

# Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia

Endorsed by the Principals on September 4, 2019



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### CONTEXT

1. In British Columbia, pre-existing inherent rights of Indigenous Nations continue to exist today and the reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty through treaties, agreements and other constructive arrangements remains largely outstanding.
2. Canada, British Columbia and the First Nations Summit adopted the 19 recommendations of the *Report of the British Columbia Claims Task Force* (1991) and established the British Columbia Treaty Commission and the British Columbia treaty negotiations framework. Between 1992 and 2019, three treaties were concluded with seven Indigenous Nations in British Columbia through the British Columbia treaty negotiations framework. Over the years, numerous reports, studies and initiatives have recommended ways to improve the British Columbia treaty negotiations framework.
3. Canada and British Columbia recognize that to facilitate greater progress in negotiations, current policies and mandates need to be reviewed and updated. Canada and British Columbia also wish to continue moving beyond historic legacies of Crown denial, unilateralism, and the doctrine of discovery to a new nation-to-nation relationship based on the recognition of rights, reconciliation, respect, co-operation and partnership.
4. Canada has adopted, without qualification, and British Columbia has fully adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), which sets out minimum standards for the survival, dignity and well-being of Indigenous peoples.
5. Canada, British Columbia and representatives of Participating Indigenous Nations in British Columbia have, within the context of the British Columbia treaty negotiations framework, co-developed this British Columbia-specific recognition and reconciliation policy.

### DEFINITIONS

6. For the purposes of this policy,
  - a) **“Participating Indigenous Nation”** means Indigenous peoples engaged in the negotiation of treaties, agreements and other constructive arrangements within the British Columbia treaty negotiations framework, whose Statement of Intent has been accepted by the British Columbia Treaty Commission; and

- b) **“Treaties, agreements and other constructive arrangements”** means treaties as well as other agreements and constructive arrangements negotiated within the British Columbia treaty negotiations framework.

## PURPOSE

7. Canada and British Columbia affirm and endorse the *Report of the British Columbia Claims Task Force* (1991) and its recommendations.
8. Canada and British Columbia endorse the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) as a foundation of the British Columbia treaty negotiations framework.
9. This policy will support, improve, and enable, and not limit, approaches to the negotiation of treaties, agreements and other constructive arrangements between and among Canada, British Columbia and Participating Indigenous Nations in British Columbia that:
  - a. are grounded in the recognition of the rights of Participating Indigenous Nations;
  - b. reconcile pre-existing Indigenous sovereignty with assumed Crown sovereignty;
  - c. do not extinguish the rights, including title of Participating Indigenous Nations, in form or result; and
  - d. are able to evolve over time based on the co-existence of Crown and Indigenous governments and the ongoing process of reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty.
10. This policy will enable flexible, innovative and collaborative approaches to the negotiation of treaties, agreements and other constructive arrangements, including through the co-development of mandates.
11. This policy establishes a framework for the reconciliation of Crown and Indigenous rights, including titles and jurisdictions, for Participating Indigenous Nations.
12. This policy does not define the legal status, nature, scope, content or geographic extent of any particular Indigenous Nations’ rights, including title and self-government, or how those rights co-exist with those of the Crown or other Indigenous Nations.

## APPLICATION

13. This policy applies to all federal government departments, agencies and Crown representatives, including federal negotiators, in respect of the negotiation of treaties, agreements and other constructive arrangements.
14. This policy applies to the provincial Ministry of Indigenous Relations and Reconciliation in respect of the negotiation of treaties, agreements and other constructive arrangements. British Columbia also intends this policy will apply, as appropriate, to all provincial government ministries, agencies and Crown representatives.
15. This policy is not intended to abrogate or derogate, nor should it be construed as abrogating or derogating, from the inherent title and rights, treaty rights and human rights of any Indigenous Peoples in British Columbia or Canada. For greater certainty, this policy applies only to Participating Indigenous Nations and does not apply to any other Indigenous Nations in British Columbia. If an Indigenous Nation falls within the definition of “Participating Indigenous Nation” but does not want this policy to apply, it may indicate that it does not want to be a “Participating Indigenous Nation” for the purpose of this policy, and this policy will not apply to it.

## PRINCIPLES

16. The negotiation of treaties, agreements and other constructive arrangements in British Columbia will be guided by the following, in no particular order:
  - a. *Constitution Act, 1867* and *Constitution Act, 1982*, including sections 25 and 35;
  - b. *United Nations Declaration on the Rights of Indigenous Peoples* (2007);
  - c. *Report of the British Columbia Claims Task Force* (1991) and its recommendations;
  - d. Truth and Reconciliation Commission’s 94 Calls to Action, which call for repudiation of concepts such as the doctrine of discovery;
  - e. applicable customary international law; and
  - f. Indigenous laws and legal systems.
17. The rights of Participating Indigenous Nations continue to evolve. They are not frozen in time and are not contingent on state recognition, court declaration or treaty articulation for their existence or exercise.
18. Treaties, agreements and other constructive arrangements are the preferred methods of achieving the reconciliation of Crown title and the inherent titles of Participating Indigenous Nations, and the reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty. They will:
  - a. provide for the recognition and continuation of Indigenous rights;

- b. not extinguish, surrender or require the modification of the rights of Participating Indigenous Nations, in form or result;
  - c. not set out the specific nature, scope or extent of inherent Indigenous rights, except as otherwise agreed by the parties to the negotiations;
  - d. provide a framework for reconciling Crown title and the inherent titles of Participating Indigenous Nations, and pre-existing Indigenous sovereignty with assumed Crown sovereignty;
  - e. provide for the co-existence of Crown and Participating Indigenous Nation governments;
  - f. be capable of evolving over time and not require full and final settlement;
  - g. employ approaches that reflect the unique circumstances of each Participating Indigenous Nation rather than unilaterally developed, formulaic approaches and formulas; and
  - h. provide for the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), including the rights to redress and “free, prior and informed consent”.
19. Canada and British Columbia will fund the participation of Participating Indigenous Nations in the British Columbia treaty negotiations framework through non-repayable contributions rather than through loans. Funding will be allocated by the British Columbia Treaty Commission in accordance with the *British Columbia Treaty Commission Agreement* (1992).
20. Canada and British Columbia acknowledge their legal obligations to respect the rights of Indigenous Nations and Participating Indigenous Nations.
21. Overlaps and shared territories are a matter of importance and significance that have the potential to impact relations between Participating Indigenous Nations and neighbouring Indigenous Nations. The Crown acknowledges that it cannot unjustifiably infringe on the Aboriginal and treaty rights and titles of Indigenous Nations.
22. In the negotiation of treaties, agreements and other constructive arrangements, Canada and British Columbia will respect their legal obligations to all Canadians.
23. Reconciliation requires honourable processes of negotiations. The honour of the Crown is reflected, not just in the identification of the interests, but in how those interests are expressed. This requires the federal and provincial governments and their departments, ministries, agencies and officials to act with honour, integrity, good faith, fairness and genuine intention to reach agreement in all dealings with Participating Indigenous Nations. The overarching aim is to ensure that Participating Indigenous Nations are treated with respect and as full partners in Confederation, with their rights, treaties and agreements recognized and implemented.

24. Negotiations, including the co-development of mandates, should be conducted in an interest-based, non-adversarial manner, conducive to reaching agreements.

## CO-DEVELOPMENT OF MANDATES

25. In the negotiation of treaties, agreements and other constructive arrangements, federal and provincial negotiators are authorized to co-develop mandates with Participating Indigenous Nations. Federal and provincial negotiators may employ incremental, staged or stepping stone approaches to the co-development of mandates.

26. All relevant federal government departments, agencies and Crown representatives will participate in the co-development of mandates.

27. The provincial Ministry of Indigenous Relations and Reconciliation will participate in the co-development of mandates. British Columbia also intends that, as appropriate, relevant provincial government ministries, agencies and Crown representatives will participate in the co-development of mandates.

28. Where the parties agree, Canada, British Columbia and Participating Indigenous Nations can also work together, through the co-development process set out in this policy, to find common ground to settle litigation outside of the courts.

29. Consistent with recommendation 2 of the *Report of the British Columbia Claims Task Force* (1991), Canada, British Columbia or a Participating Indigenous Nation can raise any issue that it views as significant to the new relationship of reconciliation, including longstanding issues previously raised by a Participating Indigenous Nation that are not covered by existing federal or provincial mandates.

30. If any party to the negotiations raises an issue that it views as significant to the new relationship of reconciliation, the parties will create or identify options for addressing the issue, which could include the co-development of mandates.

31. In co-developing mandates, the following principles will apply:

- a. there will be no “one size fits all” approach to the co-development of mandates;
- b. co-developed mandates will take into account the diversity of Participating Indigenous Nations in British Columbia; and
- c. the parties to the negotiations may address longstanding issues that are not covered by existing federal or provincial mandates.

32. Federal and provincial negotiators will use best efforts to work expeditiously with Participating Indigenous Nations to:
- a. jointly design the process for co-developing a mandate in respect of the issue raised;
  - b. under the agreed-upon process, co-develop a mandate in respect of the issue raised;
  - c. develop non-binding documents that capture key components of co-developed mandates; and
  - d. seek specific negotiating mandates from their respective decision-makers to negotiate and conclude binding agreements based on the non-binding documents.
33. Co-development will occur continuously from design of the co-development process to approval of the mandate, through open and transparent discussions of issues being raised, while respecting the confidence of Cabinet processes.
34. In preparing submissions to Cabinet, Canada and British Columbia will work collaboratively with the Participating Indigenous Nation that participated in co-development of the mandate to ensure that its perspective is accurately reflected.

#### DISPUTE RESOLUTION

35. Canada and British Columbia, with the full and effective participation of Participating Indigenous Nations, will seek to support just, equitable and effective mechanisms and procedures for the prompt resolution of conflicts, disputes and impasses, giving due consideration to the customs, traditions, norms or legal systems of the Participating Indigenous Nations concerned. Where impasses cannot be resolved, Canada and British Columbia will be open to third-party facilitation and mediation. Canada, British Columbia and Participating Indigenous Nations may wish to develop a pre-approved list of facilitators and mediators to minimize delays.

#### SELF-DETERMINATION AND JURISDICTION

36. Recognition of the inherent right of self-determination of Participating Indigenous Nations in British Columbia is the starting point of negotiations to reconcile and achieve the co-existence of federal, provincial and Indigenous jurisdictions, laws and legal systems.
37. The inherent right of self-determination of Participating Indigenous Nations in British Columbia is recognized and affirmed in section 35 of the *Constitution Act, 1982* and expressed in the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).

38. Canada and British Columbia recognize that Participating Indigenous Nations in British Columbia have the inherent right of self-determination, which includes:
- a. an inextricable link to the lands, territories and resources traditionally owned, occupied or otherwise used or acquired by Participating Indigenous Nations;
  - b. rights to determine their own identity and membership in accordance with their customs, traditions and laws;
  - c. inherent rights of jurisdiction and self-government;
  - d. laws, law-making authority and legal systems;
  - e. rights to determine, maintain, develop and strengthen their distinct political systems, institutional structures and representative institutions, through representatives chosen by themselves in accordance with their own procedures; and
  - f. rights to freely pursue economic, political, social and cultural development.
39. Canada and British Columbia recognize that section 35 of the *Constitution Act, 1982* contains a full box of rights, which means that Participating Indigenous Nations do not have to prove the existence of their constitutionally protected rights.
40. The Crown acknowledges that it is pursuing reconciliation negotiations with Indigenous Nations outside of this policy, and the recognition of Indigenous rights by the Crown is not limited to negotiations under this policy.
41. Canada and British Columbia recognize that self-governing Participating Indigenous Nations are part of Canada's evolving system of cooperative federalism and distinct orders of government.
42. Federal and provincial negotiators may negotiate comprehensive, core or incremental treaties, agreements and other constructive arrangements to:
- a. reconcile Crown and Indigenous jurisdictions, laws and legal systems;
  - b. support the co-existence of Crown and Indigenous jurisdictions and laws;
  - c. enable shared decision-making; and
  - d. implement Participating Indigenous Nations' rights to "free, prior and informed consent," consistent with federal and provincial commitments to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).
43. Federal and provincial negotiators may negotiate comprehensive, core or incremental treaties, agreements and other constructive arrangements to address Participating Indigenous Nations' rights to redress, including just, fair and equitable compensation, consistent with federal and provincial commitments to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).
44. Treaties, agreements, and other constructive arrangements under this policy are one pathway for enabling Indigenous Nations to transition away from the *Indian Act*. Prior



to concluding treaties, Canada and British Columbia will support the transition away from the *Indian Act* and colonial systems of administration. In pursuit of this objective, federal and provincial negotiators may negotiate the following types of agreements or constructive arrangements with Participating Indigenous Nations:

- a. comprehensive, core, sectoral (e.g., education or child welfare) or incremental self-government agreements or other constructive arrangements to support Participating Indigenous Nations to remove and replace the application of *Indian Act* band governance structures;
- b. agreements or other constructive measures that recognize the legal capacity of Participating Indigenous Nations; and
- c. measures directed at supporting nation-building and governance capacity-building for Participating Indigenous Nations.

## FISCAL ARRANGEMENTS

45. A new government-to-government relationship requires new approaches and models for the co-existence and exercise of Canada's, British Columbia's and Participating Indigenous Nations' jurisdictions. Canada, British Columbia and Participating Indigenous Nations will seek to develop new fiscal arrangements to support treaties, agreements and other constructive arrangements.

## TITLE

46. Negotiation of treaties, agreements and other constructive arrangements will be based on recognition of the inherent titles of Participating Indigenous Nations in British Columbia to their respective lands, territories and resources, which they have traditionally owned, occupied or otherwise used or acquired.
47. The inherent titles of Participating Indigenous Nations in British Columbia are recognized and affirmed in section 35 of the *Constitution Act, 1982* and are reflected in the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).
48. Canada and British Columbia recognize that the inherent titles of Participating Indigenous Nations in British Columbia include a number of attributes unique to each Participating Indigenous Nation, including Aboriginal title as recognized and affirmed under section 35 of the *Constitution Act, 1982*.
49. The parties will work collaboratively through negotiations to reconcile inherent titles with Crown title through treaties, agreements and other constructive arrangements. Components of inherent titles, which may be addressed in that context, may include:
- a. legal interests in lands and resources, including rights of use and ownership;
  - b. an inescapable economic component, including the right to benefit from the land;
  - c. a jurisdictional component; and

d. decision-making authority.

50. Treaties, agreements and other constructive arrangements are the preferred methods of achieving the reconciliation of Crown title and the inherent titles of Participating Indigenous Nations.
51. In negotiating treaties, agreements and other constructive arrangements to reconcile Crown title and the inherent titles of Participating Indigenous Nations, negotiation tables may employ an incremental or stepping stone approach.
52. Federal and provincial negotiators may negotiate comprehensive, core or incremental treaties, agreements and other constructive arrangements to reconcile Crown title and the inherent titles of Participating Indigenous Nations that may include:
- a. land transfers, including land transfers earlier in the negotiation process;
  - b. resource revenue sharing agreements and economic benefit sharing agreements;
  - c. shared decision-making in respect of lands and resources; and
  - d. jurisdictional arrangements that support the effective implementation of title.
53. Canada and British Columbia acknowledge that achieving the reconciliation of Crown title and the inherent titles of Participating Indigenous Nations through treaties, agreements and other constructive arrangements may take time. In the interim, consistent with recommendation 16 of the *Report of the British Columbia Claims Task Force* (1991), “the parties [will] negotiate interim measure agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.”
54. Participating Indigenous Nations each have unique perspectives about their title and rights in and to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired. These perspectives are grounded in their respective laws and legal systems. Federal and provincial negotiators will respect these perspectives when negotiating treaties, agreements and other constructive arrangements to reconcile Crown title and the inherent titles of Participating Indigenous Nations.
55. Throughout the process of negotiating treaties, agreements and other constructive arrangements, Canada and British Columbia will respect the titles and rights of Participating Indigenous Nations who have been wholly or partially dispossessed, displaced or dislocated from their lands, territories and resources.

#### SHARED TERRITORIES AND OVERLAPS

56. Canada, British Columbia, and Participating Indigenous Nations acknowledge the significance and importance of resolving issues relating to shared territories and

overlaps among Indigenous Nations and Participating Indigenous Nations in British Columbia. The Crown further acknowledges that it has a constructive role to play in the resolution of these issues in the context of the negotiation of treaties, agreements and other constructive arrangements. Resolution of these issues will require ongoing efforts and may require the development of new policies, policy annexes, tools, approaches and techniques. Proposals for further work in this area are set out in section 5 of Schedule A.

57. Consistent with recommendation 8 of the *Report of the British Columbia Claims Task Force* (1991), Canada and British Columbia acknowledge that Indigenous Nations are best placed to resolve shared territory and overlap issues amongst themselves.

58. Where two or more Indigenous Nations or groups have a shared territory and wish to enter into joint negotiations with Canada and British Columbia, federal and provincial negotiators may negotiate and enter into shared territory agreements and other constructive arrangements with these Indigenous Nations or groups in respect of the shared territory.

#### IMPLEMENTATION OF TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS

59. Guidance on the implementation of treaties, agreements and other constructive arrangements will be co-developed on a tripartite basis, will include Participating Indigenous Nations that have concluded modern treaties in British Columbia and will be set out in an annex.

#### EFFECTIVE DATE

60. This policy takes effect on September 4, 2019.

#### GENERAL PROVISIONS

61. For the purposes of negotiations with Participating Indigenous Nations, this policy supersedes and replaces the following:

- a. *Statement on Claims of Indian and Inuit People*, 1973;
- b. *In All Fairness: A Native Claims Policy – Comprehensive Claims*, 1981;
- c. *Comprehensive Land Claims Policy*, 1986;
- d. *Federal Policy for the Settlement of Native Claims*, 1993;
- e. *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, 1995;
- f. *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights (Interim Policy)*, 2014; and
- g. Any other federal and provincial policies and directives to the extent of any conflict with this policy.

## MONITORING, EVALUATION AND REVIEW

62. Canada and British Columbia will continually monitor and assess the effectiveness and implementation of this policy and ensure that problems and issues are addressed.

63. Canada, British Columbia and representatives of Participating Indigenous Nations will evaluate this policy annually for the first four years, with the first evaluation commencing one year following its coming into effect. After the fourth evaluation, Canada, British Columbia and the First Nations Summit will evaluate this policy every four years.

## AMENDMENT

64. Any amendment to this policy must be co-developed and approved by Canada, British Columbia and Participating Indigenous Nations.

## SCHEDULE A: COMMITMENTS TO FURTHER WORK

Canada, British Columbia and representatives of Participating Indigenous Nations will co-develop annexes in respect of the following issues in the context of treaties, agreements and other constructive arrangements:

1. A framework for guiding the development and negotiation of fiscal relationships.
2. Free, prior and informed consent, consistent with federal and provincial commitments to implement the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).
3. Land-related issues, including:
  - a. the constitutional status of title lands;
  - b. mechanisms for conversion of land status of acquired fee simple lands;
  - c. non-time limited mechanisms and processes to acquire property in instances where there is limited availability of Crown land, including rights of first refusal and access to financing for land acquisition;
  - d. the role of municipal governments in connection with the acquisition of private lands on a willing buyer, willing seller basis;
  - e. the granting of tenures by Participating Indigenous Nations to third parties; and
  - f. interim land protection measures.
4. Principles to address concurrent litigation and negotiation.
5. Shared territory and overlap issues, which, within the context of recommendation 8 of the *Report of the British Columbia Claims Task Force* (1991) and subject to seeking the participation and collaboration of Indigenous Nations outside the British Columbia treaty negotiations framework on the sub-issues to address, may include but are not limited to:
  - a. identifying the roles and responsibilities of federal and provincial negotiators, if any, in connection with the resolution of shared territory and overlap issues among Participating Indigenous Nations and Indigenous Nations;
  - b. development of principles to guide the resolution of shared territory and overlap issues;
  - c. timing considerations relating to the resolution of shared territory and overlap issues among Participating Indigenous Nations and Indigenous Nations; and
  - d. exploring the potential for an institution to support the resolution of shared territory and overlap issues.

6. Exploring the potential for institutions to support the following:
  - a. implementation and accountability;
  - b. dispute resolution; and
  - c. oversight of negotiations.
7. Aqua nullius and water.
8. Guidance on the implementation of treaties, agreements and other constructive arrangements. (Note: co-development to include Participating Indigenous Nations that have concluded modern treaties in British Columbia).
9. Dispute resolution, including mechanisms.
10. Guidance on good faith and conduct in negotiations.
11. Processes for ensuring the reflection of Participating Indigenous Nations' perspectives in submissions to Cabinet.
12. The application of the *Canadian Charter of Rights and Freedoms, 1982*.
13. Other outstanding issues.