



Affirming First Nations Rights, Title and Jurisdiction

September 5, 2018

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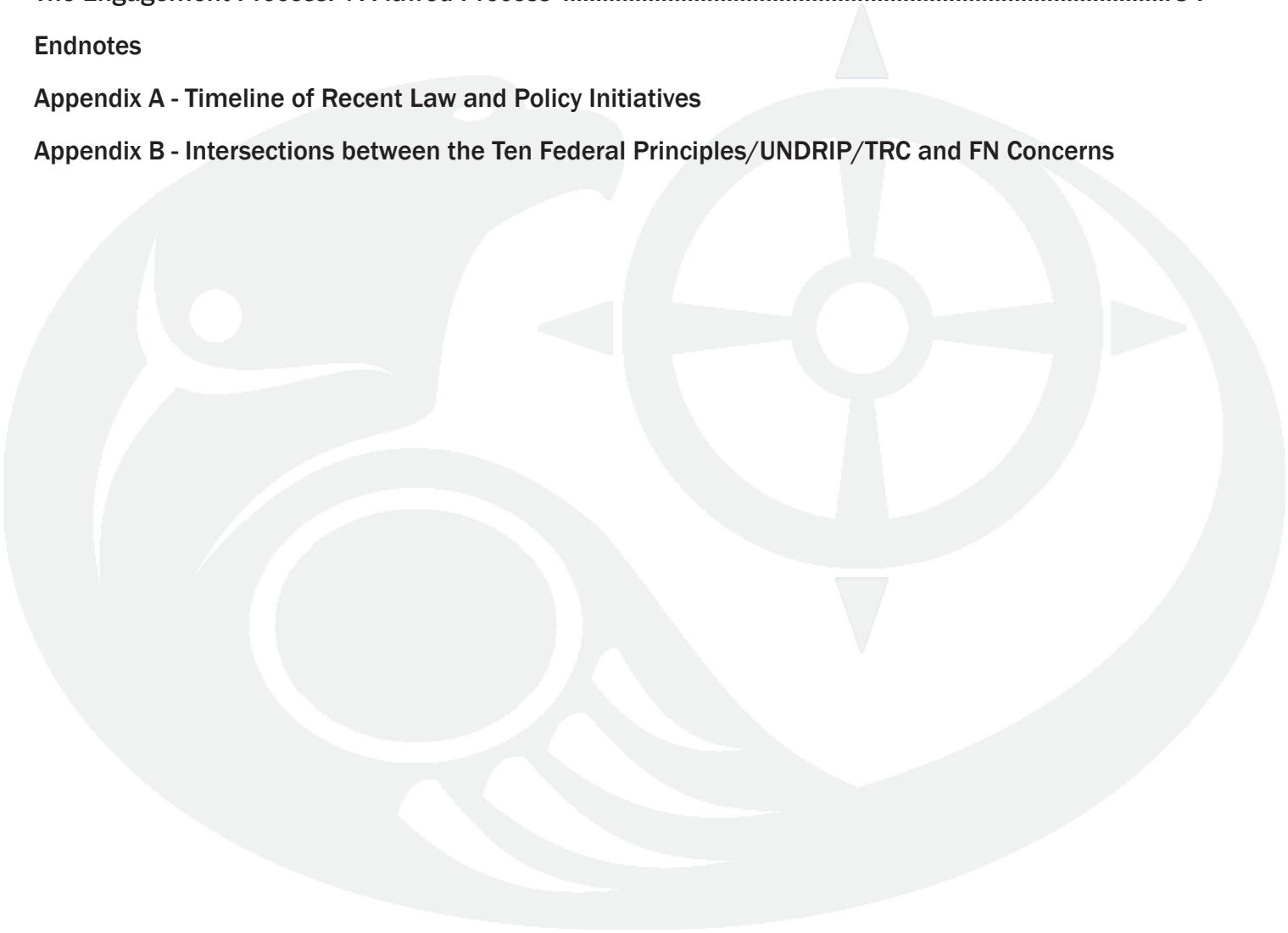
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Executive Summary

In response to decades of advocacy by First Nations for the recognition and affirmation of Treaty and Inherent rights, title and jurisdiction, the Prime Minister of Canada announced on February 14, 2018 the Government of Canada's intention to develop, "in full partnership with Indigenous Peoples", a new Recognition and Implementation of Indigenous Rights Framework. From its engagement documents, both legislative and policy changes are contemplated, and it is the government's stated intention to introduce its suite of proposals this fall.

While First Nations initially reacted favourably towards the Prime Minister's statement, concerns have been raised about the process's lack of accountability and transparency, with the Government of Canada acting unilaterally and in a manner that itself is not consistent with a new nation-to-nation, government-to-government relationship. Minister Bennett, Crown Indigenous Relations Canada, has been leading Canada's engagement since February but the short time lines and lack of support to fully participate has left many First Nations without the opportunity to develop a common understanding.

The Assembly of First Nations has therefore prepared this Background Paper to assist leadership in their understanding of the issues. No one is more aware than First Nations leadership of the efforts undertaken here and internationally to assert our Treaty and Inherent rights, title and jurisdiction and we provide this retrospective. What is being undertaken by this government is the most recent initiative by Canada. Current AFN Resolutions 08/2018 and 39/2018 confirm support for First Nations rights holders to lead the process and we called upon the Government of Canada to work with First Nations before adopting and implementing any legislative or administrative measures that affect them. Canada's failure to do so runs counter to the intention expressed by the Prime Minister on February 14th and if implemented, is not consistent with a Framework that is grounded in the *United Nations Declaration on the Rights of Indigenous Peoples*.

Canada's stated intention is to create new legislation and policy to make "the recognition and implementation of rights the basis of all relations between Indigenous Peoples and the federal government going forward." Canada would recognize Nations and Collectives as "legal entities within federal legislation", replacing the governance provisions of the *Indian Act* and further support the self-determination of Indigenous peoples but its engagement documents raise many more questions than answers and must be clarified. Canada further suggests that the legislation could also ensure it remains accountable by creating an oversight body to report directly to Parliament on government's action or inaction and support the resolution of issues through an independent dispute resolution mechanism.

Canada also intends to develop a new policy to implement rights through negotiated agreements. Those wishing to establish negotiation tables could apply to Crown Indigenous Relations Canada to demonstrate that they are a rights-holding Indigenous Nation or Collective. Rights holders who are already participating in negotiation processes would not need to reapply to establish a negotiation under the new policy. Mandates that have



already been developed at exploratory tables would continue to build and could include treaty and non-treaty agreements, incremental, sectoral, comprehensive and governance agreements. Periodic reviews of agreements would support their evolution through time and support for negotiations would continue by contribution agreement rather than loan funding.

While this Rights Recognition and Implementation Framework is under development by the Government of Canada, 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*, is currently before Parliament. It calls upon the Government of Canada, “in consultation and cooperation” with Indigenous Peoples, to “take all measures necessary to ensure that the laws of Canada are consistent with the UN Declaration. The Bill repudiates the Doctrine of Discovery and requires the federal government to work with Indigenous peoples to develop a national action plan for the implementation of the UN Declaration.

In 2016 Canada stated its full endorsement and commitment to implement the UN Declaration. Passage of Bill C 262 will be proof of the extent of this commitment. Further, to the extent that the current engagement process shapes Canada’s consultation toward “implementing legislative or administrative measures”, it must show deference to Indigenous Peoples “representative institutions” and obtain their free, prior and informed consent (Article 19, UN Declaration).

There are deep flaws with the current approach to rights affirmation and recognition by this government and there are many questions to be answered. Even the Government’s 10 “*Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*” were developed and unrolled in a manner that was not consistent with a new nation-to-nation relationship.

We have gathered, as First Nations leadership, to dialogue and engage each other. It will be critical going forward that Canada recommit to work in true partnership with Indigenous peoples as full partners. We deserve nothing less.



Introduction

For decades First Nations have pressed forward to assert and exercise our Treaty rights and inherent rights, title and jurisdiction. We have worked together to push back assimilationist policies including Indian Residential Schools and the *Indian Act*. The consistent advocacy of First Nations on the rights agenda has led to many important victories that include: the defeat of the 1969 White Paper, the constitutional recognition and affirmation of Aboriginal and treaty rights in section 35 of the Constitution Act, 1982, an ever growing list of successes in court, the adoption of the UN Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples.

First Nations are now examining a recent federal initiative.

On February 14, 2018, the Prime Minister of Canada announced ***“that the Government of Canada will develop – in full partnership with First Nations, Inuit, and Métis Peoples” – a Recognition and Implementation of Rights Framework***. He stated,

“For too long, Indigenous Peoples in Canada have had to prove their rights exist and fight to have them recognized and fully implemented. To truly renew the relationship between Canada and Indigenous Peoples, the Government of Canada must make the recognition and implementation of rights the basis for all relations between Indigenous Peoples and the federal government.

The contents of the Framework will be determined through national engagement activities led by the Minister of Crown-Indigenous Relations and Northern Affairs. Engagement will continue throughout the spring, with the intention to have the Framework introduced in 2018 and implemented before October 2019.

While the results of this engagement will guide what the final Framework looks like, we believe that, as a starting point, it should include new legislation and policy that will make the recognition and implementation of rights the basis for all relations between Indigenous Peoples and the federal government going forward. The Framework can also include new measures to support the rebuilding of Indigenous nations and governments, and advance Indigenous self-determination, including the inherent right of self-government.

Through this Framework, we will lay the foundation for real and lasting change on issues that matter most to people, including eliminating long-term boil water advisories, improving primary and secondary education on reserve, and taking further steps toward reconciliation.”¹



In the press release, the Government noted that in 1982, Aboriginal and treaty rights were recognized and affirmed through Section 35 of the *Constitution Act, 1982*, but the work to define these rights was not undertaken² and that in addition to Indigenous Peoples, engagement with provincial and territorial governments as well as individuals from civil society, the business community, and the public at large would be part of this process.

Further, these engagement activities would focus on the newly established departments that will replace Indigenous and Northern Affairs Canada, as well as the mandates of each Minister. The feedback they receive will help the Government of Canada “better serve the distinct priorities of First Nations, Inuit, and Métis Peoples.”³

The Government characterized this initiative as building on its ongoing reconciliation efforts, which it described as including:

- The unqualified endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration);
- A commitment to implement the Truth and Reconciliation Commission’s 94 Calls to Action;
- The creation of the Working Group on the Review of Laws and Policies Related to Indigenous Peoples;
- The release of the Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples; and
- The ongoing work at Recognition of Indigenous Rights and Self-Determination tables

In their words, a clear Recognition and Implementation of Rights Framework across the federal government “will provide clarity and certainty on Canada’s responsibilities toward engaging with Indigenous Peoples in a respectful, cooperative partnership—from coast to coast to coast.”⁴

Purpose of this Document and the Role of AFN

Following the Prime Minister’s announcement, Assembly of First Nations National Chief Perry Bellegarde issued a Bulletin to First Nations Leadership stating,

“... that recognition of our rights, Treaties, title and jurisdiction is something First Nations have long pushed for, and a legislative approach has been recommended many times in the past including the Penner Report (1983) and the final report of the Royal Commission on Aboriginal Peoples (1996).

Our rights have been denied for too long, resulting in conflict and court battles for enforcement of our inherent rights, Treaty rights, title and jurisdiction. This announcement should be met with a degree of caution, but it also represents an important opportunity to move into a new era of recognition and a new relationship with the Crown, with the United Nations Declaration on the Rights of Indigenous Peoples as our framework for reconciliation. Recognizing and implementing our rights is directly connected to closing the gap for our peoples. The key will be walking this road together.



The AFN expects nothing less than a full and meaningful process of engagement with First Nations, First Nations leaders, Elders, youth and other experts in our governance, rights, Treaties, title and jurisdiction⁵.

Feedback from early engagements however, indicated that First Nations rights holders expressed concern about the current process lacking accountability and transparency, with the Government of Canada acting unilaterally⁶.

By Assembly of First Nations Resolution 08/2018 and 39/2018, the Chiefs in Assembly confirmed their support for the First Nations rights holders to lead the process and called on the Government of Canada to work with First Nations before adopting and implementing any legislative or administrative measures that affect First Nations. They called upon the federal government to obtain their free, prior and informed consent as only First Nations can determine the path to decolonization and reconciliation. The Federal government has not responded.

The Assembly of First Nations has therefore decided to hold a two-day forum to facilitate an open dialogue amongst First Nations rights holders. This paper has been prepared as background information to support this important dialogue and aid First Nations leadership. It is not an Assembly of First Nations position paper.

Canada's Engagement Documents

Following, the Prime Minister's February 2018 statement, the government embarked upon an engagement process of its own design and in the absence of any meaningful involvement with Indigenous peoples. While First Nations initially reacted favourably towards the PM's Statement, flaws in the process have resulted in serious concerns and lack of trust. There appears to be a failure to fulfill the Prime Minister's statement regarding a full partnership approach.

The federal government released two engagement documents. The first, "Engagement Document" on February 14, 2018 outlined what a new rights framework might contain and the second, "Engagement Guide" on March 21, 2018 posed a series of questions concerning policy and law, nation building, and departmental transformation. In July 2018, the Federal government produced a summary of "What We Heard So Far" to describe what Minister of Crown-Indigenous Relations and Northern Affairs Canada (CIRNA) heard from February to June, 2018. The government reports holding 89 engagement sessions across Canada with 1326 First Nations, Inuit, Metis participants, including 19 Elders groups, 646 women and 25 youth and student groups. From its engagement documents, both legislative changes and policy changes are contemplated. Canada's intentions are expressed as: "expects to formalize the recognition and implementation of Indigenous rights through new legislation and policies" and while the specifics of this framework will be based on its engagement, it suggests that the legislation could:



Recognition and Implementation of Rights

- a. Recognize that Indigenous Peoples continue to have inherent and treaty rights, as recognized and affirmed by section 35 of the Constitution Act, 1982, including the right to self-determination;
- b. Establish a legislative basis for the recognition of Indigenous Nations and Collectives;
- c. Recognized Indigenous Nations and Collectives could become legal entities within federal legislation;

Support Self Determination

- d. Recognize the right of self-government from a legislative rather than policy basis;
- e. Require Canada to participate in intergovernmental negotiations to effectively implement Indigenous jurisdictions where provincial and territorial jurisdictions are key considerations;
- f. Recognize that implementation of rights invokes the honour of the Crown;
- g. Require Canada to negotiate the economic and jurisdictional components of the inherent rights to land, which could include title. Such arrangements could include co-management, shared decision-making, compensation, restitution, economic opportunities and revenue sharing;
- h. Add a universal non-derogation clause to the federal *Interpretation Act* to ensure that all laws are interpreted in alignment with Section 35 of the *Constitution Act, 1982*;

Keep the Government Accountable

- i. Establish processes to give effect to Indigenous jurisdictions through negotiations;
- j. Establish an independent oversight body to ensure Canada fulfills its obligations and responsibilities toward implementation; and
- k. Establish an independent dispute resolution mechanism to support resolution of issues relating to the recognition and implementation of Indigenous rights.⁷

The contemplated policy changes could:

- a. Replace the current Comprehensive Land Claims Policy (1986) and Inherent Right Policy (1995) with a new policy approach that implements Indigenous rights through negotiated agreements. Indigenous groups interested in negotiating would submit information to the Minister of CIRNA demonstrating “that they represent a rights-bearing Indigenous Nation or Collective;
- b. Achieve negotiated agreements that evolve over time;
- c. Achieve negotiated agreements as an alternative to or in advance of a comprehensive agreement;
- d. Accelerate the pace of negotiations; and
- e. Work toward equity in socio-economic outcomes.⁸

The engagement documents reflect a fundamental lack of understanding about what inherent title and jurisdiction and the right to self-determination actually mean. One of the more recent documents suggests that the proposed federal legislation could establish processes to recognize **and give effect** to Indigenous jurisdictions”. The “give effect” language undermines and possibly negates completely the concept of FNs **inherent** jurisdiction – jurisdiction that is pre-existing and does not require federal legislation to be valid and operative.



Negotiated Agreements

The federal government says it is using “exploratory tables” to inform its own policy development process regarding the Rights Recognition Framework. The Government of Canada explains that since the establishment of its “recognition of Indigenous rights and self-determination discussions” in 2015, it has been exploring the vision of what self-determination looks like for the participating communities⁹. These “Indigenous Nations and Collectives” would not need to re-apply to establish a negotiation table but could transition to the new policy should they wish to.¹⁰ Negotiations going forward under a new policy could co-develop negotiation mandates across government, targeting various types of agreements (i.e., treaty, non-treaty, sectoral, incremental, comprehensive and governance) and involve provincial and territorial governments for matters within their areas of jurisdiction.¹¹

There are deep flaws in the federally controlled policy development process.

Canada has so far, and says it intends to continue to exclude First Nations from the drafting process. This is an old way of trying to govern and control First Nations and does not align with the minimum standards of the UN Declaration or with our status as peoples and nations. This approach has so far simply resulted in officials to develop putting forward a recycled version of the status quo that violate our fundamental rights as nations and peoples. This is not the direction set out by the Prime Minister or his cabinet colleagues. For example, in what looks to be a renewed articulation of “contingent” rights, Canada says it will continue to look to negotiated agreements as the “pathway for the implementation of rights” and through these agreements will “recognize” inherent and treaty rights recognized by section 35 of the Constitution Act, 1982 at the outset. By agreement, “certainty techniques” that have resulted in extinguishment would be off the table. Periodic reviews of “living agreements” to provide for evolution where needed or desired and practical approaches could be introduced to recognize and implement interest in and title to lands. Support in negotiations to transition to new approaches, including contribution rather than loan funding would be provided.¹²

About policy changes on “implementation of treaties, agreements and other arrangements”, the language in the federal Engagement document is weak. It does not mention giving force to the spirit and intent and First Nation understandings of Treaty. It says a new policy could seek to implement agreements in accord with the United Nations Declaration on the Rights of Indigenous Peoples, and with Canada’s principle #5 Respecting the Government of Canada’s relationship with Indigenous peoples, whereby Canada recognizes such agreements as acts of reconciliation based on mutual recognition and respect. This new policy approach would work in parallel with a dispute resolution mechanism and independent oversight bodies to facilitate and monitor implementation of all treaties and agreements. Principles and guidelines could be included to support discussions on the interpretation and implementation of treaties and include measures to determine modern beneficiary of treaties signed prior to 1975.¹³



Finally, about fiscal relations, Canada is prepared to negotiate transfer arrangements that are sufficient, predictable and sustained to ensure capacity to govern effectively and provide programs and services.¹⁴

The Engagement Sessions: ‘What Canada Heard’

The engagement sessions led by CIRC Minister Bennett have been finalized however, CIRC has left open the possibility of accepting written comments on the possible ways forward. CIRC has acknowledged that the process was flawed resulting in an uneven level of participation with different First Nations, some of whom were very involved while others were not involved at all.¹⁵

In “*What We Heard So Far*” the government purports to provide a “snapshot” of the input received from February to June 2018 and to “test whether we have understood the issues and recommendations presented to us by First Nation, Inuit, and Metis rights holders.”¹⁶ It is difficult to know how comprehensive the statements are in this report as much of it is paraphrased however, what follows is a synopsis of this report:

Part A: Reconciliation Through Rights Recognition and Implementation

(i) Recognizing inherent and treaty rights

- The relationship between Canada and Indigenous peoples has been characterized by a denial of rights, and court case after court case, with Indigenous peoples having to fight to prove the existence of their rights
- The recognition of rights must respect the differences between First Nations, Inuit and Metis peoples, as well as diversity within these groups
- Any recognition of rights must acknowledge the inherent nature of these rights: this means honouring inherent and treaty rights, including title, the right to govern themselves, and respecting that Indigenous nations have existed since time immemorial
- Respecting rights also means Canada must denounce the Doctrine of Discovery and Terra Nullius
- Canada must recognize rights to land, that have always existed and implementation of these rights means changing Canada’s laws as well as those of other levels of government
- Recognition legislation must give direction to all arms of government to implement the United Nations Declaration on the Rights of Indigenous Peoples
- As Treaty people we have the right of Free, Prior and Informed Consent
- We are beyond wanting the Government of Canada’s recognition, we want our treaty implemented and our language respected

(ii) Supporting self-determination

- Indigenous peoples need an approach to rebuild their own systems of governance based on their own values, laws and traditions and define their nations, determine their citizenship, control areas such as health, education and economic development
- Indigenous legal “traditions” is plural: we are not just one people there are multiple legal traditions



- There is a need to decolonize the male-dominated governance structures of the *Indian Act*
- A new fiscal relationship is needed: one that respects Indigenous nations as owners of their lands, resources and waters where they have the right to economically benefit from those lands, resources and waters
- Increased resource revenue sharing and control over lands and resources
- The *Natural Resources Transfer Act* has to be eliminated

(iii) Keeping the Government of Canada accountable

- Canada must develop mechanisms to oversee how well the federal government fulfills its obligations – which could include an independent body to hold the federal government to account for its action, or inaction
- Canada should consider developing dispute resolution mechanisms over land issues and treaty implementation (i.e., treaty commissioners within the Auditor General's Office or an oversight body reporting to Parliament)
- Create an independent body that provides resources to help mediate and resolve disputes
- Many want to be directly involved in development of the framework, including the drafting instructions for the legislation
- There are concerns with the timeline for the development of the framework being too rushed as well as the need for comprehensive and meaningful engagement

Part B: Reconciliation and Other Matters

(i) Language and Culture

- There is crucial need for a culture change in Canadian institutions and policies to ensure the Indigenous rights are respected, affirmed and implemented The Royal Commission on Aboriginal Peoples (RCAP) is a helpful guide and many of the issues identified by the Commission remain
- There is an urgent need to rebuild Indigenous languages

(ii) Social Issues

- There is an urgent need to address the day-to-day social and economic issues impacting the lives of Indigenous peoples
- It is difficult for Indigenous people to have the capacity to participate in complex discussions on Indigenous rights, when they are preoccupied with the social issues in front of them
- The perspectives of the LGBTQ2S community should be included in discussions

(iii) Urban Indigenous Issues

- A significant proportion of Indigenous people living in urban centres are often marginalized and must maintain their rights if they leave their communities
- The youth need the opportunity to return to their communities and to learn their culture on the land



(iv) Public Education

- It will take all Canadians to truly advance reconciliation
- Racism persists and Indigenous relations with the Crown including early treaty making is not well-taught in schools
- Public information and education must be part of the framework

(v) Departmental Transformation

- The government's responsibilities were not clear enough and it is difficult knowing where to go for certain services
- There is a lack of Indigenous representation in the public service
- Public servants must be educated on Indigenous culture as well as be able to conduct business in Indigenous languages¹⁷

Part C: Path Forward

This section of the report is silent concerning what the government might have heard from First Nations regarding the path forward. The report is also silent in capturing the input of the provinces and territories or other interested parties. This is surprising given the intention of ensuring a broad-based process at the outset. Instead the government continues to invite input through its “*Recognition and Implementation of Indigenous Rights: Engagement Guide*” and it remains their intention to bring forward a comprehensive suite of changes this fall, including potential new legislation.¹⁸

Minister Bennett’s Appearance Before the House of Commons Standing Committee on Indigenous and Northern Affairs

On May 29, 2018 Minister Bennett appeared before the House of Commons Standing Committee on Indigenous and Northern Affairs to speak to her Department’s main estimates (i.e. budget) for 2018-2019. During the course of her testimony, she answered questions from the Committee on the ‘rights recognition initiative’. She stated that since 2015, 65 recognition of Indigenous rights and self-determination discussions have been launched with over 335 either Indian Act bands or Métis governments, impacting over 753,000 people. In total 19 negotiated agreements have been co-developed and signed through these discussions although she did not provide details.¹⁹ She further explained,

*By moving from a denial of rights approach to a recognition of rights, really what we’re doing is **doing the work** – a lot of people say this is a conversation that should have happened 150 years ago in how we would work together, a lot of people feel it really is a conversation that should have happened in 1982 when Indigenous and treaty rights were affirmed and recognized in section 35. At that time, a whole bunch of work was done on sections 1 to 34, meaning the Charter and in making sure that all the laws and policies and practices of Canada were Charter-compliant or in keeping with the Charter.*



The work that we're doing now is actually the recognition and implementation of those indigenous and treaty rights as we move to a legal framework that would allow communities as the Minister of Justice says, when they're ready, willing and able to opt in to a different relationship with Canada that was not offered in the Indian Act or ignored. [emphasis added]

In answer to how Bill C-262²⁰ relates to the rights framework, Minister Bennett stated,

... [t]he UN Declaration on the Rights of Indigenous Peoples needs to be a fundamental foundation of the legal framework... we need to build the mechanisms that will allow us to honour all of those articles [of the UN Declaration]. There are many people who say volume 2 of the Royal Commission wrote it all out. Why don't we get on with that? There are some parts of the Truth and Reconciliations Calls to Action that need to be in this ... but basically its saying that section 35 rights need to be honoured in the way that UNDRIP explained.”²¹

Minister Bennett was asked to clarify the government's definition of “free, prior and informed consent” (FPIC) to which Minister Bennett explained, “I think we've been clear that FPIC is not a veto, and a consensus does not mean unanimity...”

Finally, Minister Bennett was asked to clarify that the government is only consulting with “rights holders”, she replied

“... [w]e have been very clear that this is not the issue of national indigenous organizations. We have met with rights holders, treaty groups, as treaty groups but also hereditary chiefs. We have met with women, and youth and we are trying to get back to the indigenous legal practices and customs, the role of women in communities...We are very clear that if we're going to get this rights recognition framework right, we have to listen directly to the rights holders, and that's how we have organized the engagement.”

While it is true that it is rights-holders must be consulted, all too often, the federal government uses this argument to side-step the AFN and national processes, if it doesn't like what is being said at the national level. In other words, it is a form of divide and conquer strategy.

Unfortunately, there were no First Nation representatives to provide a balanced perspective to the House of Commons Standing Committee following Minister Bennett's remarks²². The Committee was potentially left with view that First Nations were either involved in the design and/or approve the direction the government is taking and that its framework is being founded upon the UN Declaration. This is not the case – as shall be seen in the sections below.



“Doing the Work”²³ – a Brief Retrospective on First Nations Advocacy and Policy Reform

Minister Bennett stated at Committee that “really what we’re doing is doing the work ... that should have happened in 1982 when indigenous and treaty rights were affirmed and recognized in section 35.”²⁴

It would have been more accurate for Minister Bennett to have been clear that the drive by First Nations for meaningful recognition and implementation of their inherent rights and treaties has been going on for as long as government efforts to assimilate First Nations and this government “doing the work” is only their most recent effort.²⁵ In recent history, it was First Nation advocacy and resistance that led the federal government to shelve the 1969 White Paper. As you will recall, the White Paper proposed to do away with Indians and Indian status. It galvanized First Nations across the country in their resistance and forced the government to change policy direction. This advocacy forced government to formulate the first modern land claims policy. It also forced the government of the day to establish a Joint NIB/Cabinet Committee to work on First Nation policy development. While that mechanism had promise, it fell apart because of bureaucratic intransigence and the federal systemic refusal to move beyond the *Indian Act*.²⁶

First Nations successes in the courts also added to impetus for change. In the 1970s, the James Bay Cree were able to get an injunction to stop the James Bay Hydro Project. And in 1973, the Calder decision of the Supreme Court of Canada recognized Aboriginal title of the Nishga people in BC. It forced then Prime Minister Pierre Elliot Trudeau to acknowledge that he was wrong about Aboriginal title, which resulted in the federal government amending its policies to recognize “comprehensive claims”.

In the period leading up to 1982, Pierre Trudeau proposed to patriate the Constitution to Canada – the British North America Act – which was then residing in England. Fearing that their relationship with the British Crown would be undermined and that our rights would be eroded, First Nations launched court proceedings and lobbied in the UK Parliament to stop patriation. The “Constitution Express” brought additional pressure to bear on federal and provincial politicians and eventually forced governments to include section 35 in the Constitution Act, 1982, when it was patriated to Canada.

Section 35 (1) states:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Attempts to clarify the meaning of this section, and more particularly the inherent right of self-government, were undertaken at constitutional conferences from 1983 through 1987. Those talks resulted in elevating the profile of Aboriginal and treaty rights and the inherent right of self-government. They also clarified the application of equality rights and the inclusion of modern day treaties in section 35. However, there was no agreement on the recognition of self-government.²⁷



In 1982, a House of Commons Special Committee on Indian Self-Government was appointed to review legal and institutional issues related to band governance and make recommendations to Parliament. The Committee released its report in 1983, known as the **Penner Report**, which was a high-point of Parliamentary engagement in the First Nation policy development process. The Penner Committee engaged in extensive consultations with First Nations across the country and in the end received “all-Party” support for a series of significant recommendations. It recommended that the federal government recognize First Nations as a distinct legal order of government within the Canadian federation and pursue processes leading to self-government. The Penner Report clearly favoured Constitutional discussions leading to reform but until that happened, the Committee recommended that the federal government introduce legislation to lead to the ‘maximum degree of self-government immediately’. It proposed constitutional entrenchment of self-government and the introduction of recognition legislation, developed jointly with First Nations, to facilitate it.

The Penner Report received wide support amongst First Nations. However, the response from the Department of Indian Affairs was muted. In 1984, the Department of Indian Affairs delivered its response to the *Penner Report* by first acknowledging that “Indian communities” were historically self-governing and that further clarification of constitutional entrenchment would require greater consultation with the provinces. Nevertheless, it agreed to introduce legislation to establish a framework for those Indian First Nations that wish to govern themselves and their land in a way that is not possible under the *Indian Act*. On June 27, 1984, Bill C-52 entitled, *An Act relating to Self-Government for Indian Nations* was introduced in Parliament. It fell far short of the Penner recommendations and did not go beyond first reading.²⁸

Meech Lake and the Charlottetown Accord

Four Constitutional conferences were held between 1983 and 1987 to further define s. 35 in the Constitution Act, 1982. The first conference included a commitment to include Aboriginal peoples in conferences dealing with their rights. In the conferences that followed, the parties failed to produce agreement. After that, Aboriginal peoples were excluded from constitutional negotiations that led to the 1987 Meech Lake Accord. This produced strong protests and contributed to the Accord’s defeat in 1990. After much negotiation, all parties agreed, as part of the 1992 Charlottetown Accord, on amendments to the Constitution that would have included recognition of self-government for Aboriginal people, but the Accord was rejected in a national referendum.²⁹

With few prospects for constitutional change, the government sustained its s. 91(24) legislative authority while it also took a revised policy approach. In 1986 it revised the Comprehensive Land Claims policy to include the possibility of negotiating broader self-government. In 1995, greater political acceptance of the concept of self-government led to federal recognition of the inherent right of Aboriginal self-government as an existing section 35 right under the new Inherent Right to Self-Government Policy. Although the policy purported to recognize inherent rights, recognition was contingent on negotiations. Under this policy, negotiated self-government rights might attain section 35 protection as treaty rights in new treaties, as part of comprehensive land claim agreements or as additions to existing treaties. This approach had the very practical effect of not being a rights recognition policy but rather rights avoidance. Negotiated agreements under the Inherent Right Policy set aside any legal debate in favour of practical arrangements to require that self-government be exercised within the



existing Canadian Constitution, meaning that laws of overriding federal and provincial importance would prevail, and federal, provincial, territorial and Aboriginal laws must work in harmony.³⁰

Many years of negotiation produced relatively few **self-government arrangements** between 1975 and 1995:

- The Cree, Naskapi and Inuit of Northern Quebec under the 1975 James Bay and Northern Quebec Agreement and the 1978 Northeastern Quebec Agreements and the legislated Cree-Naskapi (of Quebec) Act;³¹
- The Sechelt Indian Band of British Columbia under the 1986 Sechelt Indian Band Self-Government Act;³² and
- Seven Yukon First Nations, pursuant to a 1993 umbrella final agreement³³ in which land claim or treaty aspects and self-government aspects were to be implemented in separate agreements, the latter being legislated in the Yukon First Nations Self-Government Act.³⁴

Four additional comprehensive land claims agreements within the meaning of section 35 that were concluded prior to 1995 north of the 60th parallel do not define self-government powers, while making some provision for subsequent self-government negotiations. Post 1995 self-government arrangements are either in place or under negotiation for each of the following: Inuvialuit (1984); the Gwich'in (1992); the Inuit of Nunavut (1993, affirming the territory of Nunavut in 1999); and the Sahtu Dene and Métis (1994).

Following the new Inherent Rights Policy, the *Nisga'a Final Agreement* in 1998 was the first modern treaty in British Columbia and the first in the country to explicitly extend section 35 protection to self-government rights as well as land rights in the same agreement.³⁵ Today there are 22 comprehensive self-government agreements. The conclusion of each form of agreement has the effect of removing affected communities from the application of at least some *Indian Act* provisions. The extent to which the *Indian Act* ceases to apply depends, generally speaking, on how broadly based the self-government agreement is. It is also important to note that the federal approach requires that the *Canadian Charter of Rights and Freedoms* apply. In this regard, the scope of the Charter's section 25 "shield" of Aboriginal and treaty rights, including those set out in self-government and other agreements with self-government components, remains a topic of discussion.³⁶

Oka

When Kanehsata:ke protested the expansion of a golf course over their traditional territory in the summer of 1990, attention was again galvanized, this time on the unresolved land rights and title of Aboriginal peoples and Canada's failure to fairly and justly resolve its outstanding legal obligations. The confrontation that ensued drew international attention and prompted the federal government to create the Indian Specific Claims Commission in 1991 and establish the Royal Commission on Aboriginal Peoples.

In its 1996 Final Report, the **Royal Commission on Aboriginal Peoples** repeated many of the recommendations in the Penner report. It set out an approach to self-government built on the recognition of Aboriginal governments as one of three orders of government in Canada.³⁷ The Report recommended passage of an *Aboriginal Nations Recognition and Government Act*; elimination of the Department of Indian Affairs and



establishment of a new Department of Aboriginal Relations to negotiate and manage agreements with Aboriginal nations, and passage of an *Aboriginal Parliament Act* to establish a representative body of Aboriginal peoples that would evolve into a House of First Peoples and become part of Parliament.

The Recognition and Government Act contemplated by RCAP was viewed as an interim step within a broader strategy on self-government involving circumscribed powers in section 35(1) rather than unlimited powers. Within their sphere of jurisdiction then, the authority of Aboriginal government would be immune to indiscriminate federal and provincial interference. This approach aligns with the Supreme Court decision in *Sparrow* where Aboriginal and treaty rights were treated as immune to legislative inroads, except where a high justification standard could be satisfied. The passage of legislation would commit Canada to provide the financing commensurate with their scope of jurisdiction. In RCAP's view, the right of self-government recognized in section 35(1) should be considered organic. To hold that the right of self-government cannot be exercised at all without the agreement of the Crown appears inconsistent with the fact that the right is inherent.

The federal government's 1997 response to RCAP lacked substantive content. In *Gathering Strength: Canada's Aboriginal Action Plan* centered on four objectives, including strengthening Aboriginal governance. The government stated that

- It had recognized the right of self-government as an existing inherent Aboriginal right within section 35 and outlined the ongoing self-government processes;
- With regard to the Royal Commission's recommendation calling for a restructuring of federal institutions, it is open to further discussions to improve ...
- With respect to the recognition of Aboriginal governments, the federal government said it would consult Aboriginal organizations and the provinces and territories on "appropriate instruments" for the recognition of Aboriginal governments and to provide a framework of principles to guide jurisdictional and intergovernmental arrangements"
- It would focus on improving the capacity of Aboriginal peoples to negotiate and ...
- It was willing to work in partnership with Treaty First Nations to achieve self-government within the context of the treaty relationship and consider the creation of additional treaty commissions, similar to the Office of the Treaty Commission in Saskatchewan.³⁸

One of the most significant things to come out of the RCAP Report was the focus on Indian Residential Schools. The class actions which followed resulted in the Indian Residential School Settlement Agreement. This Agreement contained important compensation provisions, but also committed the government to establishing the Truth and Reconciliation Commission.

In 2002, the Chretien government though then Minister Bob Nault, tried to pass the **First Nations Governance Act (FNGA)**, without adequately consulting First Nations. It was roundly rejected. But it set the stage for a renewed round of consultations under Prime Minister Paul Martin. This led, in May 2005, to Canada and the AFN concluding a Political Accord on **Recognition and Implementation of First Nation Governments** that included establishing a joint steering committee to work cooperatively on a number of policy fronts, including self-government.³⁹ Regional sessions to seek input on a collective framework and strategy to advance recognition



and implementation of First Nation governments were held throughout the country. In each session, two key questions were posed:

- What is needed for the satisfactory expression and restoration of First Nation governments? and
- What does the federal government need to do to facilitate First Nation governments implementation?

To explore these questions, discussion was organized around the following themes:

1. **Strengthening Recognition of First Nation Governments**

It was paramount to establish that First Nations right to govern is a responsibility given by the Creator and cannot be taken away by another nation. It is imperative that our laws are based on our understanding of natural law and local customs, traditions and values. The *Indian Act* is a barrier and legal impediment that needs to be overcome as part of decolonization and if a legislative approach to recognition was chosen, then the legislation should not be prescriptive but jointly drafted with First Nations.⁴⁰

2. **Core Functions of First Nation Governments**

The United Nations Development Programme views “capable government” as a precondition to development and is one that makes decisions affecting its citizens. Governance and administration are two separate functions and with the *Indian Act* over your head, this is not governance. A government works best when it is close to those it governs and should include core functions such as citizenship, economic development fiscal relations, health, education, and justice systems.⁴¹

3. **Lands, Resources and Treaties**

Federal and provincial approaches to lands are resource negotiations based on extinguishment and denial of rights rather than “recognition and affirmation”. Crown policies are unreflective of case law regarding Aboriginal title and treaty rights. First Nations require their own economic base to strengthen their governments and create self-sufficiency.

4. **Mechanisms for Engaging with the Government of Canada**

The current relationship with Canada is not working and fails to uphold the honour of the Crown or advance the development of an effective relationship. “Transformative change” will not come without addressing key relationship issues like power imbalances and failure to recognize rights. The Department of Justice and Finance serve critical roles.⁴²

The Harper government came to power in 2006 which derailed the policy process in the Political Accord.



Chronic Impediments and The Status Quo

Absent agreement on constitutional reform, the federal government has maintained its s. 91(24) *Constitution Act*, 1867 power to legislate respecting “Indians and lands reserved for Indians”. This has most fundamentally taken the form of the *Indian Act*, first proclaimed in 1876 and the most strident barrier in the lives of First Nations people.⁴³ The *Indian Act*’s dysfunctional system, created to forcibly assimilate Indians, through sex-based discrimination and other forms of discrimination and maintains the colonial hold of the federal government.⁴⁴

As was said during the 2005 regional engagements, the *Indian Act* is a legal impediment that needs to be overcome as part of decolonization.⁴⁵ Further, the failure of policy and legislation to respect the fundamental social, cultural, economic and political rights of First Nations facilitates the third world living conditions and life chances for First Nations.

Since 2001 the Office of the Auditor General (OAG) has put a keen focus on the delivery of social programs and services by the Government of Canada to First Nations using its s. 91(24) power to legislate regarding “Indians and lands reserved for Indians” however, no further legislation sets out service standards, delivery models or funding mechanisms. Therefore, these important tasks have been left to policy and departmental discretion which has resulted in underfunding and poor or inadequate service delivery.

Reporting the audit findings concerning federal delivery of services concerning environmental protection, treaty land entitlement obligations, child and family services, drinking water, housing, claim settlements, education, funding arrangements, to name a few, over this period of time has led to a number of significant recommendations by the **OAG**, many of which have yet to be fully realized or result in meaningful improvement in the lives of First Nations people on reserve⁴⁶ despite repeated promises for change by government. In 2011, the OAG delivered a “status report” to the House of Commons summarizing the previous decade of analysis and concluded:

“... Change is needed if First Nations are to experience more meaningful outcomes from the services they receive. We recognize the issues are complex and that solutions will require concerted efforts of the federal government and First Nations, in collaboration with provincial governments and other parties.

We believe that there have been structural impediments to improvements in living conditions on First Nations reserves. In our opinion, real improvement will depend on clarity about service levels, a legislative base for programs, commensurate statutory funding instead of reliance on policy and contribution agreements, and organizations that support service delivery by First Nations. All four are needed before conditions on reserve will approach those existing elsewhere across Canada. There needs to be a stronger emphasis on achieving results.”⁴⁷



While Canada may have legislative authority and responsibility to deliver programs and services on reserve, the transfer of these responsibilities to bands, provinces and other federal agencies actually began in the 1950s and continues, in many respects, to the present day. However, as was noted by the *Penner Report*, devolution of programs to First Nations is not self-government.⁴⁸ The Office of the Auditor General has repeatedly documented the key problems with this service delivery model, most fundamentally the lack of a comparable service standard that stands in stark contrast from other governments who provide essential services to their citizens.

Federal policy intentions appear to have been primarily driven by off-loading of fiscal responsibility. Moreover, it is difficult to see how First Nation's taking over delivery of a program can be characterized as self-government. The federal government continues to control program standards and funding, which in turn are purportedly based on provincial comparators. In the absence of a legislative framework, policy directives and discretion take over.⁴⁹ The government relies on Treasury Board authorities, policy and funding agreements to meet its obligation. No legislation specifically authorizes the Department of Indian Affairs to provide essential services in this way.⁵⁰

Furthermore, inadequate funding levels fail to take account of redressing historical disadvantages created by the impacts of Indian Residential Schools, according to the Canadian Human Rights Tribunal decision in the child welfare case. The Tribunal held that this perpetuates historical disadvantage and constitutes systemic discrimination.⁵¹

In addition to leaving First Nations out of policy development, provincial essential services laws tend to not be culturally appropriate for First Nations.⁵² A result of applying Euro-Canadian values to First Nations services is to undermine the collective and traditional ways of First Nations kinship systems and impose inappropriate and harmful laws.⁵³

It has been said that "First Nations self-government over programs and services on reserve, with adequate funding meeting the needs and circumstances of communities, based in appropriate fiscal mechanisms that do not impose program standards and monitoring conditions, with legislative (of even a constitutional) foundation to clearly define objectives is the only way forward."⁵⁴

In addition to the program and service barriers described above, federal policies and processes create their own impediments to success. During the Recognition and Implementation of First Nation Governments engagement in 2005 it was noted that Canada dictates the degree to which it is willing to negotiate in several "list" areas. List 1 are those matters "that are integral to the group". List 2 matters are those "that may go beyond those that are integral" and List 3 matters are those "where there are no compelling reasons for Aboriginal ...law making authority". The placement of matters is entirely chosen by Canada with First Nations required to persuade federal "decision-makers" of "compelling reasons" for the exercise of a particular lawmaking power even though there is no case law requiring this.⁵⁵



Further, it was noted even at that time, that federal claims policy has not kept pace with court decisions which prompted a call for a bilateral review process. Thirteen years and many more significant court decisions later, the same broken policies are in place and the same narrow interpretations of s. 35 and s. 35 case law are articulated by federal officials. In 1982 and through today, Canada's position is that section 35 was/is an empty box.

Sadly, the approach of 'no recognition without an agreement' adheres to the status quo and is contrary to what was said by the Royal Commission on Aboriginal People (RCAP):

"In our judgement, the right of Aboriginal governments to exercise authority over all matters relating to the good government and welfare of Aboriginal peoples and their territories is an existing Aboriginal right and is therefore recognized and affirmed by the constitution.

This governing authority has two parts: a "core" and a "periphery". The core of Aboriginal jurisdiction consists of matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity – but do not have a major impact on neighboring communities and are not otherwise the object of transcendent federal or provincial interest.

Legally, nothing prevents Aboriginal governments from taking charge of core issues in their communities and nations tomorrow. Practically, of course, they are tied into existing program arrangements with other governments. Before they can reasonably be expected to take charge, agreements about new funding formulas and many other issues are needed."⁵⁶

The federal insistence on extinguishment or variations of extinguishment is not consistent with the human rights of Indigenous peoples recognized under international human rights law. Extinguishment is not required to reconcile Aboriginal title with Crown title, a point clearly made in the *Tsilhqot'in* decision. The jurisprudence of the Supreme Court of Canada has clearly recognized the prior existence of First Nation societies and pre-existing sovereignty. First Nations are not going to backslide to a policy of extinguishment which is based on doctrines of discovery or terra nullius.⁵⁷

Finally, failure to meet its existing treaty obligations remains despite the repeated demands of First Nations. There is no national treaty implementation policy and there should be, developed in partnership with First Nations and overseen by a new Ministry responsible for relationships with First Nations based on a nation-to-nation relationship.⁵⁸



Canadian Jurisprudence: A double edged sword

In the absence of rights recognition, the “denial of rights” spoken of by Prime Minister Justin Trudeau on February 14th, 2018 is still very much a reality and has a very real and profound consequence for First Nations.

Too often, First Nations have no option but recourse to the **courts** – an expensive, time consuming, adversarial process. This path has however, resulted in the development Canadian jurisprudence (i.e., common law) regarding Aboriginal and Treaty rights through its judicial branch where the executive and legislative branch failed to define the scope and content. This path has itself not been devoid of risks and in many ways has stunted Canada’s constitutional evolution.⁵⁹

In *Calder et al. v. Attorney General of British Columbia*, the Supreme Court of Canada found that Aboriginal title was part of the common law and is based on political organization and occupation of land:

“Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the *Royal Proclamation of 1763*, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal and usufructuary right.” What they are asserting in this action is that they had the right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was “dependent on the goodwill of the Sovereign.”⁶⁰

The Supreme Court of Canada affirmed *Calder* in *R v. Van der Peet* to clearly state that Aboriginal rights are part of the common law:

[28] In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: *Calder*...⁶¹

The Supreme Court of Canada has repeatedly stated that the doctrine of Aboriginal rights are recognized and affirmed by s. 35(1). In *R v Van der Peet* this affirmation came because of one simple fact:

when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.⁶²

In *R v Sioui* the Supreme Court explicitly recognized that Indigenous societies had a sovereign, political dimension: ...we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations. The mother countries did everything in their power to secure alliance of each Indian nation and to



encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality.⁶³

The courts have also recognized that treaties are based on Aboriginal sovereignty⁶⁴. In *Haida Nation v British Columbia (Minister of Forests)*, the Supreme Court of Canada specifically noted that Aboriginal rights are based on Aboriginal sovereignty:

[20] ... Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition⁶⁵

In *R v Marshall* and *R v Bernard*, the Supreme Court of Canada set out a comprehensive list of principles of treaty interpretation (based upon its body of jurisprudence) and noted that aboriginal laws may be protected by treaties:⁶⁶

127. In my view, aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had not rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights. See S. Hepburn, “Feudal Tenure and Native Title: Revising an Enduring Fiction” (2005), 27 Sydney L.Rev.49

128. It is very difficult to introduce aboriginal conceptions of property and ownership into the modern property law concepts of the civil law and common law systems, according to which land is considered to be a stock in trade of the economy. Aboriginal title has been recognized by the common law and is in part defined by the common law, but it is grounded in aboriginal customary laws relating to land. The interest is propriety in nature and is derived from inter-traditional notions of ownership. “The idea is to reconcile indigenous and non-indigenous legal traditions by paying attention to the Aboriginal perspective on the meaning of the right at stake” (J Borrows, “Creating an Indigenous Legal Community” (2005) 50 McGill LJ 153 at p. 173).

In *Tsilhqot’in Nation v British Columbia*⁶⁷, the Supreme Court of Canada confirmed that Aboriginal title carries collective decision-making power regarding land:⁶⁸

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982.

[...]

[88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out – that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance



with the Crown's procedural duty to consult and must be justified on the basis of a compelling and substantial public interest and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

[...]

[121] A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (Delgamuukw, at para. 166).

Thus, while establishing territorial jurisdiction protected by section 35(1), the court also noted that it is not immune from federal or provincial jurisdiction but those incursions must be justified. This justification threshold is a constraint both on Aboriginal title and Crown sovereignty. In this regard, the court was not breaking new ground but reaffirming its justification threshold first established in 1990 with *R v Sparrow*.⁶⁹

In *R v Sparrow*, the Supreme Court of Canada protected Musquem rights to fish for food and for social and ceremonial purposes and it prohibited the unilateral extinguishment of these rights. It required the government to justify any attempt to infringe section 35(1) rights. For the first time, the courts imposed a limit on Crown sovereignty.⁷⁰

In 1990, this legal victory appeared to present a path to genuine reform. Then the idea of "originalist history" re-emerged and became the touchstone for proving Aboriginal rights. "The Supreme Court of Canada created a framework that would make colonial engagement the measure of Aboriginal peoples' constitutional rights."⁷¹ It turned judges and lawyers into amateur historians. Courts focused their attention on what was, once upon a time, of central significance to "Indians" and did not consider what was important to Aboriginal peoples when the constitution was patriated in 1982 and beyond. Thus, Aboriginal peoples could not claim any rights that owed their origins to European influence. Historians were called to provide evidence of what was central to Aboriginal culture prior to European arrival. This legal framework has produced "few victories" for Aboriginal peoples but further entrenched a view that Aboriginal nations were past-tense peoples. "Retrospectivity was entrenched because the courts will only protect what was once integral to Aboriginal cultures, not necessarily what is significant to them today."⁷²

In day to day terms, Canada's Constitution has little relevance for improving the health, welfare and security of most Aboriginal peoples.⁷³ Aboriginal rights have been simultaneously enriched and constrained by "frozen in time" moments of a problematic past in defining contemporary constitutional protections. Living constitutionalism is pushed aside but perhaps this would be a better method for courts to follow when considering Aboriginal rights.⁷⁴



Living Tree Jurisprudence⁷⁵

This is the approach taken in all other constitutional fields. This approach favours contemporary interpretations when engaging with the past. History is relevant but historical understandings are thought to be the “floor” for interpretation rather than the “ceiling” for understanding rights. Yet, Canadian judges do not interpret constitutional provisions in the light of Indigenous perspectives. Despite a public perception that sees Aboriginal rights as progressively expansive, the courts generally apply the narrowest methodology to this field in the trenches of constitutional interpretation.⁷⁶

The common law has affirmed that Aboriginal and treaty rights are based on pre-existing social and political organization, with sovereign elements. The language of “pre-existing” employed by the courts is however a double-edged sword. The idea of freezing history at the moment when the Crown asserted sovereignty turns back the clock for Aboriginal peoples and allows them to claim the land rights they possessed at that time.⁷⁷ Aboriginal peoples’ economic, social and political rights do not fare as well under a “frozen in time” analysis. This becomes evident when examining rights like hunting, fishing, trading, education, economic development, caring for children, providing for their health and general welfare – in short, rights of self-government.⁷⁸ This is perhaps most apparent in the case of *R v Pamajewon*⁷⁹. Members of the Shawanaga and Eagle Lake First Nations were charged with operating a common gaming house contrary to section 201 of the Criminal Code. They defended this charge by asserting that they were exercising an existing right to self-government under section 35(1) of the *Constitution Act*, 1982. They had passed laws and created the infrastructure to financially support their communities through high-stake gambling. Similar rights had been recognized by the Supreme Court for the United States for Indian Nations south of the border. The Shawanaga and Eagle Lake Nations could be said to have a right to govern themselves that was integral to their distinctive cultures prior to the arrival of Europeans. They said this right was unextinguished and, therefore, recognized and affirmed in contemporary law.

The court did not accept the communities’ arguments. Despite finding that the Anishinaabe people historically gambled, the court found that there was “no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were part of the First Nations’ historic cultures and traditions, or an aspect of their use of their land.”⁸⁰ The Supreme Court of Canada accepted the opinion of the lower court, which held: “[C]ommercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized.”⁸¹ The court’s recharacterization of the communities’ claims from governance to gambling would have been more difficult to manipulate if living tree jurisprudence had been applied⁸².

The court was looking for what was integral to the distinctive culture of the Anishinaabe people prior to contact. The claim to governance was disallowed because it did not accord with the “specific history and culture of the aboriginal group claiming the right.” The Anishinaabe people did not gamble on a twentieth-century scale in the 1600s. Therefore, the court held they could not claim rights to govern activities that did not correlate with first-contact activities. The court wrote that “to characterize the appellants’ claim [as self-government] would be to cast the Court’s inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case.”⁸³



Apparently, looking at Aboriginal rights in accordance with the specific circumstances of each case sends the courts back in time. This demonstrates originalism's flaws; the Supreme Court of Canada's "idea" of history tightly disciplines Canada's Constitution within a colonial framework.

“Reconciliation” as the constitutional law imperative

The courts have established that Aboriginal and treaty rights are pre-existing rights having a source independent of the common law and the Canadian constitution, therefore, a full discussion and consideration thereof must include other perspectives and sources of law, namely, indigenous perspectives and legal systems as to their meaning and application.

Case law such as *Van Der Peet* and *Delgamuukw* provide clear direction in that regard:

“Courts must take into account the perspective of Aboriginal peoples themselves.

In assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right. In *Sparrow*, supra Dickson C.J. and La Forest J. held at p.1112 [S.C.R.; p. 182 C.N.L.R.] that it is “crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake”. It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35 (1) is the reconciliation of the pre-existence of distinctive Aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating Aboriginal rights claims must, therefore, be sensitive to the Aboriginal perspective, but they must also be aware that Aboriginal rights exist within the general legal system of Canada.

...True reconciliation will, equally, place weight on each.”⁸⁴

“... the reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the “aboriginal perspective while at the same time taking into account the perspective of the common law” and that “true reconciliation will, equally, place weight on each”. I also held that the Aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of Aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an Aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands, which are the subject of a claim for Aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.”⁸⁵

Can there be another way? Can there be a Revitalization of the Constitution?



Canada's obligations to implement the United Nations Declaration on the Rights of Indigenous Peoples⁸⁶

The *Declaration on the Rights of Indigenous Peoples* (the *UN Declaration*) consolidates decades of progressive development of international norms and standards recognizing and protecting the rights of Indigenous peoples, as reflected in the jurisprudence and recommendations of international and regional human rights bodies.⁸⁷ Global consensus in support of the *Declaration* has been affirmed in eight UN General Assembly resolutions, the most extensive of which, the Outcome Document of the 2014 World Conference on Indigenous Peoples, commits all General Assembly members to taking,

in consultation and cooperation with indigenous peoples, appropriate measures at the national level, including legislative, policy and administrative measures, to achieve the ends of the *Declaration* and to promote awareness of it among all sectors of society, including members of legislatures, the judiciary and the civil service.⁸⁸

Commenting specifically on the rights of Indigenous peoples in Canada, James Anaya, a renowned expert on the rights of Indigenous peoples in international law and at the time the UN Special Rapporteur on the Rights of Indigenous Peoples, wrote that “implementation of the *Declaration* should be regarded as political, moral and, yes, legal imperative without qualification.”⁸⁹

Since its adoption by the United Nations General Assembly in 2007, First Nations have collectively advocated for the full implementation of the UN Declaration, including the National Chief of the Assembly of First Nations. Finally, the Government of Canada has committed to implementing the *UN Declaration* “without qualification” In 2016, Minister Bennett announced to the United Nations,

“[t]hrough Section 35 of its Constitution, Canada has a robust framework for the protection of Indigenous rights... We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution ... by adopting and implementing the declaration, we are excited that we are breathing life into Section 35 and recognizing it as a full box of rights for Indigenous Peoples in Canada.”⁹⁰

Speaking to the UN General Assembly in September 2017, Prime Minister Trudeau stated, We know that the world expects Canada to strictly adhere to international human rights standards – including the *United Nations Declaration on the Rights of Indigenous Peoples* – and that is what we expect of ourselves, too.⁹¹

Human rights instruments like the *UN Declaration* define the responsibilities of nation states, and in some instances, of other sectors of society. These responsibilities can have diverse legal effects,⁹² including the use of international law as a “relevant and persuasive source of interpretation”⁹³ of domestic law, including the Constitution.



In 2016, the Ontario Superior Court relied on statements and commitments of the Crown – including becoming a “full supporter, without qualification of this international [United Nations] Declaration [of the Rights of Indigenous People]”.⁹⁴ In 2017, an Ontario court elaborated:

... in dealing with aboriginal people and aboriginal land claims and rights, the Crown has a special responsibility and relationship with its indigenous peoples. The Crown must deal with such peoples and related issues fairly and appropriately, especially in light of the recent recommendations as released by the Truth and Reconciliation Commission and Canada’s recent adoption of the United Nations Declaration of the Rights of Indigenous Peoples.⁹⁵

All sectors of society are obligated to *respect* human rights; that is, to ensure that their own actions do not violate the rights of others or undermine their ability to exercise and enjoy their rights. Governments are also obligated to *protect* human rights; that is, to take reasonable precautions to prevent violation of rights by others. Governments are additionally obligated to *fulfill* human rights; that is, through laws, policies, programs and funding commitments, help create the conditions in which rights can be fully enjoyed and exercised.

The *UN Declaration* recognizes that in the context of colonialism and discrimination, and the resulting marginalization, dispossession and impoverishment of Indigenous peoples, special measures will be required to meet these obligations. International human rights bodies have also recognized that in a federal state, the national government has a particular responsibility to ensure that international human rights obligations are upheld, regardless of divisions of power between the federal, provincial and territorial governments.⁹⁶

The UN Declaration should cause Canadian Parliament and courts to reject its previous approach: its application to Indigenous peoples does not rest on proof of pre-contact or pre-non-native sovereign assertions. Rights are vested in peoples; peoples as identified in section 35(1) of the *Constitution Act, 1982* should draw their meaning from international law and be regarded as a political category.⁹⁷

Peoples rights within the UN Declaration are expressed in universal terms; their exercise is not contingent on a non-Indigenous event (such as European contact with Indigenous peoples or the assertion of foreign sovereignty, as required in Canadian case law). Article 1 clearly exemplifies this:

“Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”⁹⁸

The incorporation of universal human rights standards in the recognition of Indigenous law and governance is an important step in rejecting the paradigm found in *Van der Peet* and *Pamajewon* (which measures Indigenous governance rights by whether they were integral to the distinctive culture of Aboriginal peoples prior to the arrival of Europeans). The government’s promise to adopt and implement the UN Declaration in a constitutional context puts the honour of the Crown “squarely on the line”.⁹⁹



Government Accountability through Other International Instruments

It remains paramount to hold the government of Canada accountable. By its own engagement documents, it speaks of “accountability” within its rights framework but there are additional international instruments to further reinforce its commitment here at home.

In 1989, the International Labour Organization (ILO) adopted the Indigenous and Tribal Peoples Convention (ILO Convention No.169). This Convention and the UN Declaration are compatible and mutually reinforcing (section 2), and although were negotiated at different time periods by different international bodies, the implementation process for the two instruments is largely the same and experiences generated in the context of Convention No. 169 can serve to inspire further efforts to implement the UN Declaration.¹⁰⁰

In September 2015, Canada and 192 other UN member states adopted the 2030 Agenda for Sustainable Development. The 2030 Agenda is a 15-year global framework centred on 17 Sustainable Development Goals (SDGs), 169 targets and over 230 indicators for people and the planet. It includes an overarching principle of ensuring that no one is left behind in the achievement of the SDGs¹⁰¹. This principle will be particularly significant for Canada’s promise to implement the UN Declaration.

On May 10, 2016 Minister Bennett reversed Canada’s view of the UN Declaration stating at the United Nations Permanent Forum on Indigenous Issues

“In fact, through Section 35 of its Constitution, Canada has a robust framework for the protection of indigenous rights. Section 35 of our Constitution states, “the existing Aboriginal and treaty rights of Aboriginal peoples of Canada are hereby recognized and affirmed.” Indigenous people, including Grand Chief John, and so many others fought hard to include these rights in our Constitution.

By adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada. Canada believes that our constitutional obligations serve to fulfil all of the principles of the declaration, including “free, prior and informed consent.” We see modern treaties and self-government agreements as the ultimate expression of free, prior and informed consent among partners.”¹⁰²

On June 15, 2016, the General Assembly of the Organization of American States (OAS) adopted the American Declaration on the Rights of Indigenous Peoples. Adopted almost ten years after the UN Declaration, the American Declaration strengthens the UN Declaration’s provisions and in particular Article XLI states:

“The rights recognized in this Declaration and the United Nations Declaration on the Rights of Indigenous Peoples constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the Americas.”¹⁰³



The Truth and Reconciliation Commission (2016): Calls to Action/ Reconciliation

The final report of the Truth and Reconciliation Commission (TRC) detailed the violent legacy of colonization in Canada and directly connected the overarching goal of reconciliation to the implementation of the UN Declaration calling it “the framework for reconciliation at all levels and across all sectors of Canadian society.”¹⁰⁴ The Supreme Court has called reconciliation “the fundamental objective of the modern law of aboriginal and treaty rights.”¹⁰⁵

Call to Action 42:

We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and UNDRIP (endorsed by Canada in November 2012).

Call to Action 43:

We call upon federal, provincial, territorial and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as a framework for reconciliation.

Call to Action 44:

We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of UNDRIP.

Call 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. (commitments to repudiate colonial judgements, create a system of laws that includes Indigenous laws, revitalize treaties and relationships etc.).

Call to Action 46:

We call upon the parties to the Indian Residential Schools Settlement Agreement to develop and sign a Covenant of Reconciliation that would identify principles for working collaboratively to advance reconciliation in Canadian society, and that would include, but not be limited to:

- i. Reaffirmation of the parties’ commitment to reconciliation.
- ii. Repudiation of concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and terra nullius, and the reformation of laws, governance structures, and policies within their respective institutions that continue to rely on such concepts.
- iii. Full adoption and implementation of the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.
- iv. Support for the renewal or establishment of Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future....



The TRC's decision to identify the UN Declaration as “the framework for reconciliation forever links the Declaration to any strategies on reconciliation. When the Declaration is undermined, reconciliation is also under threat.”¹⁰⁶

Bill C-262

The Prime Minister and the Attorney General of Canada have publicly endorsed 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*, currently before Parliament, which affirms that the United Nations Declaration is “a universal international human rights instrument with application in Canadian law” and which calls on the Government of Canada, “in consultation and cooperation” with Indigenous peoples, to “take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples”¹⁰⁷

First introduced on April 21, 2016, Bill C-262 is a Private Members Bill from Member of Parliament Romeo Saganash, NDP, Abitibi-Baie James-Nunavik-Eeyou, Quebec. It has now been introduced into the Senate for first reading as of May 31, 2018.¹⁰⁸ The Bill requires the federal government to work with Indigenous peoples to develop a national action plan for implementation of the UN Declaration and provides transparency and accountability by requiring annual reporting to Parliament on progress made. Bill C 262 repudiates the Doctrine of Discovery as well as colonialism.¹⁰⁹

Canada's law and policy review

On July 14, 2017 the federal government (Minister of Justice and Attorney General of Canada) released ten “*Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*” aimed at a renewed “nation-to-nation, government-to-government” relationship with Indigenous Peoples based on recognition of rights, respect, cooperation and partnership. In it the federal government committed to implementing the UN Declaration through the review of current laws and policies.

It should be noted that at this point, there remains a lack of information regarding specific government actions in relation to proposed internal changes to align legislation, policies and litigation and negotiation mandates with recognition. There is no clear identification of or priority list of which laws and policies will be addressed or any timelines for completion of such work. It may be helpful to explore what actions the government will take in seeking to bring their laws, policies, litigation and negotiation mandates in line with recognition, the UN Declaration, the TRC Calls to Action and the honour of the Crown.¹¹⁰



Consistency with the UN Declaration will require Canada to ensure the active participation of First Nations in the review process and must respect Article 19 in particular:

“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 affect them.”¹¹¹

Thus, to the extent that the current engagement process being undertaken by the government shapes its consultation toward “implementing legislative or administrative measures” it must show deference to Indigenous peoples’ “representative institutions”.¹¹²

Free, prior and informed consent requirements are explicitly set out in five articles of the Declaration: Article 10 (removal of Indigenous peoples from their lands and territories); Article 19 (legislative and administrative measures affecting Indigenous peoples), Article 29 (storage or disposal of hazardous materials); Article 30 (military activities on the lands of Indigenous peoples; and Article 32.2 (decisions affecting the lands, territories and resources of Indigenous peoples in general, and particularly concerning exploitation of natural resources). More broadly, the right of Indigenous peoples to say yes or no to the proposals of national states and private corporations is an indispensable corollary to the affirmation of the right to self-determination in Article 3 and the dozen other provisions affirming Indigenous decision-making authority in relation to Indigenous lands, society and culture.¹¹³

There is not, as of yet, been an explicit consideration of “free, prior and informed consent” by the Supreme Court of Canada, but the honour of the Crown presumes that Canada intends to act in compliance with its international obligations.¹¹⁴ These are early days however, the most purposive approach to the implementation of the UN Declaration will be *in conjunction with* Indigenous peoples. Such an approach would foster stronger relationships, safeguard human rights and promote reconciliation.¹¹⁵

The United Nations Expert Mechanism on the Rights of Indigenous Peoples met in July 2018 seeking advice on its study of free, prior and informed consent.¹¹⁶ While Canada uses the phrase “aims to secure” consent¹¹⁷, Indigenous representatives from Canada drew attention to the Supreme Court of Canada’s jurisprudence on the duty to consult that compels the government to consult and *accommodate* (i.e., substantially address the concerns of Indigenous peoples). Further, the minimum standard in the UN Declaration is not consultation, but consultation and cooperation.¹¹⁸



Ten Principles to assist the Federal Government Achieve Reconciliation with Indigenous Peoples (See Appendix B)

On July 14, 2017 the federal government (Minister of Justice and Attorney General of Canada) released ten “*Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*” aimed at a renewed “nation-to-nation, government-to-government” relationship with Indigenous Peoples based on recognition of rights, respect, cooperation and partnership. Each principle is to be read together with supporting commentary. There was however, little to no engagement with First Nations leading up to the release of the federal Principles.¹¹⁹

The foundation and context of the principles include section 35 of the *Constitution Act, 1982*; the Royal Commission on Aboriginal Peoples (RCAP); the United Nations Declaration on the Rights of Indigenous Peoples; the Truth and Reconciliation Commission (TRC’s) Calls to Action; and the government’s commitment to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights. Canada’s introductory statements appear to suggest that Canada is acknowledging Indigenous rights as human rights, which is consistent with recognition of the UN Declaration which is a human rights framework. This should be further explored.¹²⁰

PRINCIPLES #1 & #4:

Principle #1 provides that Canada recognize 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.

Principle #4 provides that Canada recognize that Indigenous self-government is part of Canada’s evolving system of cooperative federalism and distinct orders of government

At a high level, the Principles provide a foundation for establishing a renewed Crown-Indigenous relationship, but there remains “room for improvement”¹²¹. The first Principles does not explicitly recognize the existence of inherent Aboriginal title and it is critical to press for clarity on what is actually being recognized.¹²² It will also be helpful to clarify that the existence of the inherent nature of self-determination and self-government are not premised on articulations of Canadian courts, nor reliant upon Canadian common law or statutes.

PRINCIPLES #2, #5 and #9:

Principle #2 recognizes that “reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982.”

Principle #5 “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.”

Principle #9 “recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.”



These Principles address the important legal precept that the existence of Aboriginal rights are not contingent on the negotiation and conclusion of some type of agreement or arrangement with the Crown and “where formed, they should be based on the recognition and implementation of rights, not their extinguishment, modification, or surrender.” It is both legally and politically significant to set out that Aboriginal rights are not contingent rights. This is helpful to First Nations that are attempting to realize the practical benefits of reconciliation.¹²³

Additionally, this particular grouping of principles potentially speaks to the Crown’s commitment to move away from any approach requiring extinguishment, surrender or modification of Aboriginal rights and the potential for evolution of agreements. A statement from Principle #9 in combination with the concepts set out in Principle #5 further exemplifies the living tree approach, and the discontinuation of extinguishment, modification, or surrender, “treaties, agreements, and other constructive arrangements should be capable of evolution over time.” (Principle #9)

Given the introductory and other statements throughout both documents regarding the importance of the UN Declaration, potential changes to laws, policies and practices could include a directive to all Crown ministries and representatives stating that they must apply and implement the UN Declaration’s standards in developing service plans, mandates for all negotiations, litigation, decision making processes and so on.

Principle #3, “recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.”

As provided for in Canadian common law, it is “always assumed that the Crown intends to fulfil its promises” and that the “honour of the Crown is always at stake in its dealings with Aboriginal peoples.” The doctrine of the honour of the Crown becomes helpful in so far as it provides a legal foundation for the application of the UN Declaration in the domestic context.¹²⁴

PRINCIPLE #6:

Principle #6 states that 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 (but falls short of confirming) that the importance of free, prior and informed consent, as articulated in the UN Declaration, extends beyond Aboriginal title lands. This statement offers a helpful starting point to support First Nations in negotiating arrangements for a strengthened role in decision-making in regard to activities off of title lands and presumably, off of treaty settlement lands. However, the statement or concept cannot remain as it is currently presented.

The statement in this Principle that the government will “aim” to secure consent is not consistent with the standard set out in the UN Declaration which requires States to “obtain” consent. The articulation in the Principles of the standard provides for a lower threshold and weaker approach. Article 19 of the UN Declaration provides that, “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.” The UN Expert Mechanism on the Rights of Indigenous Peoples as identified that, “the right to free, prior and informed consent is embedded in the right to self-determination ... and is an integral element of that right.”¹²⁵

PRINCIPLE #7:

Principle #7 states that 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.”

Given that much of the documents focuses on reconciliation and recognition of the Indigenous right to self-determination and self-government, it is unclear how the recognition of Indigenous nations, including the nature and scope of Indigenous governments as articulated throughout the documents, and how recognition of Indigenous legal orders can operate alongside a continued court-imposed mechanism for justifying infringements of Aboriginal rights.

As previously stated, reconciliation is a predominant feature in both of the documents. Canadian common law has been clear that one of the aims of consultation is to achieve reconciliation. Consultation, which is grounded in the honour of the Crown, is a procedural step in the infringement of rights justification analysis. In essence, consultation becomes a mechanism for reconciliation, but is also a mechanism that potentially facilitates the infringement of rights.

PRINCIPLE #8:

Principle #8 provides that 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.”

It is unclear why a renewed fiscal relationship would be characterized as the catalyst for Indigenous peoples to have fair and ongoing access their lands, territories and resources. Fair and ongoing access our lands, territories and resources arise as a result of the inherent nature and existence of Aboriginal title. It is not predicated upon a new fiscal relationship or the existence of an agreement or arrangement for legitimacy or operationalization. Moreover, Principle #8 does not make any reference to, or provide recognition of Aboriginal title, which is a fundamental underpinning required to fully achieve economic assurances and self-sufficiency for Indigenous Nations and to best support self-government activities.

It’s commonly understood that Indigenous governments will require an economic foundation to support their operations and meet various responsibilities. What is missing from Principle #8 is the full acknowledgement of the “inescapable economic component of Aboriginal title” as articulated in *Delgamuukw*. In seeking to achieve recognition and reconciliation and to avoid the existing status quo of institutional poverty, it is imperative that a framework provide space for Indigenous Nations and communities to realize recognition of Aboriginal title. This in turn would provide a foundation for economic and commercial opportunities in Indigenous homelands, generate or support employment and business opportunities, and provide access to streams of revenue necessary to support the path to reconciliation.¹²⁶



The Engagement Process: 'A Flawed Process'

Many rights holders have expressed frustration about the short timelines and is far too compressed for what is at stake. This has the practical consequence of prohibiting a common level of understanding amongst First Nations. There has been a lack of support to participate in a well-considered way. Second, this process was planned and carried out by Canada alone. The dates, locations and participants were not released by CIRNA and many were not made aware with any advance notice. This is the opposite of “renewal” or “collaboration”. Finally, there is concern about whether “rights holders” were actually included.¹²⁷

More generally, it is becoming clear that the current engagement process is not in alignment with the Prime Minister’s announcement either in form or substance and is deepening mistrust. As previously stated, CIRC itself acknowledged that its process was flawed and resulted in uneven participation. But more fundamentally, the government reported that it heard that to move away from a denial of rights means to respect diversity. A one size fits all approach does not respect the unique laws, customs and values Indigenous Peoples have. The government continues to use homogenizing language when speaking of the Indigenous rights and Indigenous Nations. It means honouring inherent and treaty rights. What is required to move beyond denial of rights is an express denunciation of the doctrine of discovery and terra nullius. All the laws of Canada must change; at all levels of government and respect must be given to free, prior and informed consent. Canada must be held accountable for its actions and inactions starting now – not upon the conclusion of a new framework. There are existing agreements and treaties that still must be honoured.

Based upon a plain reading of its February 14th engagement guide (summarized at pages 4 and 5) there is great cause for concern that the path the government has embarked upon, unilaterally, runs counter to the intention expressed by the Prime Minister on February 14th and if implemented, is not consistent with a framework that is grounded in the UN Declaration. The honour of the Crown is at stake today as it will continue to be and regard must be had to the UN Declaration Articles 3, 19, 25-32 and 37 in particular.

The real potential exists for this legislative and policy framework to further restrict and confine the implementation of inherent and treaty rights by legislating a definition of “Indigenous Nations and Collectives” and that definition then becomes the threshold to enter into negotiations. Such an approach would in and of itself encroach upon the right of self-determination and run counter to recognizing the inherent nature of such rights. Recognition through legislative definition is the *Indian Act*¹²⁸ and to extend this approach to “nations and collectives” is the antithesis of recognizing the inherent and treaty rights recognized by section 35. Implementing only the rights it has recognized through a negotiated agreement and involving provincial and territorial governments where it believes it’s necessary, falls short of affirming the inherent right of self-government and creating space for the operation of Indigenous legal orders and jurisdictions.



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Policy guidelines and directives are the interpretative tools used by government to give effect to a legislative framework. First Nations similarly have decades of such restrictive and stunting ‘implementation tools’ unilaterally created by government and in isolation of the full recognition and affirmation of rights recognized by section 35 of the Constitution Act, 1982.

It has been nearly 50 years since the White Paper and First Nations still do not want to operate within the assimilationist policies of the *Indian Act* but they want to define the alternative. Sadly, the federal government continues to pursue a path that will only restrict and confine how this is done. First Nations still are not being heard.

There are many questions and details yet to be explored. Even the government’s 10 Principles were developed and unrolled in a manner that itself was not consistent with a new nation-to-nation, government-to-government relationship thus it will be critical going forward that Canada recommit to work in partnership with Indigenous peoples as full partners.¹²⁹



Endnotes

- 1 News Release, Government of Canada to create Rights Recognition and Implementation Framework, February 14, 2018.
- 2 The accuracy of this statement should be challenged given the four years of Constitutional Conferences between 1983 and 1987 that are highlighted later in this report.
- 3 Ibid
- 4 Supra note 1
- 5 AFN Resolutions 08/2018 and 39/2018 confirm First Nations determination of the path to self-determination and decolonization.
- 6 AFN Resolution 08/2018
- 7 Engagement Document: Working Together to Create the Foundation for the Federal Recognition and Implementation of the Inherent and Treaty Rights of Indigenous Peoples in Canada, February 14, 2018, pp. 5-8
- 8 Ibid p. 9
- 9 It is not clear how the current negotiation tables were initiated.
- 10 See note 6, p. 9
- 11 Ibid p. 10
- 12 Ibid., p. 10
- 13 Ibid., p. 11
- 14 Ibid.
- 15 Process concerns communicated to the AFN are also summarized later in this report.
- 16 What We Heard So Far: National Engagement with Indigenous Peoples on the Recognition and Implementation of Indigenous Rights, February-June 2018.
- 17 Ibid.
- 18 The March 21, 2018 edition is available on its website.
- 19 House of Commons Standing Committee on Indigenous and Northern Affairs, unedited version, Tuesday, May 29, 2018. Replace with final committee transcript
- 20 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 (United Nations Declaration on the Rights of Indigenous Peoples Act).
- 21 House of Commons Standing Committee on Indigenous and Northern Affairs, unedited version, Tuesday, May 29, 2018
- 22 A new Cabinet Committee on Reconciliation has been formed to strengthen the relationship with Indigenous Peoples and advance the commitment to a renewed nation-to-nation, Inuit-Crown, government-to-government relationship with First Nations, Inuit and the Metis Nation based on recognition of rights, respect, cooperation and partnership. This Committee will build upon the work previously undertaken by the Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples. The Ministerial Working Group on Law and Policy Review was not a formal Cabinet Committee like this new one; and although it had the latitude to meet directly with First Nations leadership it did not really do so or in any organized transparent way. Finally, the MOU on Joint Priorities provides an opportunity to discuss with Ministers the direction of Chiefs on such matters as well as issues relating to co-development where Chiefs have indicated they wish to proceed e.g. on child welfare legislation.
- 23 Minister Bennett's reply to Standing Committee erroneously left the impression that no work has been undertaken to give effect to section 35. For a brief historical timeline, see Appendix B
- 24 Standing Committee,
- 25 Our Nations, Our Governments: Choosing Our Own Paths, Report of the Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments, Executive Summary, May 2005.
- 26 Ibid, p. 3
- 27 M. Hurley, Library of Parliament, June 1999
- 28 Cuning, P.A. Ginn, D., First Nations Self-Government in Canada, 1986 Osgoode Hall Law School of York University. Part of the failure of Bill C 52 was the result of First Nations concerns over the 'delegation of authority' versus the recognition of authority.
- 29 M. Hurley, Library of Parliament, June 1999. Regarding s. 35 rights, one of the reasons Aboriginal peoples rejected the Charlottetown Accord was the suspension of self-government rights for a 10-year period to allow negotiated agreements to be achieved. People also rejected the non-justiciability clause because it was inconsistent with rights recognition.
- 30 Inherent Rights Policy (1995). The AFN rejected this approach (Resolution 01/1992)
- 31 S.C. 1984, c. 18, R.S. c. C-45.7. The Agreement does contain a section requiring self-government legislation.
- 32 S.C. 1986, c. 27, R.S. C-S-6.6
- 33 Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon, 1993.



- 34 S.C. 1994, c. 35, R.S.C. Y-2.6
- 35 Nisga'a Final Agreement, 1998
- 36 See note 30, p. 7
- 37 Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, Volume II, Part One, Chapter 3, "Governance", 1996.
- 38 Gathering Strength: Canada's Aboriginal Action Plan, 1997
- 39 A First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments, May 2005
- 40 Our Nations Our Governments: Choosing Our Own Paths, Report of the Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments, Executive Summary, pp. 3-4
- 41 Ibid. p. 4
- 42 Ibid., pp-4-6
- 43 In 1951, following the Joint House of Commons and Senate Committee Review, comprehensive amendments were made to the Indian Act, but the largely archaic and paternalistic objectives remained. In 1985, gender-based discrimination through marriage was removed from the Act through Bill C-31 along with all remaining enfranchisement clauses. Over time, sectoral initiatives to address some areas have led to incremental reform such as, The First Nations Land Management Act, S.C. 1999, c. 24 that allows participating First Nations to opt out of the 34 land related sections of the Indian Act and manage their land, resources and environment under their own land codes. The First Nations Fiscal Management Act, S.C. 2005, c. 9 provides First Nations with modern fiscal management tools like other governments. The First Nations Oil and Gas and Moneys Management Act, S.C. 2005, c. 48 allows First Nations to opt out of the moneys management provisions of the Indian Act and provides for the release of capital and revenue moneys for the management and control of the First Nation. The First Nations Commercial and Industrial Development Act (FN CIDA), S.C. 2005, c. 53, addresses regulatory gaps by enabling the federal government, at the request of the First Nation, to develop regulations that mirror a provincial regime for specific commercial and industrial development projects on reserve lands. The First Nations Certainty of Land Title Act, amended FNCIDA in 2010 to permit registration of on-reserve commercial real estate developments in a system that replicates the provincial land titles or registry system. More recently, the Gender Equity in Indian Registration Act, S.C. 2010, c. 18, provides a new entitlement to registration in response to the decision in *McIvor v Canada* that was issued by the BC Court of Appeal on April 6, 2009. The Act ensures that eligible grand-children of women, who lost status because of marrying non-Indian men, will become entitled to registration.
- 44 J Borrows
- 45 See note 44, p. 4
- 46 2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, "Programs for First Nations on Reserves", p. 5
- 47 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, Programs for First Nations on Reserves, 2011.
- 48 Penner Report, p. 20.
- 49 The Office of the Auditor General has repeatedly recommended development of legislation in 2006, 2011 and 2013.
- 50 The Department's current enabling legislation, the Department of Indian Affairs and Northern Development Act, R.S.C. 1985, c. I-6, ss. 2(1) and (4) provide very generalized authority: "may authorize". This approach may violate the rule of law. The government's intention is to introduce enabling legislation for the new department following this engagement process in the fall of 2019.
- 51 First Nations Child and Family Caring Society of Canada et al v. AG Canada 2016 CHRT 2 (January 2016)
- 52 Ibid., p. 6.
- 53 Ibid., p. 6. The First Nations Child and Family Caring Society of Canada et al v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2.
- 54 Ibid., p. 16.
- 55 See note 44, p. 8
- 56 People to People, Nation to Nation, Highlights from the Report of the Royal Commission on Aboriginal Peoples, Volume 2, pp. 29-30
- 57 Note 44., p.8
- 58 Ibid., pp.8-9
- 59 Revitalizing Canada's Indigenous Constitution, Two Challenges, J. Borrows, pp. 20-27.
- 60 [1973] SCR 313.
- 61 [1996] 2 SCR 507
- 62 This has been affirmed in *R v Cote*, [1996] 3 SCR 139 at para 67; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para 115; *Mitchell v. MNR* [2001] 1 SCR 9111 at para 9; *R v Sappier*; *R v Gray* [2006] SCC 54 at para. 26, 31, 74
- 63 [1990] 1 SCR 1025 at 1052-53.



- 64 See note 44
- 65 [2004] 3 SCR 511, 2004 SCC 73
- 66 See note 44
- 67 [2014] 2 SCR 257, 2014 SCC 44
- 68 Ibid.,
- 69 [1990] 1 SCR 1075
- 70 J Borrows, Challenging Historical Frameworks: Aboriginal Rights, The Trickster and Originalism, *The Canadian Historical Review*, Volume 98, Number 1, March 2017, pp. 114-135
- 71 Ibid.,
- 72 Ibid., For a critique of this framework, see Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*, *McGill Law Journal* 42 (1997): 1011-44; J Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster", *American Indian Law Review* 22 (1997): 37-64; Russel Barsh and Sakej Henderson, "The Supreme Court's Vanderpeet Trilogy: Native Imperialism and Ropes of Sand", *McGill Law Journal* 42 (1997) 993-1010.
- 73 Ibid
- 74 Ibid, p. 124
- 75 81. Ibid, p. 125
- 76 Ibid., p. 126
- 77 See note 75, J Borrows, p. 130
- 78 Ibid, p. 131
- 79 [1996] 2 SCR 821
- 80 Ibid., para 18
- 81 Ibid., para. 29
- 82 Ibid., para 30
- 83 Ibid., para. 27
- 84 *R v. Van der Peet*, [1996] 4 C.N.L.R. 177 at p. 201-202.
- 85 *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. p. 14 at p. 71. This is a significant statement, often overlooked or not applied by Crown policy and law, with respect to the task of dealing with First Nations assertions of their rights and jurisdiction
- 86 Upholding the UN Declaration on the Rights of Indigenous Peoples in Domestic Law, C. Benjamin, March 12, 2018
- 87 UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya. UN Doc. A/HRC/9/9, August 11, 2008, paras. 85-6.
- 88 UN General Assembly, Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, UN Doc. A/RES/69/2, 22 September 2014. (Adopted by consensus.), para. 7.
- 89 UN General Assembly, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, UN Doc. A/67/301, 14 August 2013, para. 67.
- 90 Minister of Indigenous and Northern Affairs Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues," May 10, 2016.
- 91 Prime Minister Justin Trudeau's Address to the 72th Session of the United Nations General Assembly, 21 September 2017. <https://pm.gc.ca/eng/news/2017/09/21/prime-minister-justin-trudeaus-address-72th-session-united-nations-general-assembly>
- 92 Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Not Merely 'Aspirational'," 25 June 2015. <http://quakerservice.ca/wp-content/uploads/2012/09/UN-Decl-Not-merely-aspirational-.pdf>
- 93 Reference re Public Service Employee Relations Act (Alberta), 1 S.C.R. 313, 1987, para 348.
- 94 Catholic Children's Aid Society of Hamilton v. G.H., 2016 ONSC 6287, para. 66
- 95 *R v. Sayers*, 2017 ONCJ77, para. 53(2). See also para. 50 and 51.
- 96 See note 93.
- 97 Revitalizing Canada's Indigenous Constitution: Two Challenges, J. Borrows, p. 21.
- 98 Ibid, p. 21 citing UNDRIP, Art. 1
- 99 Ibid, p. 21
- 100 www.ilo.org/Indigenous&Tribal Peoples' Rights in Practice
- 101 www.international.gc.ca/the 2030 agenda for sustainable development
- 102 Speaking Notes for the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples, United Nations Permanent Forum on Indigenous Issues May 10, 2016, New York City
- 103 www.asil.org/volume:21, issue 7, June 22, 2017.



- 104 Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation*, 2015. p. 3.
- 105 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69, para. 1.
- 106 J. Preston and P. Joffe, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples*.
- 107 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 (United Nations Declaration on the Rights of Indigenous Peoples Act)*.
- 108 <https://openparliament.ca/bills/42-1/C-262/>
- 109 See note 103
- 110 *Supra* note 103, paras. 31-37
- 111 UNDRIP, Art. 19
- 112 Minister Bennett affirmed to the House Standing Committee on May 29, 2018 that the government would not be including the AFN in its engagement explaining its exclusion in that the AFN is not a “rights holder” (May 29, 2018 transcript).
- 113 Summary extracted from UN Declaration on the Rights of Indigenous Peoples and Canada’s Human Rights Obligations, C. Benjamin, March 12, 2018. A purposive and relational interpretation of free, prior and informed consent has emerged amongst some policy councils, emphasizing the need for good faith negotiations prior to decisions being taken. Collaboration is not a substitute for consent and respect for dissent is necessary.
- 114 P. Joffe, *Veto and Consent – Significant Differences*, March 26, 2016, citing *R v. Hape* [2007] 2 SCR 292 at para. 53
- 115 *Ibid.*, page 13
- 116 Unpublished meeting note, July 9-13, 2018, Expert Mechanism on the Rights of Indigenous Peoples, Eleventh session, Item 4: study and advice on free, prior and informed consent.
- 117 Principle 6 of its Ten Principles (Appendix B)
- 118 *Ibid.*, note 95 citing *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at para. 88.
- 119 BC First Nations Leadership Council, June 26, 2018. On May 22, 2018 the BC Government released its own draft Principles directed at renewing Crown-Indigenous relations. The 10 draft BC Principles are the same as the Federal Principles, with different commentary context. Again, there was no engagement with First Nations leading up to release of the BC Principles.
- 120 See note 93, para. 18
- 121 *Ibid.*, para. 4
- 122 *Ibid.*, paras 9-11
- 123 *Ibid.*, para 35.
- 124 *Ibid.*, para. 38
- 125 *Ibid.*, para. 39-42
- 126 *Ibid.* para. 48-50
- 127 AFN, *Concept and Analysis document for September 11 and 12, 2018*
- 128 Section 2(1) definitions, *Indian Act*, R.S.C. c. I-6
- 129 *Ibid.* 103, para. 52-53

Appendix A:

Timeline of Recent Law and Policy Initiatives

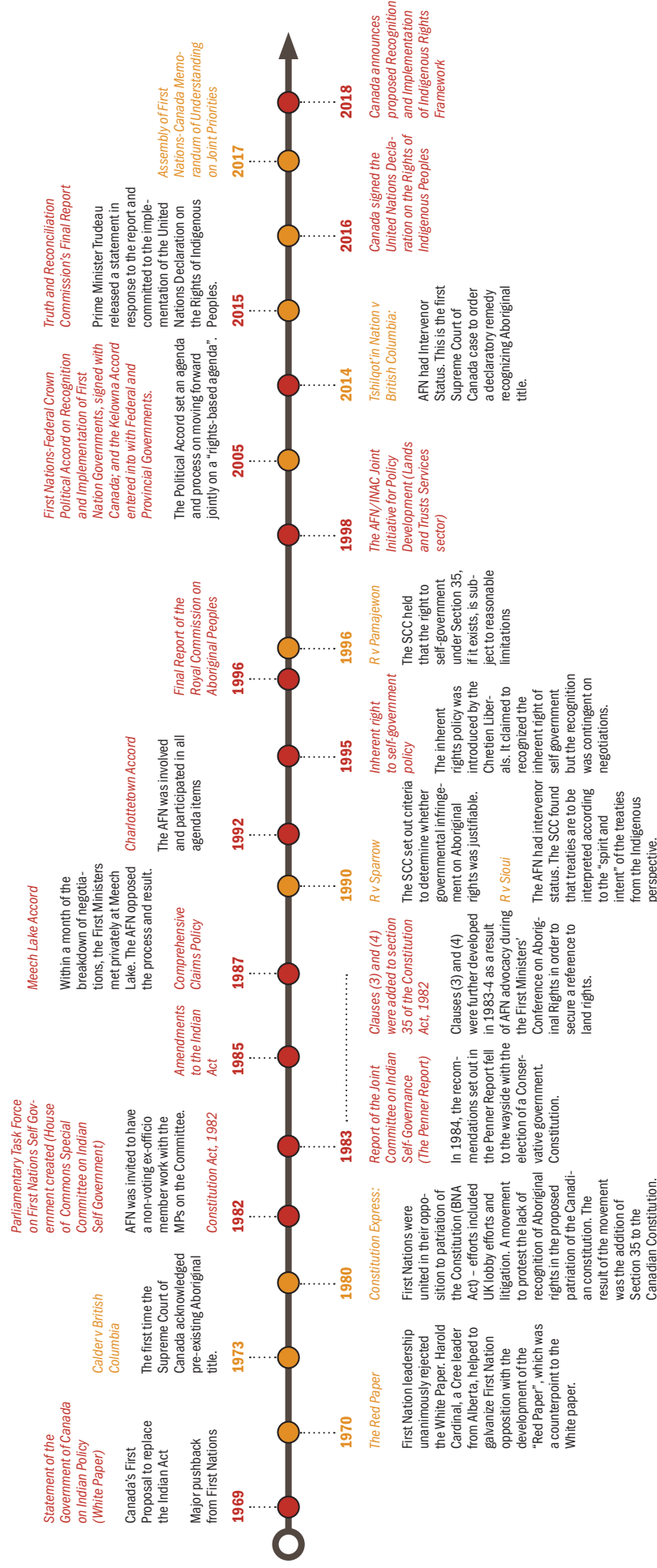


The following is a timeline illustrating highlights of law and policy initiatives affecting First Nations. The Assembly of First Nations, directed by Chiefs in Assembly, has influenced the direction of policy initiatives alongside First Nations advocates and organizations since its inception in 1970 as the National Indian Brotherhood.



Canada-led Initiative

First Nations-led Initiative



Appendix B: Intersections between the Ten Federal Principles/UNDRIP/TRC and FN Concerns

Ten Principles	UN Declaration on the Rights of Indigenous Peoples	Questions/Concerns
1. 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 to self-government	Article 3 of the <i>UN Declaration</i> affirms that the Indigenous peoples have the right to self-determination. This is the same right enjoyed by all other peoples or nations. (See also preambular paragraphs 16 and 17 of the <i>UN Declaration</i> .)	<p>Canada's commentary recognizes Indigenous nations or rights holding groups as they are defined by the courts (i.e., a group of Indigenous people sharing critical features such as language, customs, traditions, and historical experiences). These elements appear to be drawn from Canadian jurisprudence. Such reliance has the affect of stunting the evolution of "self-determination" and "self-government".</p> <p>This approach has the potential to encroach upon the right of self-determination and is runs counter to recognizing the inherent nature of such rights.</p> <p>This principle falls short of explicit recognition of Aboriginal title.</p>
2. The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982.		<p>TRC Call to Action 46 calls upon the federal government to repudiate concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and terra nullius, and the reformation of laws, governance structures and policies within policies within their respective institutions that continue to rely on such concepts as an action toward reconciliation.</p> <p>"existing" is taken to mean "unextinguished" right (<i>Sparrow</i>).</p> <p>The work here is to reconcile how Canada's sovereignty operates without diminishing the inherent rights of Indigenous nations.</p>

Ten Principles	UN Declaration on the Rights of Indigenous Peoples	Questions/Concerns
3. The Government of Canada recognizes that the Honour of the Crown guides the conduct of the Crown in all its dealings with Indigenous peoples.	The <i>UN Declaration</i> affirms the right of Indigenous peoples to just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies...” (Article 40). In fulfillment of its obligations under the <i>Declaration</i> , the Government of Canada should ensure that its litigation strategies are consistent with the <i>Declaration</i> and the government’s broader commitment to rights recognition.	Honour of the Crown is a common law doctrine whereby “it is always assumed that the Crown intends to fulfill its promises” and that “the honour of the Crown is always at stake in its dealings with Aboriginal peoples.” Citing this doctrine as a principle becomes helpful in so far as it provides a legal foundation for the application of the UN Declaration in the domestic context and uphold the implementation of the Declaration through as a human rights framework.
4. The Government of Canada recognizes that Indigenous self-government is part of Canada’s evolving system of cooperative federalism and distinct orders of government.	<i>The UN Declaration</i> also sets out numerous areas where Indigenous peoples have the right to make their own decisions according to their own traditions and values and through their own governance institutions and processes. These areas include education (Article 14), resource development on Indigenous lands and territories (Article 32) and citizenship in Indigenous nations (Articles 33.2 and 35), as well as numerous other areas.	The recognition and creation of space for the operation of Indigenous legal orders and jurisdictions is a significant starting point. It will be important to ensure this recognition takes into consideration the scope, breadth and uniqueness of Indigenous legal orders and avoid any attempts to constrict or consolidate approaches into a single model. Also, the right of ‘self-determination’ is not included in principle 4 – a principle that focuses on cooperative federalism. Section 35 cannot revitalize Indigenous legal orders until self-determination informs the approach.
5. The Government of Canada recognizes that treaties, agreements, and other constructive arrangements between Indigenous people and the Crown have been and are intended to be acts of reconciliation based upon mutual recognition and respect.		To move beyond a denial of rights and give real, practical affect to reconciliation, it is both legally and politically significant to state that Aboriginal rights are not contingent on the negotiation or conclusion of some type of agreement or arrangement with the Crown.

Ten Principles	UN Declaration on the Rights of Indigenous Peoples	Questions/Concerns
6. 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 action which impacts them and their rights, including their lands, territories and resources.	<p>Article 19 of the UN Declaration sets out the following requirement in respect to the creation of legislation:</p> <p><i>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.</i></p> <p>This provision should be read together with other provisions in the <i>UN Declaration</i>, including Article 3 on self-determination, and in the context of a broader body of international law that has repeatedly affirmed the right of Indigenous peoples to grant or withhold consent for decisions affecting their rights.¹</p>	<p>The government's "aim to" secure free, prior and informed consent is not consistent with the standard set out in the UN Declaration which requires states to "obtain" consent. The principle introduces a lower threshold and weaker approach. More than "consultation" is required.</p> <p>There is no consideration as to how the federal government will deal with the constraints on its ability to act in light of sections 91(24), 92 and 109 of the Constitution Act, 1867 (BC).</p>

¹ See for example, UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Indigenous Peoples*, Fifty-first session, 1997, 18/08/97 which calls on State Parties to that Convention to ensure that "no decisions directly relating to their [Indigenous peoples'] rights and interests are taken without their informed consent." Similarly the UN Committee on Economic Social and Cultural Rights has concluded, "States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights." UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 37.

Ten Principles	UN Declaration on the Rights of Indigenous Peoples	Questions/Concerns
7. 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.	<p>The interplay between the infringement and redress of Indigenous rights and articles 46(2) and 28(1) of the UN Declaration requires exploration. For ease of reference, the articles states that,</p> <p><i>Art. 46(2) "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."</i></p> <p><i>Art. 28 (1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.</i></p>	<p>This principle provides space for the continuation of governments to infringe on Aboriginal and treaty rights and preserve the status quo. Given that many of the principles and commentary focus on reconciliation and recognition of rights, it is unclear how the rights recognition framework can operate alongside a continued court-imposed mechanism for justifying infringements.</p>

Ten Principles	UN Declaration on the Rights of Indigenous Peoples	Questions/Concerns
8. 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.		<p>Absent from this principle is the “inescapable economic component of Aboriginal title” (<i>Delgamuukw</i>).</p> <p>The principle is also silent on compensation for past or existing infringement of title and rights.</p>
9. The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving indigenous-Crown relationships.		A ‘living tree approach’ should mean the discontinuation of extinguishment, modification, or surrender and “treaties, agreements and other constructive arrangements should be capable of evolution over time.”
10. The Government of Canada recognizes that a distinction-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, Metis and Inuit are acknowledged, affirmed and implemented.		



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