

OVERVIEW OF A RECOGNITION AND IMPLEMENTATION OF INDIGENOUS RIGHTS FRAMEWORK

Background

The Government of Canada is committed to renewing the relationship with First Nations, Inuit and Métis based on the recognition of rights, respect, cooperation and partnership. To live up to this commitment, the Government of Canada is reforming its laws and policies to ensure the rights of Indigenous peoples, and the treaties¹ and agreements we have signed together are upheld. The recognition and implementation of Indigenous rights is central to Canada's relationship with First Nations, Inuit and Métis peoples and to advancing the vital work of reconciliation.²

As stated by the Prime Minister on February 14, 2018, the Government of Canada will develop a Recognition and Implementation of Indigenous Rights Framework consisting of legislation and policy, in partnership with First Nations, Inuit and Métis peoples. We will also be working with our provincial and territorial partners on this framework, as well as engaging with stakeholders. The Framework will ensure that the Government of Canada recognizes, respects, and implements Indigenous rights, including inherent and treaty rights, and provides mechanisms to support self-determination. The Framework will support Indigenous peoples' rights as recognized and affirmed in section 35 of the *Constitution Act, 1982*, while also aligning with the articles outlined in the *United Nations Declaration on the Rights of Indigenous Peoples*. It will also be consistent with the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*.

In recent years, Canada has shifted its approach to engaging with Indigenous peoples on their rights with a focus on co-developed paths forward and flexible solutions. For instance, since 2015, Canada has been co-developing mandates for discussion with Indigenous partners at over 70 Recognition of Indigenous Rights and Self-Determination tables with over 300 communities representing over 800,000 Indigenous people. In addition, Budget 2018 provided \$101.5M over five years to support activities that will facilitate Indigenous peoples in reconstituting their Nations or Collectives. The Framework will build on these and other initiatives.

The legislative element of the Framework would contain statutory principles and impose obligations on the federal government to ensure that the recognition and implementation

¹ For the purposes of this document, references to "treaty" or "treaties" include pre-1975 treaties and modern treaties, unless otherwise stated.

² Through the engagement process, we have heard the need to ensure the Framework is distinctions-based, and reflective of the unique cultures, experiences and desires of First Nations, Inuit and Metis.

of rights is the basis of all relations between the federal crown and Indigenous peoples. To support the legislation and ensure consistency, the policy element would follow and complement the legislation. It will consist of a new distinctions-based Policy on the Recognition and Implementation of Indigenous Rights to replace the Comprehensive Land Claims and Inherent Right Policies. This new policy would guide federal officials in engaging with Indigenous peoples in discussions and negotiations that support Indigenous self-government, self-determination and treaty rights. The policy will facilitate the implementation and exercise of Indigenous rights, which includes building upon and strengthening Canada's approach to implementing existing and new treaties and agreements. Moreover, the new policy will recognize Indigenous lawmaking power; their inherent rights to land; and, in many instances, title within their traditional territories. In all, the legislation and policy will support the implementation of *United Nations Declaration on the Rights of Indigenous Peoples Act*. The Declaration is an international human rights instrument that identifies rights of Indigenous peoples. In November 2017, the Government of Canada committed to supporting and implementing it in Canada. These objectives are being advanced through several approaches, including the alignment of federal laws and policies with the Declaration.

Further, the legislation would build on other legislative initiatives such as 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*. The focus on recognition of rights, self-determination and keeping the Government accountable would contribute to the further implementation of the Declaration in Canada. These potential approaches would remain within Canada's current constitutional framework, including with respect to the division of powers.

The Government intends to take a comprehensive whole-of-government approach that supports flexibility in the expression of self-determination and ensures the recognition and implementation of rights is the basis for relations going forward. Structural barriers created with the intent to deny rights and that prevent the Government from proceeding with the important work of respecting and upholding Indigenous and treaty rights will be removed. This work will be undertaken in a manner that will not undermine or impact existing treaties and agreements.

It is intended that through the Framework:

- Canada will remove barriers that have prevented the exercise of Indigenous rights, including inherent and treaty rights, and the achievement of true self-determination by Indigenous Nations and Collectives.

- Indigenous peoples will have flexibility to determine their own paths forward and governance systems for their Nations and Collectives.
- Rights-holding Indigenous Nations and Collectives will have the choice to immediately exercise certain jurisdictions, consistent with their constitutions.
- Canada will impose accountability measures on itself to ensure that rights, treaties and agreements are fully implemented.
- Independent bodies could be established to keep Canada further accountable;
- New dispute mechanisms could become available so that Indigenous peoples have access to remedies outside of costly, adversarial court processes.

THE FRAMEWORK WILL

- ✓ *Create new tools and mechanisms for supporting self-determination through both law and policy*
- ✓ *Support distinctions-based approaches for First Nations, Inuit and Métis*
- ✓ *Advance the implementation of treaties and agreements*
- ✓ *Support new approaches to the evolution of treaties and agreements*
- ✓ *Keep the Government of Canada accountable*

THE FRAMEWORK WILL NOT

- ✓ *Define and limit the rights of Indigenous Peoples*
- ✓ *Create municipal-style governments*
- ✓ *Infringe on provincial or territorial jurisdiction*
- ✓ *Alter, without the agreement of the parties, any treaties, agreements or arrangements concluded under existing policies, or tables currently operating under existing policies*
- ✓ *Preclude Indigenous peoples from pursuing other opportunities to advance their priorities*
- ✓ *Extinguish rights or seek the cession, release or surrender of rights*
- ✓ *Impose solutions*

What follows is a description of the potential parameters for the legislative and policy components of the Recognition and Implementation of Indigenous Rights Framework.

Structure of Legislation

1. Definitions

When developing legislation, Canada could work with a set of specific definitions of key terms in order to ensure consistency and reflect what we have heard from Indigenous

peoples. These definitions would be for the purposes of guiding the development of the proposed Act and would not necessarily be included in the legislation itself.

2. Preamble and Purpose

What We Have Learned

Indigenous peoples have repeatedly expressed that recognition legislation must be framed by an understanding that rights, including title, are inherent and not premised on Crown understandings, standards or recognition. We have also heard from Indigenous peoples that legislation should include affirmations of the intent to implement treaties, the *United Nations Declaration on the Rights of Indigenous Peoples*, and the Calls to Action of the Truth and Reconciliation Commission. Finally, embedding a continuing commitment to collaborative approaches is seen as critical.

There has also been an interest expressed in ensuring that recognition legislation respects the constitutional division of powers. At the same time, we have heard that space is needed for Indigenous communities to exercise jurisdiction over a variety of areas, such as child and family services, in line with the inherent right to self-government and relevant court decisions.

Potential Approaches

The preamble could anchor the legislation in the enduring relationship between the Government of Canada and Indigenous peoples and could outline how the legislation will advance reconciliation. It could affirm that the inherent and treaty rights of Indigenous peoples are tied to their relationships with the land, which may include title.

The preamble could include a narrative that describes the diversity of Indigenous peoples, including their cultures and systems of governance. It could outline the history of relationships between Indigenous peoples and European settlers, including the importance of treaties and other agreements between the Crown and Indigenous peoples. It could also discuss the negative impacts of colonial practices, including the denial of rights and unfulfilled promises, and how these approaches continue to negatively impact Indigenous peoples today. It could also highlight the contributions of Indigenous peoples to the development of Canada.

The preamble could document the importance of decades of tireless advocacy by Indigenous leaders and communities, as well as reports and studies, particularly the reports of the Special Committee on Indian Self-Government (commonly known as the

“Penner Report”), the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission, which have all, over the course of nearly 30 years, called for a shift in the way the Government of Canada recognizes and implements Indigenous rights.

These expert sources have emphasized, time and again, that Canada must support the renewal and development of self-determining Indigenous communities making their own decisions for their own people.

The preamble could recognize that the Government of Canada must implement federal rights-related obligations in a manner which respects those rights, and is consistent with agreements signed with Indigenous peoples and the Honour of the Crown. It could make reference to the rights enshrined in the *Constitution Act*, including the *Canadian Charter of Rights and Freedoms*, as well as the *United Nations Declaration on the Rights of Indigenous Peoples*.

Further, the preamble could acknowledge that through section 35 of the *Constitution Act, 1982*, Canada recognized and affirmed the Aboriginal and treaty rights of Indigenous peoples. Reference can be made to the fact that Canadian courts have repeatedly upheld Indigenous rights, setting a strong legal precedent for the recognition and implementation of Indigenous rights.

The fact that Indigenous peoples lived on, and governed, lands that now form part of Canada could also be recognized. Consequently, the preamble could also recognize the rights of Indigenous peoples, which in many instances include title, in their traditional lands and territories. In addressing lands and title on federal Crown lands, the preamble could make further reference to constructive arrangements such as co-management and shared decision-making as mechanisms for giving life to recognition.

The preamble could acknowledge, further to consultation with provinces and territories, that co-operative federalism and legal pluralism will guide relationships. The preamble could also acknowledge that the legislation is creating new opportunities for how the parties come together and how they explore ways to co-operate and co-exist.

The preamble could conclude by reaffirming the Government of Canada’s commitment to reconciliation with First Nation, Inuit and Métis peoples through renewed nation-to-nation, Inuit-Crown, and government-to-government relationships based on the recognition of rights, respect, co-operation and partnership.

Following the preamble, the legislation could set out the purpose of the legislation, which could be:

- to contribute to meaningful reconciliation with Indigenous peoples;
- to ensure that the recognition and implementation of the rights of Indigenous peoples is the foundation for all relations between the Government of Canada and Indigenous peoples; and,
- to ensure that the federal Government fulfills its obligations with respect to the rights of Indigenous peoples, including by;
 - supporting Indigenous peoples in determining their own Nations and Collectives; and,
 - encouraging a range of options for the federal recognition of self-determined Indigenous Nations and Collectives and their authority to govern themselves.

3. Obligations Binding on the Crown

What We Have Learned

Through the national engagement, and at the over 70 Recognition of Indigenous Rights and Self-Determination discussion tables across the country, Canada has consistently heard that legislation must include clear federal commitments to ensure that the recognition and implementation of Indigenous rights are truly the foundation of all relations between the Government of Canada and Indigenous peoples. We have heard that these commitments should derive from section 35-related jurisprudence, the *United Nations Declaration on the Rights of Indigenous Peoples* and the Truth and Reconciliation Commission's Calls to Action. We have also heard that a commitment to consent-based decision-making on Indigenous rights-related matters based on the principle of free, prior and informed consent is critical.

We have heard from Indigenous peoples that recognition of rights and title, and their inherent nature, will be critical to meeting the Government's commitments with respect to Crown conduct in relationships with Indigenous peoples. Others have expressed the view that issues concerning title may have impacts beyond federal jurisdiction, and emphasized that a recognition framework must respect provincial and territorial jurisdiction. Many Indigenous peoples expect federal recognition of their Nations and

Collectives as well as the inherent right of these entities to self-determination. We have heard that existing processes for achieving self-determination impose undue burdens on Indigenous communities, and new approaches must be more timely and financially fair. We have also heard that there is a need to bring greater clarity to the relationship between Canada and Indigenous peoples to support collaboration and advance Indigenous participation in the Canadian economy.

Indigenous Nations and Collectives, their systems of governance, and their circumstances and priorities are diverse; accordingly, we heard that any new approach to advancing self-determination must be flexible so as to respond to varying contexts and reflect their customs and traditional legal practices. Indigenous governments should be able to exercise jurisdictions incrementally and in response to the priorities of their communities and at the time and pace of their own choosing.

Indigenous peoples have expressed a range of perspectives regarding their degree of autonomy within the recognition process and in determining and governing themselves. For instance, some have been clear that Canada should recognize inherent rights and title, including Indigenous governance and systems of law, without requiring proof of rights.

We have also heard calls for a new approach to the paramountcy of laws, with recognition legislation prevailing over all legislation to the extent of a conflict, and with the governments of recognized Nations or other Collectives forming a new order of government within Canadian federalism. Others have conveyed that a recognition of rights framework must respect the existing constitutional framework and division of powers, and operate in areas of federal responsibility without unilaterally encroaching on provincial and territorial jurisdiction in a manner that is unconstitutional. Some parties have noted that a recognition framework could facilitate cooperation and partnership arrangements with provinces or territories in the implementation of Indigenous self-determination.

Indigenous peoples expressed that Nations and Collectives require sustainable fiscal arrangements and economic opportunities.

Ultimately, we heard that Indigenous peoples expect to be able to fully exercise the inherent right to self-determination and that any tools or mechanisms established through Recognition and Implementation of Indigenous Rights legislation are premised on enabling choice or alternative options for Indigenous peoples to pursue their self-determination. The proposed legislation would not displace existing Indigenous governance agreements or arrangements, but rather would provide greater flexibility in

how Indigenous Nations and Collectives exercise self-determination. New arrangements could enable the continuation of rights within and outside of agreements, with periodic reviews to provide an orderly process for the evolution of agreements.

Potential Approaches

Legislation could require that the Government of Canada conduct itself based on binding principles of recognition and respect for Indigenous rights, and could include binding obligations to ensure this conduct.

The legislation would be intended to enable choices and recognize Indigenous peoples' inherent right to pursue their self-determination through the constitution or reconstitution of their self-determined Nations and Collectives. It could enable Canada to recognize a Nation or other Collective as an entity that has the authority to govern itself through a government having the legal capacity of a natural person. The legislation could ensure that upon recognition, the governing body of the Indigenous Nation or Collective in question could immediately exercise core governance powers without requiring negotiations. It could also ensure that recognized Nations and Collectives would be able to arrange for the exercise of other powers through agreements with Canada, and provinces and territories where appropriate. Where applicable, best practices related to co-management or shared decision-making could be used.

The potential approach contemplates a collaborative process for recognition supported by binding obligations on Canada. It could also include the continued pursuit of negotiated arrangements with respect to certain jurisdictions and title to land, where appropriate.

To further support the recognition process, the legislation could oblige the Minister to lead the Government of Canada in developing, in collaboration with Indigenous peoples, and with provinces and territories where appropriate:

- Further measures to support the process by which Canada recognizes Indigenous Nations and Collectives.
- Approaches to guide the development and implementation of fiscal arrangements between Canada and recognized Indigenous Nations and Collectives.
- Further measures to implement Indigenous rights, including title, encompassing:

- measures to affirm the co-existence of Indigenous title, with the jurisdictions and interests of other governments in the federation (i.e. Canada, provinces and territories); and,
- measures to coordinate the exercise and protection of jurisdictions of Indigenous peoples; the federal Crown; and, the provinces and territories where appropriate.

Processes to support the co-existence of Indigenous and Crown jurisdictions and title, including all negotiations, would be co-developed with Indigenous peoples, in a manner that enables their central role in the design of solutions that respond to their distinct rights and interests.

The Governor in Council could act on the recommendation of the Minister to add recognized Nations or other Collectives and their governments to a schedule of the Act. In making his or her recommendation to the Governor in Council, the Minister could be required to take into account independent advice, provided either by an ad hoc advisory committee or an institution (see “Implementation of Framework: Institutions”, below).

The legislation could deal with powers and core governance jurisdictions. Indigenous governments could choose which powers and jurisdictions they exercise, at a pace of their own choosing and consistent with the will of their members. The list of powers could also be amended over time, and Canada could be required to pursue any amendments through a collaborative process with Indigenous peoples. Processes to amend the list of powers could be further supported by transparent advice from the newly created independent institution. It is currently envisioned that the government of a Nation or Collective could exercise any of the list of powers immediately upon the occasion of federal recognition, in areas of jurisdiction such as:

- who is part of the Nation or other Collective;
- the nature, structure, composition, and functions of the governing body;
- rules and procedures for the selection of members of a governing body;
- conflict of interest rules and procedures for a governing body;
- rules and procedures for enacting laws;
- system of financial management and accountability;

- rules and procedures for holding meetings of the governing body;
- process for amending of a constitution;
- ability to delegate responsibilities, powers, duties and/or functions of the governing body to another entity; and,
- law-making authority respecting subject matters of language and culture.

Canada recognizes the spectrum of interests among Indigenous groups, particularly First Nations, with respect to how and when they may wish to avail themselves of the mechanisms for federal recognition of their Nations or Collectives within the proposed legislation. The nature and timing of a given group's transition to self-determination and self-determined governance would need to be at the Nation or Collective's discretion. The intention behind the proposed legislation would be to enable these sorts of choices.

In the case where a Nation or Collective composed of one or more *Indian Act* bands may wish to be recognized by Canada, multiple desired outcomes could be possible. Some may wish to be recognized as Nations or Collectives and immediately leave behind all *Indian Act* structures and governance, and potentially any other provisions for governance under federal statutes (such as the *First Nations Land Management Act*). Some may wish to substitute their recognized Nation or Collective for the band within some or all provisions of the *Indian Act*, or other federal statutes, as they continue to develop their own governance and capacity. Others still may wish to retain their bands as sub-units of the Nation or Collective for certain purposes, potentially including the exercise of certain powers ("core" or otherwise). The legislation could ensure that all of these pathways to self-determination and self-determined governance are possible.

Where the Nation or Collective may not want to immediately make arrangements for governance outside the *Indian Act*, the legislation could provide for the possibility that governance could continue to operate under the auspices of the *Indian Act*. In this instance, the Nation or other Collective could replace the band as the unit of governance as an initial step. Legislation could also provide for the necessary consequential amendments to the *Indian Act* and any other Indigenous governance-related federal legislation (e.g. the *First Nations Land Management Act* and the *First Nations Fiscal Management Act*, etc.) to enable the government of a recognized Nation or other Collective to take on the legal role of the band for governance purposes. Should the Nation or Collective subsequently determine that it is ready to move beyond

governance under the *Indian Act*, the legislation could enable this transition at a time and pace of the Nation or Collective's choosing.

Legislation could set out rules about the application or non-application, as the case may be, of provisions of federal statutes such as the *Indian Act*, the *First Nations Land Management Act* and the *First Nations Fiscal Management Act* to address situations where a Nation or Collective's exercise of governance powers may enter into conflict with the application of these laws. This would enable Nations and Collectives to determine and design their own systems and mechanisms for governance to suit their unique priorities and circumstances.

In essence, the legislation could ensure that Nations and Collectives could determine the ongoing roles of any pre-existing units or governing bodies at a time and pace of their choosing.

Finally, Canada could recognize that any fiscal component of Canada's government-to-government relationships with recognized Nations and other Collectives be consistent with the responsibilities, powers, duties and functions of the governing bodies of those Nations and Collectives.

To summarize, the legislation could:

- enable the Government of Canada to recognize Indigenous Nations and Collectives as legal entities with the status and capacities of a natural person;
- enable the self-determined exercise of governance by federally recognized Nations and Collectives;
- affirm Canada's intent to enter into government-to-government fiscal relationships with recognized Nations and Collectives; and,
- require Canada to co-develop further measures to support these elements.

4. Implementation of the Framework: Institutions

What We Have Learned

Indigenous peoples have consistently voiced that new institutions are required to ensure that Indigenous rights are being implemented. We have heard that new independent

institutions could monitor the implementation of Indigenous rights, including the Government of Canada's implementation of treaties and agreements. Institutions could also be empowered to assist in resolving disputes between Indigenous groups and the Crown and amongst Indigenous groups without going to court. Common elements from the recommendations and other feedback are that the any new institution be neutral; be national in scope; have responsibility for ensuring that the federal government is fulfilling its obligations in relation to Indigenous rights; and, have authority to report to Parliament.

We have heard from some that Canada should create entirely new bodies, while others have called for existing bodies to take on additional functions. Some have recommended the creation of several institutions with broad mandates: a body to oversee implementation of the Framework legislation; a treaty oversight body to provide oversight of treaty implementation; a co-developed dispute resolution institution; and, additional institutions to support Indigenous Nation and governance re-building.

Alternatively, some have recommended bodies with more narrow mandates. For instance, it has been proposed that an oversight body be established as an adjunct office within the Office of the Auditor General to monitor and report to Parliament on the progress of modern treaty implementation throughout Canada and to examine Canada's actions affecting the implementation of modern treaties. Under this approach, additional institutions would be required to fulfill a similar oversight function for other treaties and to serve any other proposed functions.

Through the national engagement, the need for proper oversight of Indigenous rights implementation was a recurring theme as Indigenous peoples were clear that Canada needs to do a better job of fully implementing federal obligations described in treaties and other agreements. In some instances a focus on capacity building was recommended as an option.

Through the national engagement, some Indigenous participants indicated that any new accountability measures, such as oversight and dispute resolution functions, need to consider that goals and definitions of success may be different for Indigenous peoples than they are in the Western paradigm.

Potential Approaches

Legislation could expand the mandate of existing bodies or create a new institution (or institutions), which could be based on co-development and shared governance. Given the variety of approaches and functions that have been suggested, coupled to the need

to support the recognition of Nations and Collectives process, the key functions of any expanded or new institution could include an advisory role for the federal recognition of Nations and Collectives; alternative dispute resolution; oversight of Indigenous rights implementation; and, oversight on reconciliation and public education.

Advisory Support to the Minister – Recognition of Indigenous Nations and Collectives

The legislation could equip the Minister to receive independent, expert advice to support his or her role in the process for federal recognition of Indigenous Nations and Collectives. Two potential options for this role are envisioned:

1. The advisory role could be undertaken by an ad hoc advisory committee struck by the Minister on an as-needed basis.

In this option, the legislation could allow the Minister to strike such a committee on a case-by-case basis as Indigenous Nations and Collectives come forward to seek recognition. The committee could have three members: one recommended by the Indigenous party seeking recognition; one selected by the Minister; and, one jointly identified by the first two members. Any such committee could be mandated to provide a transparent and publically available advice, supported by research, to the Minister in order to support the federal recognition of Nations and Collectives. In carrying out its duties, any such committee could have to consider traditional Indigenous knowledge, forms of evidence, and methods of study. The Minister could be required to take the advice of any such committee into consideration in providing the ultimate recommendation to the Governor in Council on whether or not to provide federal recognition of the Nation or Collective.

2. The advisory role could be undertaken by the institution (or by one of the institutions) provided for in the legislation to fulfill dispute resolution, oversight and education functions (see “Alternative Dispute Resolution, Oversight of Federal Conduct and Public Education”, below).

In this option, the given institution could be mandated to provide transparent and publically available advice, supported by research, to the Minister in order to support the federal recognition of Nations and Collectives. In carrying out its duties to fulfill this role, the institution could have to consider traditional Indigenous knowledge, forms of evidence, and methods of study. The Minister could be required to take the advice into consideration in providing the ultimate recommendation to the Governor in Council on whether or not to provide federal recognition of the Nation or Collective. Additionally, the

institution could administer funds to support governance capacity development to support Indigenous groups' self-determination.

Alternative Dispute Resolution, Oversight of Federal Conduct and Public Education

To fulfill dispute resolution, oversight and public education roles, an institution or institutions could be structured as follows:

A. Alternative Dispute Resolution

- Optional and non-binding alternative dispute resolution services, including required research, could also be provided by an institution to help resolve issues related to fulfillment of the Government of Canada's obligations with respect to the rights of Indigenous peoples and matters related to the federal recognition of Nations and Collectives including composition and membership. In addition, Nations or Collectives could access the service on matters related to shared or overlapping territory with other Nations or Collectives.
- If an institution were to be created it could be required to take into account Indigenous knowledge; legal traditions; and, customary laws.

B. Oversight of Indigenous Rights Implementation

- A new or existing institution could monitor and report on the fulfillment of the Government of Canada's obligations under legislation, treaties and other agreements related to rights.
- The institution could also play a role in monitoring the implementation of management accountability tools and departmental results reports with respect to the Framework.
- Such an institution could be required to: 1) prepare an annual report detailing its observations with respect to the Government of Canada's fulfillment of its obligations, as well as a review of its dispute resolution services and 2) table the report in Parliament.

C. Oversight on Reconciliation and Public Education

- Broader oversight on reconciliation in Canada and accountability on progress, as well as public education efforts to ensure that all Canadians are brought along

throughout this process, could be undertaken by a separate body such as the National Council for Reconciliation, which is currently being contemplated following recommendations by the Interim Board of Directors.

5. Amendments to the *Interpretation Act*

What We Have Learned

Some Indigenous groups have a longstanding interest in seeing a non-derogation clause added to the *Interpretation Act*, as well as the repeal of existing non-derogation clauses, in order to help ensure that Indigenous and treaty rights are upheld and that they are not abrogated or derogated from.

Potential Approaches

Legislation could amend the federal *Interpretation Act* to add a non-derogation clause that would require that other federal legislation be interpreted so as to uphold or respect constitutionally-protected Aboriginal and treaty rights and not to abrogate or derogate from them. The legislation could also repeal existing non-derogation clauses in order to ensure a harmonized federal approach to the interpretation of legislation.

New Policy on the Recognition and Implementation of Indigenous Rights

What We Have Learned

We have heard that Canada's current policy framework to support the recognition and implementation of Indigenous rights is flawed, and that past insistence on "cede, release and surrender" provisions in treaties and agreements is inappropriate and outdated. We need to address issues created by the Comprehensive Land Claims and Inherent Right Policies, such as the imposition of strict federal mandates that do not take the distinctions between Indigenous groups into account, and inappropriately rigid approaches to certainty that impede the renewal of relationships. We have also heard that too often, the federal government acts as though it is not bound to recognize rights and to enter into negotiations concerning the exercise of those rights in good faith, despite jurisprudence telling us otherwise.

Through decades of advocacy by Indigenous leaders and communities, the Report on the Royal Commission on Aboriginal Peoples (1996), the Penner Report (1983), the Truth and Reconciliation Commission Calls to Action (2015), the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (2017), Recognition of Indigenous Rights and Self-Determination discussions, and the national engagement led by the Minister of Crown-Indigenous Relations, we have heard that changes are needed to ensure that policies effectively respond to the needs and interests of Indigenous communities, are grounded in recognition, and are aligned with evolving laws and the *United Nations Declaration on the Rights of Indigenous Peoples*, including the concept of free, prior and informed consent.

Potential Approaches

Since 2015, Canada has significantly shifted its policy approach to engaging with Indigenous peoples on their rights, away from imposing pre-crafted federal mandates and limited opportunities for agreements to evolve, towards a focus on co-developed paths forward and flexible solutions.

Canada's negotiation policies need to catch up to our approaches. The fundamental purpose of replacing the Comprehensive Land Claims and Inherent Right Policies with a Policy on the Recognition and Implementation of Indigenous Rights would be to entrench co-development as the basic standard for federal engagement with Indigenous peoples to advance the implementation of their rights. The policy could be built on the principles of citizen-centered design, with Indigenous peoples at the heart of the process. It could formalize policy innovations that are already creating significant

progress at negotiation tables, such as the co-development of all negotiation mandates and new approaches to certainty.

The Policy on the Recognition and Implementation of Indigenous Rights would specifically seek to provide mechanisms to uphold and implement obligations set out in the legislation. The policy would be co-developed with Indigenous peoples following a timeline that would allow for the legislation to be fully supported once it comes into effect.

Next Steps

Moving forward towards reconciliation and a renewed Crown-Indigenous relationship will require an ongoing commitment to collaborative approaches. This will mean working in partnership with Indigenous peoples, cooperating with provincial and territorial governments, and engaging industry, other stakeholders and all Canadians.

In addition to and building on the legislation, a range of policies and mechanisms will be required to realize the implementation of the Recognition and Implementation of Indigenous Rights Framework. This includes supporting the capacity of Indigenous organizations and governments to fully realize their potential.