

Summary for Creating an Indigenous Institution

The need for structural supports for resolution of territorial boundary issues between First Nations has been discussed and examined for many years. The need is well-recognized, and is grounded in the basic historical reality of the extent to which colonialism in Canada relied upon the use of law, policy, and the power of the State to weaken Indigenous governments, institutions, and structures, and to create division between and amongst Indigenous peoples. Through such divisive practices, colonial plans for land settlement, economic growth, and social control were facilitated. At the same time, disempowerment and division of Indigenous peoples were aligned with moralistic and assimilationist cultural agendas, as Indigenous peoples were removed from their ancestral lands, and their territorial sovereignty ignored.

This paper provides a survey of some background information, as well as preliminary concepts and perspectives, that may inform dialogue and development by First Nations in BC of approaches to the establishment of an Indigenous institution that may assist with the resolution of inter-Nation territorial boundary issues, such as shared territories and overlaps.

A starting premise of this paper is that an Indigenous institution to support First Nations to resolve territorial boundary issues will necessarily be a unique type of institution, unlike those we have seen before – it will be created by First Nations in BC to meet specific aspects of the work of decolonization at this moment in time and must be grounded in Indigenous legal traditions. Such an institution must also be consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*, including particularly the right of self-determination.

There have been many approaches, and discussion of models and supports, for the resolution of territorial boundary issues over many years. And of course, on the ground, First Nations in BC are advancing the work of resolution in a range of ways every day. In surveying critical issues and approaches, the paper identifies the following foundations for establishing an institution:

- *First Nations Control*: Indigenous control of an institution is essential. Control, in this context, means that full responsibility for the establishment, administration, and operations of the institution must be at the direction of the First Nations of BC, through structures, processes, directives, and mechanisms that they have endorsed.
- *Independence from the Crown*: The role of the Crown in the institution should be extremely limited – such as to funding support - to ensure its independence and ability to play an effective role. It is imperative that the Crown be fully arms length from the institution, its operations, and functioning.

- *Trust*: A central element of the design and operations of the institution is that it must engender growing trust in the First Nations it seeks to work with in resolving shared territory and overlap matters. This has many implications for models of institutions, including how it is structured, how it brings transparency to its work, and the design of the actions and services it might offer.
- *Voluntariness*: Voluntariness of participation is essential. It is difficult to imagine how a resolution process for shared territories and overlaps could be legitimate, successful, and supported if a First Nation was forced to engage in it (such as like when one is sued in a court). Such a principle of voluntariness aligns with self-determination.
- *Flexible, Adaptable and Integrative*: Consideration should be given to procedures and mechanisms established and implemented by an institution being somewhat non-prescriptive and responsive in character, as distinct from those that may be overly prescribed, fixed, and limited.
- *Indigenous Legal Orders and Legal Pluralism*: Indigenous legal orders must be central to the institution. Relatedly, an institution must have legal pluralism at the foundation of how it is designed and structured, and how it operates.
- *Uniqueness*: No institution of this nature has ever been built in Canada, by and for First Nations. It should be designed to do what is needed, and not built on following the models of existing institutions.
- *Non-Adversarial or Court-like*: While an institution should be viewed as supporting outcomes that may be relied upon by First Nations, the Crown, and stakeholders and, indeed, may provide binding outcomes in certain contexts that may have legal force and effect (such as through agreements), it is challenging to see how the institution may be conceived of as a formal, lawyer-driven, adversarial body, such as a court or many administrative tribunals.
- *Educative*: One of the challenges that First Nations have faced in dealing with territorial boundary matters is the lack of understanding amongst the Crown, stakeholders, and the general public of the colonial roots of these divisions, the work that is being done to resolve them, and how other actors can support efforts at resolution. While First Nations are undertaking the work of addressing these matters, with support from an institution, there is the opportunity for an institution to play additional supportive roles. Amongst other things, the institution will be an institution with significant expertise in the work and complexities of Indigenous dispute resolution, and have a platform and public visibility through which to help explain these issues to all British Columbians.

The paper identifies the following topic areas for exploration by First Nations as they advance the work of designing the institution.

Topic 1: Establishment of the Institution

The institution must be established through an instrument, or series of instruments – such as an agreement, statute, resolutions from First Nations or First Nations organizations, or otherwise. Key questions that need to be answered are:

- How will First Nations establish the institution?
- What will the role of the Crown be in the establishment of the institution?
- Are there comparable entities or analogies to the institution?
- Is Crown legislation necessary or a good idea?

Topic 2: Purpose and Functioning of the Institution

The specific role and mode of functioning of the institution will need to be defined as part of its creation. This includes clarifying what kind of role the institution may play with First Nations in resolving shared territory and overlap conflicts. Key questions that need to be answered are:

- What are the specific purposes of the institution?
- What powers does the institution need over its own functioning?
- What structures will support the institution in meeting its purposes?
- How will the institution remain accountable?

Topic 3: Qualifications and Appointments

The utility and effectiveness of the institution will depend significantly on how individuals are appointed, and the qualifications that individuals are required to have. Key questions that need to be answered are:

- What are the qualifications for appointment?
- What are their specific roles?
- How many appointments will there be?
- How will individuals be appointed?

In terms of moving forward with the work of defining and designing an institution, the following strategies are proposed:

1. First Nations in British Columbia could work to articulate and affirm consensus on core foundations and principles for an institution, including potentially, some of those identified in this paper. The consensus foundations and principles could then form a

starting point for broader engagement with the Crown about design and development of the institution.

2. First Nations in British Columbia could consider the establishment of a committee of experts in Indigenous laws and legal orders who could provide guidance and input in all stages of the development of the institution. This could include drawing on Indigenous legal experts at local post-secondary institutions (e.g. UVIC and UBC), as well as others who have specific expertise in Indigenous dispute-resolution, and governance and nation-building. Drawing on expertise from the outset of this work could lead substantial support to the deliberations and dialogue amongst First Nations leadership.
3. First Nations in British Columbia could consider collectively establishing a “process roadmap” for the development of an institution. This would support participation, transparency, and building constructive momentum towards the launching of the institution. Some of the core stages in the process roadmap may include:
 - a. Stage 1: Development of First Nations consensus foundations and principles
 - b. Stage 2: Preliminary design of proposed institution elements between First Nations and the Crown
 - c. Stage 3: Development of First Nations consensus on institution elements
 - d. Stage 4: Development of founding instruments of institution (including, for example, resolutions, legislation, agreements)
 - e. Stage 5: Establishment of institution

The process roadmap could include identification of the plan for province-wide and regional forums, as well as opportunities for other forms of dialogue, feedback, and consensus-building amongst First Nations about the design and development of the institution.