration out of our common desire to be unified in affirming our Aboriginal title.

As the original Peoples to this land, we declare:

- We have Aboriginal title and rights to our lands, waters and resources and that we will exercise our collective, sovereign and inherent authorities and jurisdictions over these lands, waters and resources,
- We respect, honour and are sustained by the values, teachings and laws passed to us by our ancestors for governing ourselves, our lands, waters and resources.
- We have the right to manage and benefit from the wealth of our territories.
- We have the inalienable sovereign right of self-determination. By virtue of this right, we are free to determine our political status and free to pursue our economic, social, health and well-being, and cultural development.
- We have diverse cultures, founded on the ways of life, traditions and values of our ancestors, which include systems of governance, law and social organization.
- We have the right to compensation and redress with regard to our territories, lands and resources which have been confiscated, taken, occupied, used or damaged without our free, prior and informed consent.
- We will only negotiate on the basis of a full and complete recognition of the existence of our title and rights throughout our entire lands, waters, territories and resources.
- We acknowledge the interdependence we have with one another and respectfully honour our commitment with one another where we share lands, waters and resources. We commit to resolving these shared lands, waters and resources based on our historical relationship through ceremonies and reconciliation agreements.
- We endorse the provisions of the *UN Declaration on the Rights of Indigenous Peoples* and other international standards aimed at ensuring the dignity, survival and well-being of Indigenous peoples.

We commit to:

- Stand united today and from this time forward with the Tsilhqot'in and with each other in protecting our Aboriginal title and rights.
- Recognize and respect each other's autonomy and support each other in exercising our respective title, rights and jurisdiction in keeping with our continued interdependency.
- Work together to defend and uphold this Declaration.

We, the undersigned, represent First Nations who carry a mandate to advance Title and Rights in our homelands today referred to as British Columbia and exercise our authorities in making this Declaration. We welcome other First Nations not present today to adhere to this Declaration if they so choose.

Signed by First Nations leaders on November 29, 2007