



Affirming First Nations Rights, Title and Jurisdiction

Report from the AFN National Policy Forum - September 2018



Assembly of First Nations

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EXECUTIVE SUMMARY

Preamble

In July 2018, Chiefs-in-Assembly called for a National Forum to share information, listen and dialogue amongst each other and to more fully understand the *Recognition and Implementation of Indigenous Rights Framework* developed and proposed by Canada. The Assembly of First Nations' National Chief, Perry Bellegarde, responded by convening a National Policy Forum at the earliest opportunity as promised during discussion at the Assembly of First Nations' Annual General Assembly in July 2018.

As a policy dialogue, First Nations Leadership and delegates voiced their opinions, concerns and preferred strategic options for advancing respect and enforcement of First Nations rights. This summary of the National Forum has been prepared to capture this important dialogue.¹

A review of the policy dialogue over September 11-12, 2018 reveals emerging common messages.

Themes

Since time immemorial, the First Nations of this continent, Turtle Island, have exercised our inherent jurisdiction and authority as original sovereign nations over our lands, environments, resources and people. These inherent rights have never been relinquished through conquest, discovery, *terra nullius*, domination, force or acquiescence. The Crown evidenced its acknowledgement and initial respect for our sovereignty through the *Royal Proclamation of 1763* and in treaties.

The *Proclamation of 1763* did not purport to regulate "Indians"; rather, it was intended to prescribe how settlers and colonial governments interacted with Indian Nations. The *Treaty of Niagara, 1764* followed to evidence our *mutual understanding* of the terms of the original Proclamation and represented a Nation-to-Nation covenant or agreement, entered into according to our laws as Indian Nations and those of the Crown.

Any discussion between the Crown and First Nations must have as its starting place, the recognition that we are **equals** as peoples and Nations. This is what international human rights law requires, including the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration). Despite violations of our fundamental rights under Treaty, Canada's *Constitution* and modern international human rights law, we know this—our rights, as peoples, cannot be extinguished. We remain united in our determination to realize the promise and guarantees of Treaty, of section 35 and the *UN Declaration on the Rights of Indigenous Peoples*. Despite the imposition of assumed Crown sovereignty in violation of our rights, despite Crown efforts to assert dominion over us, we remain resilient in our advocacy. It is First Nations, and not Canada or federal bureaucrats, who will lead the path to decolonization and reconciliation.



The consistent advocacy of our rights as First Nations has led to many important victories that include:

- the defeat of the 1969 White Paper that proposed erasing our collective rights;
- the constitutional recognition and affirmation of Aboriginal (inherent) and Treaty rights in section 35 of the *Constitution Act, 1982*;
- an ever growing list of successes in Canadian courts;
- the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*;
- successful advocacy before various international human rights bodies that has maintained global awareness on Indigenous Peoples, as Canada's most pressing human rights issue.

The current dialogue between First Nations and Canada is not a new one. First Nations have pressed for changes in policy, law and operational practices to ensure these align with Treaty, with the *Constitution* and international human rights law. Current federal policy and legislative frameworks do not align with hard won court cases and international human rights standards – whether the topic is commercial fishing rights, making space for inherent title and jurisdiction or enforcing Treaty rights – either pre-1975 Treaties or so-called modern Treaties.

Prime Minister's Offer to Develop a Recognition and Implementation of Indigenous Rights Framework

On February 14, 2018, the Prime Minister of Canada announced “that the Government of Canada would develop – **in full partnership** with First Nations, Inuit and Métis Peoples” – a Recognition and Implementation of Rights Framework and depart from its denial of our rights to a renewal of our relationship making rights recognition and implementation the basis for all our relations. Many First Nations initially reacted with cautious optimism. The Prime Minister's speech is one of the most significant statements made by a Prime Minister in the House of Commons.

“...[t]he challenge – then and now – is that while Section 35 recognizes and affirms Aboriginal and treaty rights, those rights have not been implemented by our governments.

The work to give life to Section 35 was supposed to be done together with First Nations, Inuit, and Métis Peoples. And while there has been some success, progress has not been sustained, or carried out. And so over time, it too often fell to the courts to pick up the pieces, and fill in the gaps.

More precisely, instead of outright recognizing and affirming Indigenous rights – as we promised we would – Indigenous Peoples were forced to prove, time and time again, through costly and drawn-out court challenges, that their rights existed, must be recognized and implemented.

Indigenous Peoples, like all Canadians, know this must change.

We know it, too.”



A few months later before the United Nations General Assembly, the Prime Minister made another important speech respecting Indigenous peoples in which he stated:

“Canada is built on the ancestral land of Indigenous Peoples – but regrettably, it’s also a country that came into being without the meaningful participation of those who were there first.

And even where Treaties had been formed to provide a foundation for proper relations, they have not been fully honoured or implemented...The failure of successive Canadian governments to respect the rights of Indigenous Peoples in Canada is our great shame.

And for many Indigenous Peoples, this lack of respect for their rights persists to this day.

...I know that Canada has a complicated history with the *United Nations Declaration on the Rights of Indigenous Peoples*.

We actively campaigned and voted against it, then endorsed it in the most half-hearted way possible, calling it an “aspirational document.”

The *UN Declaration* is not an aspirational document. It means much more than that to the Indigenous Peoples and others who worked so hard, for so long, to bring the *Declaration* to life.

In the words of Canada’s Truth and Reconciliation Commission, the *UN Declaration* provides “the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada.”

First Nations understand this to be a policy direction of the Prime Minister that the government is charged with implementing faithfully. First Nations agree with the Prime Minister and the Truth and Reconciliation Commission that the *UN Declaration* must be our framework for reconciliation. The key for us is walking this road together.

Regretfully, a unilateral approach in the design and execution of the federal engagement process on how to construct a policy and federal framework to affirm and enforce First Nations rights does not align with the Prime Minister’s direction. The promise and the standards of the *Constitution* and international law have not been met. Again.

There are issues of unilateralism in the design and execution of the engagement process. There has been unevenness in the access of different regions to funding to dialogue on these issues. There have been significant misstatements of the state of First Nations rights and the state of constitutional and international human rights law which created obstacles to real dialogue. The engagement documents and the process have not been consistent with a Nation-to-Nation, government-to-government relationship. By Assembly of First Nations Resolution 08/2018, *Implementing Canada’s Recognition and Implementation of Indigenous Rights Framework and Clarifying the Role of the AFN* and 39/2018, *First Nations Determination of the Path to Decolonization*, Chiefs-in-Assembly identified the corrective action required. The next step is a First Nations-led process



whereby Canada must work with First Nations in a manner that meets the minimum legal standards of the *United Nations Declaration on the Rights of Indigenous Peoples* before adopting and implementing any legislative or administrative measures that could impact First Nations.

Key Considerations that Raise Alarm

There is a dissonance between the Prime Minister's direction, which aligns with the *UN Declaration*, and what government officials are doing. First Nations expected and asked the federal government to work closely with us to ensure the engagement materials were informed, technically accurate, accessible and transparent. First Nations asked that the necessary support be made available to the rights holders to enhance their capacity to lead efforts in meaningfully and directly engaging with their members.

Canada's 'engagement process' has been the primary mechanism through which the federal government has communicated its proposal and understanding of dialogue with First Nations. Federal engagement documents like the "What We Heard" ignores what was communicated to Canada by First Nations. The engagement sessions themselves fell short of full, fair and meaningful participation and were rushed. The federal proposal speaks of defining "honour of the Crown" in order to create a standard of conduct in legislation and policies to protect us from the arbitrary whims of government. The delivery of this very proposal is a measure of Canada's commitment to these words.

These criticisms are more than anecdotal; they constitute obstacles to First Nations in exercising the right to self-determination.

We are on a continuum of progress towards exercising our right to self-determination. We must respect that some are ready to move ahead while others need time. First Nations require more time to discuss the advantages of different strategic options. We must acknowledge and respect this reality. Many First Nations are struggling to have their basic human needs met because of such longstanding violations of our rights. The danger lies in the government contemplating comprehensive national legislation where a one size fits all approach is the goal. If this is the case, then the uneven participation and resourcing has the very real likelihood of forcing rejection of the government's proposal. It need not be this way.

Key Concerns

1. The government is proposing that First Nations apply to the federal government for recognition as a nation and the government will decide whether to accept that application to then advance negotiations. Such an approach is not consistent with self-determination when one government sets the criteria for recognition and then makes the determination for another.
2. Recognition is premised on Crown recognition rather than affirmation of Indigenous Peoples pre-existing, inherent legal rights.
3. The failure to accurately articulate First Nations Treaty and inherent rights as enforceable rights is problematic.



4. Canada has once again advanced what appears to be a contingent rights approach and has not presented a pitch of a full box of Section 35 rights seen through the lens of the *UN Declaration*.
5. The Attorney General of Canada and Minister of Justice Jody Wilson-Raybould stated that legislation is needed to initiate change. The federal officials leading this framework for the Prime Minister announced that they will be proceeding with legislation. BC Chiefs and Leadership have drafted proposed legislative drafting instructions which contain core commitments and propel the shift to rights recognition as they see it.
6. The design of the engagement process failed to contemplate or provide mechanisms or time for dialogue among diverse First Nations on their views of the preferred strategic options – whether that is federal legislation, a Royal Proclamation or others.

What We Do Not Want /Our Shared Concerns

First Nations will not accept policy approaches that would diminish their pre-existing sovereignty subverting the meaning of inherent and Treaty rights by characterizing them as delegated powers. First Nations rights are not contingent on negotiated agreements or arrangements. We reject delegated authority; assert our jurisdiction and our right to self-determination. Federal legislation is not required to “give effect” to our inherent title and jurisdiction.

We do not want legislation to implement our rights without our participation in the drafting. Canada must completely repudiate and abandon the Comprehensive Land Claims and Inherent Rights policies and related operating practices – all of which are firmly founded and informed by the colonial biases of the *terra nullius* and doctrine of discovery doctrines that have been condemned by international human rights law as racist colonial doctrines.

First Nations will not be bystanders in any legislative process.

First Nations will not accept rushed, unorganized engagements with minimal involvement from our governments. There are important conversations that need to continue. We need time to do this right.

Any approach that does not affirm Inherent (“Aboriginal”) title and its legal and jurisdictional implications is unacceptable in the face of a string of Supreme Court of Canada decisions making clear that First Nations pre-existing title in land and resources is a legal reality.



What We Do Want

First Nations pre-existing sovereignty needs to be reconciled with the Crown's assumed sovereignty. This must be done in unison not in isolation.

Canada must denounce the doctrine of discovery, *terra nullius*.

The *UN Declaration* must be the reconciliation framework to rights implementation with due regard for Articles such as Article 19 requiring Canada to cooperate in good faith with Indigenous Peoples to obtain our free, prior and informed consent before adopting and implementing legislative and administrative measures that affect us.

Canada must recognize that implementing the *UN Declaration* means the provinces and territories must also uphold these international standards.

First Nations expect Canada to uphold its *Constitution* affirming and recognizing our inherent rights, Treaty rights and title. Jurisdiction clearly is not exhaustively divided between Crown governments. First Nations inherent rights are not limited by the constitutional division of powers that originally excluded us. The full box of rights in s. 35 of Canada's *Constitution* must be given meaning.

First Nations want to position ourselves with respect to federal and provincial/territorial discussions and not be told where they fit after the fact.

The full and proper implementation of Treaty rights must be the basis of our relationship.

First Nations want a fair redistribution of resource revenues that continue to be extracted from our Treaty and traditional territories without our consent.

First Nations have always had jurisdiction over our lands, waters and resources. Through Treaty there was agreement to share; not cede or surrender. The full implementation of the spirit and intent of Treaty, as it was understood by Indigenous Peoples is fundamental to our relationship.



Emergent Principles to Guide a Way Forward

1. **Affirm the pre-existing sovereignty and inherent title of First Nations.** Inherent rights and title already exist and have been affirmed under section 35 of the *Constitution Act, 1982* and international law. Our rights as peoples and nations cannot be extinguished, and do not owe their existence to any other level of government;
2. **First Nations laws,** language, culture, governance, jurisdiction must inform mutually acceptable solutions;
3. **Honour of the Crown** means that the Crown's words meet their actions and the Crown always keeps its promises, including the full implementation of treaties, agreements and other constructive arrangements;
4. **Value** the equality of peoples which is evident in the *Guswentah (Two Row Wampum Treaty)*;
5. **Fair and Inclusive Collaboration** means making decisions together not in isolation;
6. Clear, Transparent **Communication** to restore not erode trust; and
7. **Organize government and government practices** to make the *UN Declaration* the foundation for guiding reconciliation. Reconciliation does not mean compromise, it means moving forward in a good, respectful way.

A First Nations Led Process

The AFN convened this Policy Forum to facilitate a deeper understanding and dialogue amongst First Nations Leadership on September 11 and 12, 2018. It is clear this important dialogue must continue and Canada should be prepared to support a First Nations led process.

First Nations can continue the work begun at the National Policy Forum of developing a common level of understanding, convening national dialogue and facilitating coordination and communication across regions. The objective of this work would be to ensure that the divide and conquer strategy pursued by Canada thus far is replaced by a position driven from minimum standards supported across the country while maintaining the rights-holders' position as the final arbiters of self-determination.



SUMMARY OF FORUM PRESENTATIONS

What can we learn from the past to evaluate the current federal initiative?

Looking back over decades of advocacy, individually and collectively First Nations have undertaken to protect our Treaty and inherent rights and title, David Nahwegahbow shared some lessons learned and best practices from past processes.

Drawing from the Background Paper prepared for the Forum, there are 10 questions we might ask to evaluate the current Rights Recognition Framework proposed by Canada. These are:

1. Does it respect the (pre) existing sovereignty of First Nations?

The *Royal Proclamation, 1763* and the *Treaty of Niagara, 1764* is evidence of the Crown's early respect for the sovereignty of "Indian Nations". These constitutional documents are not the source of sovereignty. The *Proclamation* did not regulate Indians; rather it was a prescription for settlor and colonial governments.

2. Is it truly a mutual agreement between the First Nations and the Crown?

The *Treaty of Niagara, 1764* is the Crown's recognition to put its unilateral edict of the *Royal Proclamation, 1763* into a nation to nation covenant and according to the laws of the Indian Nations. This is evidence of the need for mutual agreement between the Indian Nations and the Crown. To date the federal process has been unilaterally designed and contemplates approval through unilateral federal legislation and policy.

3. Is this prejudicial to Aboriginal and Treaty Rights?

The judicial branch of government recognizes the need for the Crown to reconcile its assumed sovereignty with First Nations' sovereignty (*Haida*). This is the 'reconciliation doctrine'. So, although the Crown wants to offer "pragmatic solutions" to reconciliation, never lose sight of your legal position.

4. Is it necessary to resist it with solidarity?

The 1969 White Paper is an important lesson.

5. Is the government trying to force policy changes?

Again, the 1969 White Paper is an important example. The First Nations Governance Act is another example of poisoning relations for a long time. It is very likely that the FNGA contributes to the current distrust of the proposed framework.



6. Is there complete, meaningful consultations and consent?

The assimilationist intentions of the 1969 White Paper resulted in a wholesale rejection. First Nations developed a counter proposal entitled the Red Paper, 1970.

7. Does it require unified, multi-faceted approaches to advocacy?

Section 35 of the *Constitution Act, 1982* exists today because of successful and strong advocacy by First Nations through legal proceedings and extensive lobbying efforts both in Canada and the United Kingdom.

8. Is Canada negotiating in good faith?

The Constitutional years are a lesson to Canada to not dismiss a rights-based approach.

9. Is this a principled and less adversarial approach?

A denial of rights has meant recourse to the courts. Section 35 has led to successes in the courts and the lesson for federal and provincial governments is to be more principled and less adversarial.

10. Is the government serious and sincere in its efforts to implement lessons learned from the Penner Report, RCAP and TRC?

These recommendations will not disappear. Ignoring these reports will not make the underlying problems go away. In fact, the problems will only worsen.²

How does the Growing Significance of International Human Rights Law help us to evaluate the federal initiative?

Canada has stated its commitment to implement the *United Nations Declaration on the Right of Indigenous Peoples*³, implement the TRC Calls to Action and has adopted the 2030 Sustainable Goals. Paul Joffe highlighted developments in the international fora. These developments prompt at least two additional questions upon which we might assess the current federal initiative.

11. Does it contribute to the well-being of Indigenous Peoples?

Rights in the Canadian *Charter* (Part 1) and rights in s. 35 (Part II) of the *Constitution Act, 1982* are human rights. Note that the notwithstanding clause does NOT apply to Part II of the *Act* where section 35 is found.⁴



The *UN Declaration* represents a principled framework for justice, reconciliation, healing and peace and requires the state, in “consultation and cooperation” with Indigenous peoples to achieve its ends. Sustainable development entails protection of human rights yet both have been denied to Indigenous peoples. By adopting the 2030 Sustainable Goals, Canada pledged to end poverty and hunger ... to protect human rights ... that no one will be left behind ...

12. Does it affirm the right of self-determination?

Canada endorsed the International Labour Office (ILO) Convention No. 169 in 1991 which affirmed the right of Indigenous and Tribal Peoples to decide their own priorities for the processes of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development (Article 7).⁵

In 2016, Canada adopted the *UN Declaration* which affirms the right of Indigenous Peoples to self-determination (Article 3).

Canada’s “Rights Recognition Framework”

Minister Bennett delivered a prepared speech and while she spoke many of the “right words”, her remarks and responses left many questions and concerns. The consensus among Forum delegates was skepticism and suspicion.

Delegates were generally very critical of the process and noted the dissonance in the Prime Minister’s promising announcement and the contradictory actions and words of the bureaucracy. The effect of this is to erode trust and create fear because what the Minister says and what she does are not the same.

Minister Bennett spoke of the federal government’s need to “**get out of the way**” and that this initiative is not something Canada will impose on anyone other than themselves. She explained that the federal government is not equating First Nations to the status of municipalities with only delegated authority over a handful of jurisdictions and that only First Nations can determine the path for decolonization. This is not the White Paper 2.0.

When the floor was open to questions, First Nations leadership reminded her:

- That the government has not been transparent in sharing what, if any, discussions have taken place with the provinces and “other stakeholders”. Delegates also mentioned that, so far, **provinces do not appear to be on board** with rights recognition and remain an active impediment to the full affirmation of Indigenous title, treaty and territorial rights (i.e. mining claims in Ontario);
- That the Minister has not always been responsive to requests to meet, even when invited. In addition, the Department has been poor in its attempts to engage remote communities, **leaving many First Nations**



- out** of the process. The point was made that to be truly working together means you cannot pick and choose with whom you will meet;
- That **tight timelines** reflect pressures on Canada (such as next year's federal election) but does not respect the right of First Nations;
 - That the Minister needs to provide direction to the Department on “legal pluralism.” This engagement process has been unilateral and has not been in the spirit of co-development;
 - That the Minister has not provided **First Nations the opportunity to determine** their own direction. First Nation leadership will require time to dialogue with its own membership. This is critical and needs to be done the right way, in **protection of our people and our lands**;
 - That the Minister seeks our input on rights and develops solutions. Delegates stated that Canada needs to **co-develop solutions and respects our need for informed consent before anything more is done.**

The Minister further explained that Canada is working on a legal framework to prevent a return to failed policies and to remove the obstacles that have prevented First Nations from thriving. She stated that Canada needs to remove barriers that were deliberately imposed so that Indigenous peoples can exercise jurisdiction to educate their children, run their businesses, harvest their natural resources, and take care of kids in need of child welfare. The “joint work” will create laws, policies and practice standards to accelerate progress to self-determination and put in place mechanisms to hold Canada to account. The Minister also noted that Canada has heard clearly that the Framework must not seek to define rights universally, but rather remove barriers to the implementation of rights and that they must fulfill the promise of all treaties – historic and modern. They have also heard that the full and proper implementation of treaty rights must be the basis of our relationship, which only makes sense because they are our treaties together. They are the living framework for our relationship.

First Nations leadership reminded the Minister that we signed treaties to share, not to “cede and surrender”. This means making decisions together, not unilateral decision-making. They also mentioned that Canada along with the provinces and territories act to undermine Indigenous inherent and treaty rights and title. For example, mining companies adhere to provincial laws which place restrictions on Indigenous jurisdiction over lands. Today, First Nations receive little to no economic benefits from the extraction of resources from their own territories.

First Nation leadership also mentioned that jurisdiction must go beyond its reserve boundaries. Every First Nation has more land than what is on their “reserve”. If the recognition of rights and title is only with respect to authority over reserve land, it will not be successful. There was criticism of Canada's documents and language which often refers to jurisdiction, but never “sovereignty”. The creation of “super Band Councils” which are funded to negotiate rights is not sovereignty. As the First Peoples of Canada, leadership would like a relationship developed in unison, not in isolation.

The Minister explained that this Framework needs to have as its foundation the *UN Declaration* and the Calls to Action of the Truth and Reconciliation Commission. The legislative proposal will be aimed at legally embedding the recognition of rights and enabling rights implementation. The legislative part of the Framework could



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fill this gap and create legal accountability for Canada. Minister Bennett noted that some significant policy shifts in rights recognition and other areas are based on what they've heard at the Recognition of Indigenous Rights and Self-Determination discussions. The Framework will replace the *Comprehensive Land Claims Policy* and the *Inherent Right Policy* with a new policy to guide discussions and negotiations with Indigenous partners. The cornerstone of this policy will be the co-development of mandates. She explained that Canada needs to address fundamental issues, such as the deep connection between rights and title, and the management of lands and resources. Laws need to describe the fiduciary duty and the recognition and implementation of rights. A number of significant points were raised by forum participants, following the minister's remarks, including:

- First Nations leadership reminded the Minister that she could easily remove the comprehensive, inherent rights and specific claims policies right now for the barriers that they currently are;
- She was asked what the Prime Minister means when he says “full partnership” and it was noted that it is likely, we do not mean the same thing;
- Consultation is not good enough for the transformation of Canada. Consent is required;
- Canada's economy is based upon lands and resources in our territories and yet excludes us from any fiscal relationship;
- The Treaties are our relationships and we must work to see the Treaties implemented: we do not need legislation;
- If First Nations opt out of this framework, is there still an opportunity to work together. Is there an alternate route?

In creating accountability mechanisms, the Minister explained that currently Canada decides who is a nation or a collectivity, which defines with whom they will negotiate. If Canada refuses to negotiate, there is no recourse and no accountability. For this reason, Canada needs to define the ‘honour of the Crown’ and create a standard of conduct in legislation and policies. Furthermore, progress is often left to political will and the “whim of government”. Minister Bennett acknowledged that leaders have asked Canada to recognize the title of Indigenous Nations and ensure fair sharing of resource revenues. She explained that title can sometimes co-exist amongst nations, so there needs to be a mechanism for resolving disagreements – without going to court. There is a need for a robust dispute resolution mechanism. Canada has heard the recommendation of the need to establish independent bodies to provide a new dispute resolution mechanism. A new policy will reflect this. It was noted by forum participants that:

- There must be recognition that implementing the *UN Declaration* will require the provinces and territories to uphold the standards;
- Canada's Overview Documents ignore what was said by First Nations and does not reflect perspectives shared with the Minister;
- Court victories (i.e., commercial fishing) have yet to be implemented by the government. Land, resources and water rights are important and in order to want to work with First Nations, there needs to be progress beyond enumerating what core powers you can define;
- Canada has missed the fundamental recognition of Aboriginal title;
- This process has not been nation-to-nation and is contrary to International human rights standards.



The Minister closed by saying that she needs our support in getting this right, to break from the status quo and create a legal foothold that holds Canada to account and ensures that the recognition of rights is the starting point.

Regional Perspectives

Following the Minister's remarks and the two response opportunities, the delegates remained in plenary to share their views of what they had just heard and then continued their discussion in regional break-out sessions. The morning of the second day, each region shared their view with the whole of the gathering. What follows is a brief synopsis of the many ideas and perspectives shared by the regions⁶.

Yukon, NWT – Regional Breakout Session

Process

- The government is not being clear on what this framework is meant to do.
- Communication has been poor and engagement has not been clear.
- There is no clear answer to what is the opportunities for the North through this process.
 - Many different documents released covering a variety of different topics, with quick turnaround for comments. It's unclear what Canada wants FNs to review, and they are not giving ample time to digest information.
 - Lack of clarity on how different policy initiatives the government is undertaking will inform or be part of this (fiscal discussions, for example).
- First Nations are at capacity. There needs to be more resources to support nations in building governance; and supporting analysis of the variety of policy initiatives and activities the government is undertaking, how they all fit together, and the impacts.
- It's not a 'yes' or a 'no' from our regions, but let's get answers to our questions.

How to Proceed

- Engaging and Co-Developing the Framework in True Partnership.
- Canada's proposal was presented as a collaborative approach with both parties must hold the pen from start to finish. First Nations cannot feel like bystanders in this process.

Engagements

- Elders say let's take our time – we are building a nation with our government – this means going to the communities and hearing their views in a respectful manner.
 - Rushed, unorganized engagements with minimal involvement from community are not helpful for establishing a 'renewed relationship.'
 - Our ways and protocols must be upheld. There needs to be a national protocol to recognize local customs. They cannot act like they own the land. They need to be educated on local protocols on how to respect the land, people, and culture.



- We need to go back to the community level with Elders in our language with a focus on certain issues. Then, bring the information together to the regional level, and then have national discussions. We need to build consensus.

Drafting

- Oversight committee and/or national policy on co-development to ensure FNs are involved in the way they want to be.
- Canada (the Prime Minister) needs to issue an apology, and then start working from that point forward.
- Discussion paper⁷: Framework must commit the federal government to work collaboratively with respect to development of federal legislation that may affect YFNs (Bill S-6 as an example of government proceeding despite objections).

Other Options

- There needs to be a plan to pay back the loans.
- Change the mindset whereby FNs are saying “this is what we want, how are you going to make it work?”

Role of Provinces and Territories

- There are many unanswered questions.
- How will First Nations position themselves with respect to federal and provincial/territorial discussions? How will FNs be involved?
- Will the PM back the FNs over the territory/provinces? (Territorial government will not like less funds, but funds must go to the FNs not the territories – not enough accountability with the territories.)

Implementation and Constitutional Protection of Yukon Self-Government Agreements

- We need full and **broad** implementation of land claim and self-government agreements to achieve their socio-economic outcomes.
 - Civil servants narrowly interpret modern treaty terms (and objectives).
 - Senior federal officials with authority and clout, and the ear of politicians, be appointed to take on implementation of modern treaties as a core mission of the federal government.
- Canada must work with Yukon First Nations (YFNs) and modern treaty holders to provide direction to its government on modern treaty implementations.
 - The ability to function effectively/efficiently is heavily impacted w/o meaningful implementation.
- A separate body should exist focused on modern treaty implementation (accountability).
 - Session: separate department of implementation suggested
 - Discussion paper: Monitor, investigate and report to Parliament on progress of treaty implementation in Canada – could also provide a dispute resolution mechanism.
- Framework must incorporate new progressive mandates and policies.
 - Repeal out of date mandates and policies, like the 1995 inherent rights policy, incorporate new jointly developed policies (like the new fiscal policy process/land claim negotiation loan reimbursement).



- Need to confirm how the Yukon Government will be involved in reconciliation measures in Yukon.
- Provide constitutional protection for the YFN self-government agreements.
- YFNs that aren't signatories to a modern treaty are self-determining. The Crown must engage with these Yukon First Nations to ensure that the Framework addresses their specific issues.
 - Human and financial resources are needed to do the work. These nations must be supported to advance their priorities.

Other Mechanisms

- Sharing Our Story – We have a unique circumstance in the North.
- Northern governance structures, as well as land claim and self-government agreements are minimally understood. Major education needed for federal staff/officials.
- Canadian public needs to know what's going on (lack of information feeds racism).
- Crown-Indigenous Relations does not represent all of government. All departments need to understand their obligations.
- Whatever this ends up being it cannot undermine the existing treaties, and respect the *UN Declaration*.
- There is an exciting opportunity to create your future. Never has there been this opportunity like this. If we want change, we have to change things ourselves.

British Columbia

Louise Mandell has led the development of drafting instructions for a Recognition Legislation Framework under consideration by the BC Chiefs and Leadership. She presented the September 11, 2018 draft to the Forum.⁸

The document is founded upon four principles reflective of the BC Chiefs and Leadership response in 2014 following *Tsilqot'in*. The Preamble consists of 17 paragraphs that reflect recognition principles which have been achieved through the *Constitution*, legally and internationally marking Canada's assimilationist policies, rejecting the doctrine of discovery and *terra nullius*, recognizing the pre-existing Indigenous peoples, laws, governance affirmed in the *Royal Proclamation* and *Treaty of Niagara, 1764*. Further, the *UN Declaration* is the minimum standard for rights implementation and serves as a framework for reconciliation. The unextinguished Aboriginal title and rights to land, resources and waters exist without proof or strength of claim or having to be negotiated with Canada. Existing Treaties, agreements and other constructive arrangements require full implementation with their spirit and intent. The path to self-determination must be driven by Indigenous People defining what consent looks like for each and then engaging in consent-based, collaborative decision making when strategic-level, statutory/regulatory decisions are to be made.

The draft defines "recognition: is affirming the historical and legal narrative set out in the preamble and includes s. 35, elaborated upon in the *UN Declaration*; fulfilling its constitutional and international obligations in full partnership with Indigenous Peoples; unextinguished Aboriginal title without strength of claim and has a jurisdictional and inescapable economic component; self-governing bodies as legal entities; and adhering to international human rights standards.



The draft defines “consent: means free, prior and informed consent.” The draft does not define “Indigenous Peoples” consistent with international convention. Should a definition be necessary, the definition will be provided by Indigenous Peoples and not the Crown. The draft defines “Crown: means the Crown in right of Canada and includes Crown corporations, agencies and other emanations, including all officials.”

There are 5 stated purposes of the draft: to articulate principles for recognition under the Act; confirm the application of the *UN Declaration* in Canadian law; to create over-arching interpretation provisions that align development and administration of federal legislation with these binding principles; to commit Canada to work collaboratively; and commit to new dispute resolution mechanisms. The draft then highlights each of these purposes. The draft concludes with a section detailing a process for engagement to implement the framework including a dispute resolution mechanisms and a Treaty/Agreement Implementation Commission.

Regarding the federal Overview of a Recognition and Implementation of Indigenous Rights Framework, the BC Region expressed the following concerns:

- 1. Overview document unacceptable:** The BC region had been open to discussing the federal government’s approach to the recognition and implementation of rights framework until the federal government released its “Overview” document which falls far short of what First Nations require in fundamental areas and is inconsistent with the work and approach proposed by First Nations in BC which we have articulated through various meetings with the federal government and in submissions.
- 2. Inadequate articulation and reflection of section 35:** The proposed framework does not capture that s. 35 is a full box of rights and completely avoids recognition of Aboriginal title. Furthermore, the government’s discourse on the ‘full box of rights’ can’t be limited to reserve lands. Recognition and the full box of rights approach must apply to the entire traditional territory and homeland of each respective First Nation, not constrained to small spots (e.g. reserve lands).
- 3. Poor consultation:** The federal process is flawed and the federal government continues to apply its failed process of consultation, when it should be employing a process of seeking the free, prior and informed consent of our nations. This process should be driven as a nation-to-nation consistent with the *UN Declaration on the Rights of Indigenous Peoples*, that’s where the conversations should be taking place. The consultation process used in the recognition and implementation of Indigenous rights framework is similar to that used in the Trans Mountain Pipeline, which the Federal Court of Appeal rejected.
- 4. Procedural concerns:** The timelines are too narrow, there are important conversations that need to continue, instead we are trying to meet the government’s narrow timeframe which doesn’t provide adequate opportunity to refine the work. Also, the development of this framework has essentially been unilateral, rather than co-developed as committed to by the Prime Minister. Instead, we are being forced to respond/react to their questions, documents and their process and we do not see our input being properly characterized. We are left in the position of providing input into their process, this is not genuine co-development.



- 5. Recognition of Aboriginal title must be a legislative element, not a policy piece:** Any approach that includes the exclusion of Aboriginal title from the legislative piece is unacceptable. The treatment of Aboriginal title through a policy piece is not acceptable as policy is discretionary and subjective. Dealing with recognition of Aboriginal title at a policy-level is also inconsistent with the approach proposed by BC Chiefs and Leadership. Similarly, the framework and the requirement that further litigation to prove the existence of Aboriginal title is also not acceptable.
- 6. Not reflective of true self-determination:** The new Overview document generally proposes that First Nations will apply to the federal government for recognition as a nation and the government decides who is a nation to advance claims of title, that approach is not consistent with government “getting out of the way”, nor is it consistent with self-determination when another government gets to set the criteria and make the determination.
- 7. Lack of Trust of the federal government’s process:** There is a lack of trust with the federal government’s process because what they are communicating, committing to both verbally and in writing do not match their actions, and this needs to be communicated to Minister Bennett.

Moving Forward

Decision point: The federal Overview document produced by Minister Bennett, released on Friday, September 7, 2018 must be rejected. The BC region will continue to advance the direction provided to it by BC Chiefs and Leadership, which includes the elements of the draft legislative drafting instructions.

There is recognition that Ontario and Alberta have concerns about BC’s position on the framework. The BC Region is interested to hear what the other regions’ approaches include, if they have prepared documents that they are able to share. It would be helpful for us to look for areas of common positions of First Nations from other regions to move forward and build on. There are a number of elements that all First Nations agree on. The complete repudiation of “*terra nullius*”, “crown sovereignty” and the “doctrine of discovery” is required. These concepts have no place in the rights framework.

Additional internal discussions, in advance of engagement with provinces, territories and the federal government may be helpful.

The path forward must move beyond consultation and ground the approach to developing the recognition and implementation of Indigenous rights framework, including development of free, prior and informed consent in First Nations’ driven processes and guided by our respective Indigenous laws. Consultation needs to take place at Nation-to-Nation level, consistent with the *UN Declaration*. The process can no longer be unilaterally controlled by Canada.



The BC drafting instructions provide a minimal threshold for the rights framework. In essence, the drafting instructions are the bottom line for this framework. We need to present the drafting instructions to Canada. If they reject the drafting instructions, we will know where Canada stands on First Nation rights and title.

Additional Required Elements of a Rights Framework

For the rights framework to succeed, the legislation needs to be **co-developed**. This requires co-drafting of the federal legislation. To date, this framework was not co-developed. Rather, the same flawed consultation process that was rejected by the courts continues to be used.

First Nations need to put a framework forward that will not undermine any treaties, inherent rights and Aboriginal title. Rather, treaties, inherent rights and title need to be part of and integral to the rights framework. The framework must also be based on First Nation laws and customs.

The recognition of First Nation jurisdiction over our resources has not been achieved, so it makes it difficult to assert our rights on this issue. The Framework must include First Nation rights to natural resources within their traditional territories.

Ed John addressed the forum to speak to how we have advanced our rights as Indigenous Peoples within the International fora. Canada's refusal to implement court victories achieved in British Columbia (*Ahousaht*) is a violation of the rule of law. We have every right to be skeptical of government. Since April 2018, BC Chiefs and Leadership have met to develop a common foundation that is reflected in the drafting instructions presented by Louise Mandell. They accept that the document is not perfect but welcome views from other regions. 'Constructive ambiguity' is built into the *UN Declaration* – no one got 100% of what they wanted, it was a balancing act but articles 1–45 are the elements of territorial integrity. Article 46 must be read based on the preceding 45 articles. This customary international law includes language and culture. There is a dissonance between what the Prime Minister is saying and what government officials are prepared to do. The government's most recent overview document provided on September 7, 2018 does not reflect what we said. The bureaucrats are tone deaf to us. We need a bridge. There are 203 First Nations in BC and it's not practical for each to go to court to assert their rights. We need to look after the best interests of our people while we develop the strength of position together. We will come prepared to do this in December at the Special Chiefs Assembly.



Alberta, Saskatchewan, Manitoba – Regional Breakout Session

Synopsis and Highlights of the many ideas and perspectives shared

- The numbered treaties create a unique relationship with the Crown in which it was the Treaty that made portions of the land a part of Canada. Within that context is another special context, that of the Natural Resources Transfer Acts, 1930 (NRTA).
- Treaties themselves are the basis of our nation to nation relationship via the Crown.

Process

- General lack of trust in the process, people are pessimistic about the final outcome.
- Specifically, there is a lack of trust in the federal government's **commitment and ability to implement** the proposed framework legislation.
- So far, there seems to be no substance to this process.
- Any process that recognizes First Nation rights has to begin with the fact that large areas of our lands and resources were stolen by the federal government, and then given to the provincial government by the NRTA in 1930, and that no compensation was provided for the use of our lands for immigration and settlement.

How to Proceed

- Many opinions on going forward – not proceed, proceed with caution, proceed reluctantly, go for it!
- We have to create a response that contains the spiritual and cultural intent that is a part of the Treaties.
- We have a spiritual and customary obligation to those not yet born and to the land itself.

Other Options

- Canada must implement and fulfill the treaties we have already agreed to before we go down a path of new promises. That must be coupled with redress.
- The solution, the remedy, must be consistent with the Treaty and its spirit and intent.
- Maybe just draft the legislation and give it to them. Then *they* can tell *us* what they think.
- We should draft reciprocal legislation.
- We need to focus on creating our own laws.
- Resource revenue sharing needs to be addressed in the framework.
- Keep the Treaties out of the framework.

Other mechanisms

- Establish a Treaty Commissioner.

Finally

- Whatever this ends up being, we cannot undermine the treaties.
- Treaties must take precedent and the *UN Declaration* and the ADRIP must form the foundations of how we go forward.



Wilton Littlechild provided the forum with a Treaty 6 perspective and added this “lens” to Canada’s Overview document and British Columbia’s Drafting Instructions and considered our possible options:

- a. draft legislation ourselves and give it to them;
- b. must look at the spiritual element of Treaty as one of the pillars of Treaty;
- c. consider a Treaty Commissioner;
- d. stop and examine all these documents for common elements/strengths and build on these; and
- e. bring an analysis through a Treaty lens.

We must abandon the language of “historic” treaties and we must always include the phrase “as understood by the Indigenous people” when speaking to the spirit and intent. Finally, we must affirm the international character of Treaties. Canada’s Framework can in no way be interpreted as domesticating our Treaties. These are not to be embedded within Canadian federalism but indeed are nation-to-nation.

Ontario

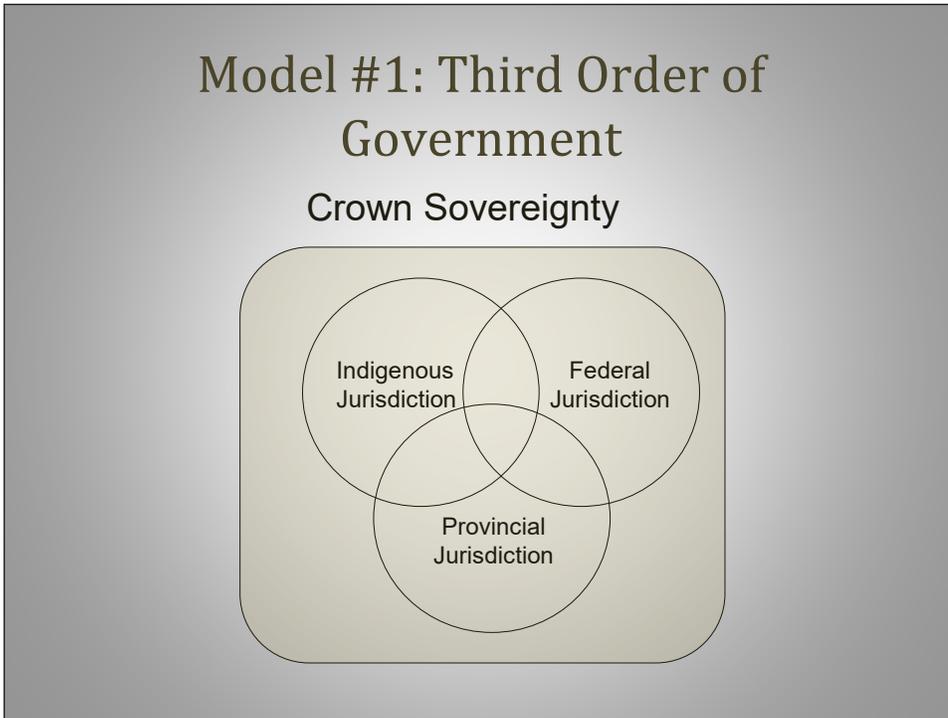
Earlier in the day, the Anishinaabek of the Waawayataanong Treaty Council communicated their position to Minister Bennett during her attendance at the forum. An acceptable process requires direct engagement with the council and they extended her an invitation to meet. She agreed to follow up.⁹

Deputy Regional Grand Chief Gord Peters, Association of Iroquois and Allied Indians (AIAI), summarized the view of First Nations leadership that was reflected in AFN Resolution 39/2018 to halt the current process and participate in First Nations led negotiations confirming that only First Nations can determine the path to decolonization and reconciliation. Going forward:

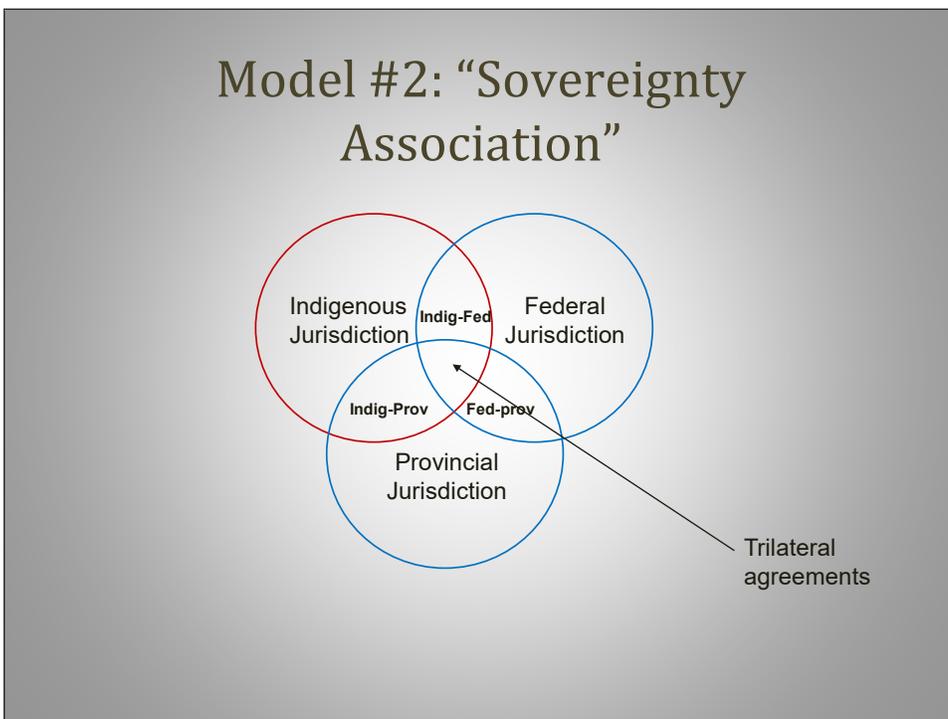
- establish a First Nations’ led process to draft a New Royal Proclamation binding on all levels of government;
- call on Canada to set-aside its ten principles;
- call on Canada to commit to an independent international arbitrator to resolve disputes;
- call on Canada to immediately convene a meeting of First Nations to discuss the issue;
- engagement and consultation are one-sided power games where First Nations can never win – any new relationship must be based on consent;
- the relationship between First Nations and Canada must be governed by international law;
- our right to self-determination already exists and is evidenced by the International Covenant on Civil and Political Rights which states that all peoples have the right to self-determination, and to which Canada is a signatory;
- the *UN Declaration* reaffirms our right to self-determination and is the floor, not the ceiling – it can be used as a toolbox, but not a recipe; and
- there are at least three models for jurisdictional arrangements:



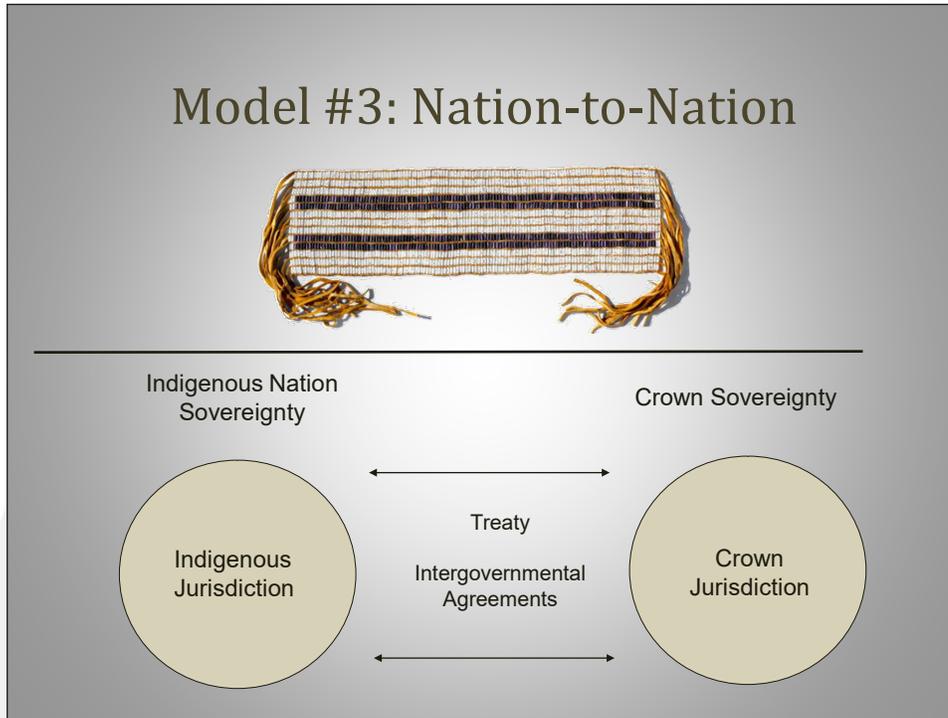
Model 1: Third Order of Government¹⁰



Model 2: Sovereignty Association



Model 3: Nation to Nation



Regarding the federal Overview of a Recognition and Implementation of Indigenous Rights Framework, the Ontario Region expressed the following:

1. **Reaffirm AOCC Resolution of June 2018 (establishing a COO Working Group to give life to the AIAI 13 Principles) and reject Canada’s framework, process and legislation.** We need to educate our people (develop an education strategy in partnership with the Treaty regions about legally enforceable obligations held by Ontario and Canada). The only way to challenge this process is to **do our own work (through an Indigenous lens, recognizing our views of the land)**. Canada’s approach raises serious concerns: drafting instructions have begun (glimpse of approach to be gleaned from impact assessment legislation); “aggregate delivery system” (ADS) wrongly becomes the focus and then will be the stream to funding; fiscal relationship: 10 year contribution agreement is tied to “financial fitness” but Canada creates a high threshold to access and seek permission from institutions they endorse (or create);
2. Canada’s public reporting of “what was heard” has fundamental **omissions of key messages** – communicated directly to Minister Bennett by women Chiefs. This omission is a manipulation of truth and understanding the issues;
3. **Legal and political action is necessary.** The assertion of inherent rights is not dependent on anyone. We can and must express ourselves in another process and might begin by identifying the list of matters that Canada must do to “get out of the way”: denounce doctrine of discovery; reject *terra nullius*; abandon the inherent rights policy, remove s. 88 etc.;



4. We will not be working from Canada's agenda and timelines. We are on a **“continuum of reconciliation”** to respect that each of our communities are at a different place of restoration and healing. We take our direction from what the people in our communities need – and some of us may not be ready at the same time;
5. **Treaty rights are inherent rights and are not to be set to the side or parked.** Treaty rights and jurisdiction are paramount. We must assert ourselves for our children (seven generations into the future);
6. Canada is **silent on the role of the province and this omission is fundamental.** This must be addressed and a change in the division of powers result. Government of Ontario continues to issue permits over our lands and resources. Land redistribution cannot be ignored.
7. It was expressed that it is very difficult to believe that the oppressor is suddenly the one with the solution.

Quebec – Regional Breakout Session

Regarding the federal Overview of a Recognition and Implementation of Indigenous Rights Framework, the Quebec Region expressed the following:

- The process that Canada has followed was deeply flawed.
 - Even though several members of the breakout are engaged in exploratory tables with Joe Wild and those conversations are progressing well for some, **information on the rights framework legislation has not been shared widely or well.**
 - One participant attended an engagement session that lasted 2 hours and mostly consisted of answering a questionnaire. A promised return engagement did not happen.
 - Most feel that they had **little understanding of the proposal** that Canada is putting forward prior to this meeting.
 - Even those at exploratory tables are not sure how Canada's proposal would affect their discussions.
- There are lots of “maybe” and “could be” in the documents and a **lack of clarity leaving need for interpretation.** Some questions Canada has not answered include:
 - How are inherent rights reinterpreted to s. 35 rights and what does that change?
 - What does nation-to-nation really mean to Canada?
 - What is Canada's definition of self-determination?
 - What does “full box of rights” mean to Canada?
 - What, precisely, is their position on title?
- The **lack of clarity on matters of provincial jurisdiction** is particularly problematic in Quebec.
 - The Quebec government acts unilaterally and Canada does nothing to defend First Nations interests against the province. Their proposal wouldn't change this.
 - The flipside is when Quebec acts on behalf of people – for example recognizing housing as a human right – they exclude First Nations.



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- The tripartite relationship needs clarification, including the role of municipalities.
- The majority consensus was around the **need for a “reset” and a new process** led by First Nations for First Nations.
 - Distinctions based should mean separate legislation for First Nations.
- Some principles:
 - We are allies of the Crown, not subjects. We are equals.
 - The Two Row Wampum Treaty is a good starting point.
 - Going forward with legislation for some First Nations should not compel others into a situation they do not choose.
 - Is it possible to get another process going if some proceed with Canada’s proposal?
 - How does Canada respond to BC’s proposal?
 - Could we use that proposal and RCAP and the Charlottetown Accord and other good work to build on for another proposal in the next term of the government after the 2019 election?
 - All First Nations should sit down together and put forward an alternative proposal, pursue it with a unity and get it done.
- There may be a need to **build a strategy to oppose legislation** if it is tabled in the House of Commons this fall.
- “Canada is looking at changing a law, but we are looking at survival.”



Potential Next Steps

National Chief Perry Bellegarde took the initiative to convene a meeting to facilitate a deeper understanding and dialogue amongst First Nations Leadership on September 11 and 12, 2018. The purpose of the National Forum was to facilitate dialogue and equip leadership with information. It was not to drive consensus or develop a unified approach. That being said, there was a position expressed almost without exception during the Forum and consistent with AFN Resolution 39/2018 where in July 2018 the Chiefs-in-Assembly called for the establishment of a First Nations led process. Most regions are prepared to take the information and knowledge that was gained here and work within their respective communities and regions to advance and come prepared to the December Special Chiefs Assembly with their considered view to propose solutions from our regions. The thought was shared that “otherwise we risk continuing on a path of tension. We need to find the path of common ground in December”. This important dialogue will therefore continue. Canada should be prepared to support a First Nations led process that includes the following:

1. Individual First Nations should be funded in order to give respect to the voices of the grassroots membership and provide each Chief or designated representative with a clear mandate on the way forward;
2. Regional bodies should be funded to a level comparable to what has been provided to First Nations in British Columbia in order to ensure a common level of understanding and participation. Regional dialogue would assist in identifying the various perspectives driven by differing provincial or territorial legislative and regulatory regimes as well as those that may arise from the differing relationships outlined in Treaty or otherwise;
3. The work begun at the National Policy Forum of ensuring a common level of understanding of the issues, to convene national dialogue and to facilitate coordination and communication across regions should also be funded. The objective of this work would be to ensure that the divide and conquer strategy pursued by Canada thus far is replaced by a position driven from minimum standards supported across the country while maintaining the rights-holders’ position as the final arbiters of self-determination;
4. The Prime Minister should assume responsibility for leading this, to ensure it has the necessary level of authority and eliminate the dissonance between his words and government action.



Endnotes

- 1 Attachment 1: Assembly of First Nations National Policy Forum: Affirming First Nations Rights, Title and Jurisdiction, Summary, September 11 & 12, 2018.
- 2 D. Nahwegahbow presentation, September 11, 2018.
- 3 May 10, 2016 Minister Bennett at the UN Permanent Forum.
- 4 Current actions by Premier Ford in Ontario to invoke the s. 33 of the Charter (the notwithstanding clause) to prompt one delegate to questions whether First Nations rights and jurisdiction would succumb to the same treatment by the provinces.
- 5 <http://pro169.org/ilo-169/>
- 6 The lack of representatives from Nova Scotia, New Brunswick, PEI and Newfoundland meant that a “regional session” did not take place and the views of these regions are not reflected in this section
- 7 Proposed Federal Recognition and Implementation of Rights Framework, Prepared for the Assembly of First Nations - Yukon Region and the Council of Yukon First Nations by Daryn Leas, September 9, 2018.
- 8 Recognition Legislation Framework: Drafting Instructions under Consideration by the BC Chiefs and Leadership, September 11, 2018.
- 9 Waawayaatanong Treaty Council, Statement on Rights Recognition Framework presented to Minister Bennett by Chief Myeengun Henry, Chippewas of the Thames First Nation.
- 10 Slides from Deputy Grand Chief Gord Peters, AIAI PowerPoint presentation, September 11, 2018.

