First Nations Summit

submission to

the Federal Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples

Re: Status of First Nations-Crown Treaty Negotiations in British Columbia

June 9, 2017

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PURPOSE

The First Nations Summit respectfully makes this submission to the Ministers' Working Group with the aim of sharing its views on the status of First Nations-Crown treaty negotiations in BC and key intersections between negotiations and a new federal framework for reconciliation, including the reform of Canada's laws and policies.

As we move down the path of reconciliation, working to address process and substantive negotiation issues and barriers, such work must be undertaken in the context of implementing the Truth and Reconciliation Commission's (TRC) Calls to Action, and the Government of Canada's commitment to implement the United Nations *Declaration on the Rights of Indigenous Peoples (*UN *Declaration)*. We note that in a letter dated October 8, 2015, the Liberal Party of Canada set out its pre-election responses to questions posed by the First Nations Leadership Council. In responding to the question of how the Liberal Party of Canada would transform the current relationship between First Nations and the Government of Canada in the implementation, negotiation and conclusion of Treaties and other agreements, in light of the UN *Declaration* and the TRC Final Report, the Liberal Party of Canada committed that it would, among other things: resolve grievances with Treaty implementation and modern land-claims agreements.

Specifically, this submission is intended to describe the realities and challenges First Nations face in resolving the long outstanding land question in BC and advancing reconciliation with the Crown through the made-in-BC treaty negotiations framework. Further, we highlight opportunities and provide practical recommendations to Canada for addressing and overcoming negotiation challenges in order to reach comprehensive treaties, agreements and other constructive arrangements.

OVERVIEW OF THE FIRST NATIONS SUMMIT

1. The First Nations Summit was founded in 1990 to support First Nations in establishing treaty negotiations and is one of the three Principals in the First Nations-Crown made-in-BC treaty negotiations framework.

2. The First Nations Summit is an action and solutions oriented First Nations-driven organization. The Summit's original mandate is to advance discussions with the governments of Canada and BC to support First Nations in conducting their own direct treaty negotiations with Canada and BC. The foundation for the Summit's mandate arises from:

    - the tripartite 1991 BC Claims Task Force Report jointly developed by the First Nations, Canada and BC,
    - the 1992 agreement to create the BC Treaty Commission as the independent body to "facilitate" treaty negotiations, and
    - subsequent federal and provincial legislation and the First Nations Summit Chiefs resolutions implementing the 1992 agreement and establishing the BC Treaty Commission as a distinct legal entity.

3. Approximately 150 First Nations participate in First Nations Summit assemblies and bring forward, discuss and provide political direction on issues of common concern.

4. In carrying out its mandate, the First Nations Summit does not participate as a negotiating party at any First Nations specific negotiations. Over time and through the collective decisions by First Nations Chiefs and leaders, as directed by resolutions, the Summit has been instructed to take a leadership and advocacy role on the full range of issues of concern to First Nations, including negotiations and implementation issues of treaties, agreements and other constructive arrangements and day-to-day social and economic issues which affect First Nations.

5. A critical element of the First Nations Summit's work includes identification of concrete steps to overcome negotiation barriers. In First Nations-Crown treaty negotiations in BC, we are facing a number of process and substantive issues that pose significant challenges and must be overcome in order to reach treaties, agreements and other constructive arrangements.

6. Although the First Nations Summit remains committed to the made-in-BC approach to negotiations and to assisting First Nations in achieving full and comprehensive treaties as a primary objective, we fully respect and support decisions of any First Nation to enter into alternative agreements and other constructive arrangements to advance the interests and priorities of their respective nations.

7. With this in mind, the First Nations Summit welcomes the federal government's aim to develop a new federal reconciliation framework and seeks to be involved in that work, endeavoring to explore opportunities to resolve the outstanding land question in BC.

8. This paper is in two main parts. Part one reflects upon various initiatives and tools designed to support First Nations on the path of reconciliation and to assist in beginning to address significant challenges in treaty negotiations. Part two contextualizes treaty negotiations, sets out our views on the status of negotiations and provides recommendations to advance change.

PART I – TOOLS AND INITIATIVES TO SUPPORT RECONCILIATION

ISSUE: FEDERAL RECONCILIATION

Context and considerations

9. On September 7, 2016 the First Nations Summit met with Minister Wilson-Raybould and discussed among other things, the concept of a federal reconciliation framework and possible intersections with, and impacts on, the made-in-BC treaty negotiations framework. At that meeting, the First Nations Summit welcomed the Minister's commitment to seeking a new principled, nation-to-nation relationship with Indigenous People through a new federal reconciliation framework and to deconstructing the existing colonial reality. The First Nations Summit has indicated its interest and availability to assist in conducting this

important work and has previously provided several recommendations to Minister Wilson-Raybould as a starting path forward.

10. We acknowledge that over the past years a number of federal initiatives have taken place that may have the potential of being revisited through work on a new federal reconciliation framework and may also have important intersections with the made-in-BC treaty negotiations framework as discussed below.

11. In reflecting upon a new federal reconciliation framework and the necessary political will to move us forward, we have noted key statements made by Minister Wilson-Raybould in regard to reconciliation and which have direct relevance upon First Nations-Crown treaty negotiations in BC:

> "*We cannot afford to invest our focus, time and energy on one initiative or approach which only meets a small part of the challenge, or gives a false sense of comfort…*
>
> *True reconciliation has to be above politics…it has to be about a different order of politics, an order of politics that is dignified and that commits us all…Reconciliation requires putting colonialism into the past, including beyond the Indian Act. It demands rebuilding Indigenous government and communities and in closing the socio-cultural gap between Indigenous and non-Indigenous peoples. It involves recognizing the Indigenous relationship with the land, respecting treaties, Aboriginal title and rights and building new structures and making decisions in new ways…*
>
> *[R]econciliation involves fundamental changes in the ways of talking, acting and relating that we all have to be a part of – Indigenous and non-Indigenous…It should understand treaties and agreements and other constructive arrangements between the Crown and Indigenous peoples are acts of reconciliation based on mutual recognition and respect, and that mechanisms for reconciliation must be developed in partnership with Indigenous peoples. These are all key principles that need to guide Crown action*." (Address of Minister Wilson-Raybould at the November 2016 BC Continuing Learning Education conference)

12. The First Nations Summit views the Minister's statements as helpful and instructive. Of particular interest are the comments that, "We cannot afford to invest our focus, time and energy on one initiative or approach… that treaties and agreements and other constructive arrangements between the Crown and Indigenous peoples are acts of reconciliation." Such remarks are interpreted to mean that Canada will not invest efforts into one single pathway or framework to achieve reconciliation, but rather, will support multiple paths including First Nations-Crown treaty negotiations in BC.

13. Consistent with our mandate, the First Nations Summit views treaties, agreements and other constructive arrangements as critical mechanisms for advancing reconciliation and building stronger relationships, on a nation-to-nation basis. This view is consistent with Prime Minister Trudeau's desire for a new nation-to-nation relationship with Indigenous Peoples. Treaties are constitutional instruments, of similar significance to the BC Terms of Union, given that First Nations are another order of government.

14. The previous unwillingness of governments to clearly recognize at the outset of negotiations that First Nations have constitutionally protected, inherent rights has posed a major obstacle to finding workable mandates on many issues. A new reconciliation framework must provide opportunity to recognize that Aboriginal and treaty rights are legitimate, legal and constitutionally protected rights that can be shaped through negotiations. In particular, that Aboriginal title is a legal interest in the land itself whereby First Nations have an inherent right to manage and occupy our lands, to decide how lands will be used and developed, and to economically benefit from the inescapable economic component of our lands.

Recommendation 1

With this in mind, on behalf of First Nations in BC who participate in First Nations-Crown treaty negotiations in BC, the First Nations Summit seeks confirmation that a new reconciliation framework will create space to strengthen and improve, rather than displace or jeopardize, the made-in-BC treaty negotiations framework. As part of its engagement with First Nations, it is recommended that Canada issue a statement to First Nations in BC reflecting this commitment.

Recommendation 2

What is required now, consistent with the *UN Declaration* is a demonstrable shift in Crown policies, mandates in regard to land and rights issues, and the commitment to negotiate treaties, agreements and other constructive arrangements with First Nations, ***reflective of a duty of good faith***, fairness and the spirit of cooperation in seeking to reconcile Aboriginal title and rights with the assertion of Crown sovereignty. This, coupled with federal efforts to ensure that Canada's laws, negotiation and litigation policies and mandates reflect the principles of rights recognition and affirmation as mandated by section 35 of the *Constitution Act, 1982*, will greatly assist all parties in moving toward the expeditious resolution of the outstanding land question in BC.

Recommendation 3

Reconciliation will also require various supports to First Nations in BC to resolve the outstanding land question, including:

i. A dedicated source of resources to establish an institution to support First Nations in BC in defining their respective homelands/territory and to address overlapping issues;

ii. Issuance of a federal statement of actual, unequivocal recognition of Indigenous Peoples as the original owners and occupants of the land now known as British Columbia, giving rise to special and unique rights that are recognized, affirmed and protected under the *Constitution Act, 1982*.

15. In considering the development of a new framework for reconciliation, the goal is to achieve an inclusive path for positive coexistence that is no longer premised on conflict, denial,

exclusion and suppression. We must make full use of this opportunity to transform and evolve beyond our historic relationship.

ISSUE: STRUCTURAL CHANGES

Context and considerations

16. As a signal of a historic political shift, Prime Minister Trudeau has publicly stated in mandate letters to his Cabinet Ministers that, "No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."

17. Further, in her November 25, 2016 address at the BC Continuing Learning Education conference in Vancouver, BC, Minister Wilson-Raybould stated that, *"To facilitate the relationship, each of the Ministers is mandated with fostering reconciliation – that is, prioritizing the need for a renewed nation-to-nation relationship with Indigenous peoples..."*

18. It is imperative that governments recognize that the Crown in right of Canada, not Indigenous and Northern Affairs, is the party to treaty and self-government agreements and that these agreements are not mere contracts with the Department. Further, the determination of the outstanding land question has numerous legal considerations and political sensitivities which require special expertise.

19. At one point in time it may have made organizational sense to the Government of Canada to attempt to settle the outstanding land question through Indigenous and Northern Affairs, but given the complexities and nuances of negotiations, this department is not the appropriate entity for such activities. Structural changes in this government are required to improve First Nations-Crown treaty negotiations in BC and to increase the likelihood of successfully concluding treaties.

20. In particular, a structural change is needed within the federal government to separate the office of Treaties and Aboriginal Government - Negotiations West (formerly the Federal Treaty Negotiation Office) from Indigenous and Northern Affairs. This separation is necessary to enable the responsibilities for First Nations-Crown treaty negotiations in BC to be separated from those of program and service responsibility. A separate office or oversight body that does not have "line department" functions would be far better suited to the role of negotiating treaties in BC. It would also help to separate the day-to-day dealings with First Nations at a program level from the larger objective of building a new relationship at the treaty table. As well, it would allow the department with responsibility for First Nations-Crown treaty negotiations in BC to focus solely on those negotiations.

21. Over the years, First Nations in BC and across the country have called for a separate high-level office to oversee the conduct of negotiations. By way of background, this call has been supported by the First Nations Summit Chiefs at the November 2002 First Nations Summit meeting at which the Chiefs called for the proposed separation of the Federal Treaty Negotiation Office from the Department of Indian Affairs and Northern Development (BC

Region), identified in FNS Resolution #1102.04 and again in the 8 point AFN consensus document which identified that, "In order to be effective, progress on these areas will require fundamental change in the machinery of government including direct political oversight, a dedicated Cabinet Committee with a secretariat within the Privy Council Office with specific responsibility for the First Nation-Crown relationship to oversee implementation" (Point #8).

Recommendation 4

As a further demonstration of commitment to a new relationship with Indigenous Peoples, Canada must separate Treaties and Aboriginal Government – Negotiations West from the Department of Indigenous and Northern Affairs and place it under the oversight of the Minister of Attorney General or the Prime Minister's Office to focus on the broader objectives of building a new Crown-Aboriginal treaty relationship, improving the lives of Aboriginal people, concluding treaties and facilitating the coordination of efforts across federal departments. Such a separation would send a clear signal that the federal government is sincere in wanting to conclude treaties and establishing a new and more positive relationship with First Nations.

ISSUE: ANNUAL FIRST NATIONS IN BC – PRIME MINISTER GATHERING

Context and considerations

22. Reconciliation as required by section 35 of the *Constitution Act, 1982* (and predecessor constitutional imperatives, such as the *Royal Proclamation, 1763*), remains elusive and has been largely unattainable in BC. One path of reconciliation is First Nations-Crown treaty negotiations. In BC, negotiations have been underway for over 20 years, with only three treaties having been concluded and implemented under negotiations facilitated by the BC Treaty Commission (BCTC).

23. It is commonly acknowledged that in conducting and overseeing negotiations, the Department of Indigenous and Northern Affairs (under its various iterations) has had a long and difficult relationship with First Nations. As noted by the Royal Commission on Aboriginal Peoples,

> Even today, despite the exponential growth over the past 20 years of policies and programs to deal with land claims and claims-related issues, the tradition that Indian people do not have land or resource rights outside their reserves is a strong component of the corporate memory of the department of Indian affairs. It is reflected in the department's preference for extinguishment as a valid option in comprehensive claims settlements. It is reinforced by *interpretations of Aboriginal and treaty rights that continue to be advanced by lawyers working in the departments of justice and Indian affairs…Adversarial attitudes are hindering the creation of policy measures that can genuinely fulfill the federal government's fiduciary duty to Aboriginal peoples*. (emphasis added)

24. Although it has largely been the point of contact in representing the Government of Canada in engaging with Indigenous Peoples, the Department of Indigenous and Northern Affairs is

not solely responsible for Canada's historically disjointed and broken relationship with Indigenous Peoples. The task at hand is to determine a more inclusive, respectful and collaborative relationship as we move forward.

Recommendation 5

As a demonstration of the commitment that no relationship is more important to the Prime Minister, the First Nations Summit requests that Canada work with First Nations in BC to host an annual meeting among the Prime Minister, federal Ministers and First Nations in BC, similar to the annual BC Cabinet - First Nations meeting, to discuss issues of common concern. Such a request is also supportive of Minister Wilson-Raybould's remarks at the 2016 BC Cabinet-First Nations Gathering at which the Minister stated, "…*it goes without saying that these types of political gatherings are an important opportunity for leaders to meet face-to-face, deal with pressing issues and build partnerships. Equally, they are also an important opportunity for leaders to reflect, to hold each other to account and, in so doing, speak truth to power*."

25. As set out below, the First Nations Summit takes this opportunity to offer the following reflections and recommendations in regard to various initiatives and efforts that may have the potential of intersecting with the new federal framework for reconciliation and First Nations-Crown treaty negotiations in BC.

ISSUE: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES & FREE, PRIOR AND INFORMED CONSENT (2016)

Context and considerations

26. In a May 2016 statement at the Opening Ceremonies of the United Nations Permanent Forum on Indigenous Issues, 15th Session, Minister Wilson-Raybould indicated that,

> *"…we can and will breathe life into section 35 of Canada's Constitution, which recognizes and affirms existing Aboriginal and treaty rights, by embracing the principles and minimum standards articulated in the United Nations Declaration on the Rights of Indigenous peoples and guided by the dozens of court decisions that provide instruction… Tied to the fundamental work of nation rebuilding and implementing the United Nations Declaration, one of the biggest legal questions we need to unpack is how to implement the concept of 'free, prior and informed consent'… Participation in real decision-making is at the heart of the Declaration's concept of free, prior and informed consent - that Indigenous peoples must be able to participate in making decisions that affect their lives."*

27. It is critical that the starting point for engagement and dialogue with First Nations in regard to reconciliation and building a collaborative path forward be guided by the UN *Declaration*.

28. The *Declaration* does not create new rights, but rather it explicitly affirms the inherent or pre-existing collective and individual human rights of Indigenous peoples. In particular,

affirming a wide range of political, civil, economic, social, cultural, spiritual and environmental rights.

29. Of direct interest to those in First Nations-Crown treaty negotiations in BC are the articles of the *Declaration* that provide for or acknowledge that:

    - (Articles 3, 4) Indigenous Peoples right to be self-determining peoples that, in turn, reinforces the right to autonomy or self-government in matters relating to their internal or local affairs, as well as the ways and means for financing their autonomous functions. This is in relation to Canada's inherent right to self-government policy, fiscal policies and comprehensive claims policies and mandates;
    - (Article 26) Indigenous Peoples have the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Further, that States shall give legal recognition and protection to these lands, territories and resources; This has potential to impact on all environmental laws, policies, mandates, review and assessment bodies, inherent right of self-government policy, fiscal policies, fisheries, natural resources, sciences); and
    - (Article 28) Restitution, just, fair and equitable compensation for lands, territories and resources that have been confiscated, taken occupied, used or damaged without the free, prior and informed consent (FPIC) of Indigenous Peoples.

30. We also note that Article 19 of the *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 FPIC before adopting and implementing legislative or administrative measures that may affect them. Further, Canadian courts may take the *Declaration* into account when interpreting Canada's domestic legal obligations. Two cases have already relied on the *Declaration* as stating values and principles that should inform an interpretation of Canada's duties to Aboriginal peoples.[1]

31. Obtaining the FPIC of Indigenous Peoples as highlighted throughout the *Declaration* is both a procedural and substantive process. FPIC essentially gives life to the right of Indigenous Peoples to be involved in decision-making.

32. The Supreme Court of Canada (SCC) has determined that the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the prior consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to prove that the proposed incursion on the land is justified under section 35 of the *Constitution Act, 1982*.[2] Domestically, the SCC and other levels of courts have been shown to take a contextual approach in interpreting Indigenous peoples' human rights and related State obligations in relation to FPIC.

33. The UN-REDD Programme Guidelines[3] has unpacked this key standard, as a basic starting point for better understanding FPIC, which is set out below for consideration:

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1 *Taku River Tlingit v. Canada* – YKSC 2016; *Nunatukavut Community Council v. Canada* – FCTD 2015

2 *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 76.

3 The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation.

- Free: refers to a consent that is given voluntarily, without coercion, intimidation, manipulation, expectations or externally imposed timelines.
- Prior: speaks to timing. Consent is sought in timely way, well in advance or commencement of activities. It means engaging at the earliest phase of a proposed project/development (at the strategic level).
- Informed: Providing Indigenous Peoples affected by the proposed activity with the type of information that would assist in making an informed decision based on best available information.
- Consent: A collective decision made by the proper rights holder (affected people or community).

34. In the context of First Nations-Crown treaty negotiations in BC, the 1991 BC Claims Task Force Report provides that Nations will self-identify and present themselves for negotiations, this is an important starting point in the Nation re-building process. Moreover, this can be considered a starting point for early engagement in seeking to determine the proper rights holder in the treaty context and seeking the FPIC of Indigenous Nations in relation to federally proposed or supported activities.

35. Ultimately, the process for reaching a section 35-protected agreement also provides a vehicle through which First Nations may choose to consent to a new framework for their relationship with the Crown.

36. By employing a human rights-based approach founded on the *Declaration* and other international law conventions to address Indigenous Peoples' issues, processes become grounded in a system of rights and corresponding obligations as established by international law. Further, Canada must avoid any approaches or initiatives which directly or indirectly undermine Indigenous Peoples' rights at the international level. Crown activities have an effect on the goal of reconciliation, regardless of whether activities take place domestically or internationally.

Recommendation 6

a. Consistent with operating paragraph 8 of the UN World Conference on Indigenous Peoples 2014 Outcome Document, Canada must take steps to create a national action plan and begin to develop a strong national approach to implementation, working collaboratively in partnership with Indigenous governments on the development of the action plan and its subsequent implementation.

b. Further, Canada must work with Indigenous Peoples to:

   i. develop a high-level awareness raising and education initiative to inform the federal public service about issues of importance to Indigenous Peoples and the necessity of the *Declaration*;
   ii. develop key messages and reiterate its commitment to the *Declaration*; and

iii. incorporate key messaging regarding Indigenous issues and corresponding articles of the *Declaration* into all existing capacity development activities and training programs for federal public service employees.
iv. raising awareness and education of other government officials, parliamentarians, the judiciary and other public institutions such as universities;

c. Whether First Nations are pursuing resolution of an issue through litigation, negotiated treaties, agreements or other constructive arrangements, we are collectively in a position to determine the content of accompanying documents. In this regard, as a party to a negotiation or litigation, Canada should:

i. insist on inclusion of relevant articles of the *Declaration* in treaties, agreements and other constructive arrangements entered into with federal government, the provincial government and third parties; and
ii. where possible, include references to relevant articles of the *Declaration* in documents prepared for litigation.

Recommendation 7

The First Nations Summit strongly urges the federal government to actively and meaningfully engage with First Nations throughout the process of harmonizing federal laws, polices and mandates with the *Declaration*. Opportunities for engagement must include the participation of First Nations representatives on key working groups tasked with reviews and harmonization activities. In addition, we call on the federal government to enact legislation to implement the *Declaration*.

The Four Principles (2014)

Context and considerations

37. On September 11, 2014, following the Supreme Court of Canada's decision in *Tsilhqot'in Nation*, First Nations leadership in BC set out "Four Principles" as the basis of recognition and reconciliation work, which have been endorsed through resolution, they are as follows:

- Acknowledgement that all our relationships are based on recognition and implementation of the existence of Indigenous peoples' inherent title and rights, and pre-confederation, historic and modern treaties throughout BC.
- Acknowledgement that Indigenous systems of governance and laws are essential to the regulation of lands and resources throughout BC.
- Acknowledgement of the mutual responsibility that all of our government systems shall shift to relationships, negotiations and agreements based on recognition.
- We immediately must move to consent based decision-making and title based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements.

38. In discussing the Four Principles at the September 2016 Cabinet-First Nations Gathering in Vancouver, BC, Minister Wilson-Raybould stated that,

> *"The Four Principles were intended to be the basis for building a new framework for how partnerships, dialogue and negotiations, and relations between governments and Indigenous Nations in BC would advance – a framework that would move away from an adversarial approach and conflict, to one of innovation, collaboration, and building new capacities and, for Indigenous peoples, the assumption of new responsibilities…The approach and goals of the Four Principles are consistent with the message that I have carried forward as Minister of Justice and Attorney General of Canada – and they are reflected in the commitments made by Prime Minister Trudeau and our government."*

Recommendation 8

As directed by Chiefs and Leadership in BC, the First Nations Summit remains committed to advocating that any provincial or federal re-engagement structure, processes, agreements, or frameworks for engagement must be fully informed and directly influenced by the four foundational principles. It is recommended that Canada with the free and effective participation of Indigenous Peoples carefully consider and reflect the Four Principles accordingly.

Senior Oversight Committee on Comprehensive Claims (2012-2013)

Context and considerations

39. In January 2012, a Senior Oversight Committee (SOC) on Comprehensive Claims was established between then-Prime Minister Harper and First Nation leaders for "high level dialogue on the issues of comprehensive claims and treaty implementation."

40. The SOC oversaw the development of draft federal "Principles respecting the recognition and reconciliation of section 35 rights" (the Ten Principles). It was proposed that those principles would:

    a. guide Crown conduct in reconciliation with First Nations;
    b. be an overarching guide for all other federal policies, informing a broader federal Reconciliation Framework; and
    c. assist in moving the work forward in seeking to reform or rewrite the federal comprehensive claims policy.

41. While the Ten Principles reflected the aim of reconciliation, they were limited by the previous government's mandate and did not go so far as to:

    a. reflect the affirmation and constitutional protection provided by section 35, nor the important element of recognition of Indigenous Peoples and the inherent nature of Aboriginal title and rights;
    b. speak to the issue of Indigenous jurisdiction in relation to Aboriginal title; and

c. provide space for Indigenous laws;

42. While it is helpful that the Ten Principles highlighted the need for "balancing Aboriginal rights with broader societal interests", it is unclear what was intended by broader societal interests. The notion of balancing is an important consideration, but it must be done within the context of unequivocal recognition of Aboriginal title, rights and jurisdiction, as highlighted in the *Declaration*.

Recommendation 9

Significant elements which are sought through the process of First Nations-Crown treaty negotiations in BC, including revenue and benefit sharing, shared decision-making and dispute resolution, are noticeably absent from the Ten Principles. Although such elements could be arrived at through active negotiations, they must be clearly identified and written directly into any process that is relied upon as a basis or framework for negotiations.

PART II - TREATY NEGOTIATION ISSUES

43. Canada's comprehensive claims policy (CCP) was first introduced in 1973 following the *Calder* decision. The CCP is not really a single policy, but a series of public and internal directives that guides Canada's participation in all treaty negotiations. Canada's national approach to modern treaty negotiations is set out in its CCP, which continues to achieve finality with respect to "land-based" Aboriginal rights. Given the unacceptability of this grouping of policies, the made-in-BC treaty negotiations framework was established.

44. BC is the only province where reconciliation of pre-existing Aboriginal title and asserted Crown sovereignty through treaties is largely outstanding, despite the made-in-BC treaty negotiations framework. Over the past number of years, there have been numerous reports, studies and initiatives aimed at improving treaty negotiations.[4]

45. These studies, reports and initiatives have highlighted a number of process and structural changes required to improve negotiations in BC and to increase the likelihood of successfully concluding treaties. We note that a number of procedural issues are being addressed through the multilateral engagement initiative (as discussed below) and that Canada has created a number of new structures and institutional initiatives that may help to advance reconciliation. However, there are other process and other structural changes required to facilitate First Nations-Crown treaty negotiations in BC.

46. Despite the enormous commitments and investments, First Nations have made to negotiations, there continue to be problems affecting the process as a whole. From the perspective of the First Nations Summit, the most fundamental problem flows from the

[4] For example, the Office of the Auditor General of Canada, Report of the Auditor General of Canada to the House of Commons, Chapter 7: Federal Participation in the British Columbia Treaty Process – Indian and Northern Affairs Canada (Minister of Public Works and Government Services Canada, Ottawa, 2006), studies conducted by Douglas Eyford and the BCTC annual reports.

refusal of Canada and BC to recognize and implement First Nations' Aboriginal title to the lands and resources within their respective traditional territories and to conduct First Nations-Crown treaty negotiations in BC from the starting point of this recognition. In this regard, they have failed to work with First Nations to develop mutually agreeable ways to recognize, protect and accommodate the full range of the First Nations' interests in their territorial lands and resources. Instead, the two governments insist on negotiating based on what Justice Vickers, the trial judge in the *William* case, properly referred to in the litigation context as the Crown's "impoverished view of Aboriginal title."

47. As we consider these issues, we reflect back on a tripartite review of treaty negotiations after the SCC decision in *Delgamuukw*, in connection with which the Principals endorsed a "Statement on Aboriginal and Crown Title" on April 29, 1998. Although this statement goes back a number of years, it continues to have direct relevance to modern-day treaty negotiations. In this statement, the Principals to the made-in-BC treaty negotiations framework politically agreed to the negotiation of treaties respecting the following principles:

    - The parties recognize that Aboriginal title exists as a right protected under s.35 of the *Constitution Act, 1982.*
    - Where Aboriginal title exists in British Columbia, it is a legal interest in land and is a burden on crown title.
    - Aboriginal title must be understood from both the common law and aboriginal perspective.
    - As acknowledged by the Supreme Court of Canada, aboriginal peoples derive their aboriginal title from their historic occupation, use and possession of their tribal lands.
    - The parties agree that it is in their best interest that aboriginal and crown interests are reconciled through honourable, respectful and good faith negotiations.

48. First Nations and the First Nations Summit have attempted to address these and other negotiation issues at the treaty tables, and at the Principals' level, through various mechanisms and processes. However, for the most part, government's global mindset and mandates remain unchanged and unresponsive to the constructive solutions put forward by First Nations – solutions that First Nations say will help remove barriers and bring about more treaties, and remain inconsistent with the direction established by the courts, contrary to the fundamental objectives of First Nations, contrary to the United Nations *Declaration on the Rights of Indigenous Peoples*, and inconsistent with the 19 recommendations of the 1991 BC Claims Task Force endorsed by Canada, BC and First Nations.

49. The courts have confirmed that, once the Crown enters into treaty negotiations, it has a duty to negotiate in good faith, which includes protecting the integrity of the negotiations. Mandates need to respond to, and be reflective of, the diversity among First Nations in BC and the goal of achieving workable treaties that help to sustain First Nations as Peoples.

50. Instead, the focus of previous governments has been to remain pre-occupied with maintaining the status quo of minimal compliance with the above noted and seeking treaties, agreements and other constructive arrangements through that minimalist approach and

further, with a view to achieving certainty for the Crown and industry. Canada and BC require First Nations to pay too high a price to reach a treaty. The First Nations Summit continues to view the BC Claims Task Force's recommendations as the cornerstone of First Nations-Crown treaty negotiations in BC and believe that adherence to the recommendations in that report is essential to effective negotiations and the achievement of fair and honourable agreements.

51. Further, in seeking to reach agreements, Canada and BC must also reverse the unprecedented policy of requiring First Nations to agree that, under the terms of a treaty, a First Nation's laws will not apply to either Canada or the province. Canada's support for such a policy is a cause for concern among First Nations in BC. To continue to do so will only result decrease the likelihood of concluding and ratifying treaties in BC.

Recommendation 10

a. Canada must revisit its comprehensive claims policy through its work on a new federal reconciliation framework and it must work in collaboration with First Nations, to revise that policy and ensure consistency with and be reflective of current conventions and common law, including, but not limited to:

   - Articles of the United Nations *Declaration on the Rights of Indigenous Peoples*;

   - explicit and unequivocal recognition of Aboriginal Peoples and Aboriginal title and rights, including the inherent right of self-government and, in particular, that:

     - Aboriginal title is a legal interest in the land itself and extends throughout the entire traditional territory of each First Nation, including the foreshore, seabed and other water bodies,
     - First Nations have a right to choose how the land is used, and
     - Aboriginal title has an inescapable economic component

   - interim land protection, and

   - a diversity of land tenure options, including recognition that First Nations' authority over their lands may stem from section 35 and section 91(24).

b. Adopt a revised comprehensive claims policy that:

   - recognize and affirms Aboriginal Title and Rights;

   - expressly acknowledges and accommodates the need for a variety of negotiating mandates designed to meet the differing circumstances in the various regions of BC – no "one size fits all" approach, and

- provides that Canada will implement and live up its legal obligations, including:
  - international conventions, and
  - the objectives, spirit and intent of existing and new treaties.

Recommendation 11

In the BC context, the First Nations Summit position is that BC and Canada must live up to the original commitments set out in the 1991 BC Claims Task Force Report. In our view, *good faith negotiation* of treaties, agreements and other constructive arrangements remains the most effective way to resolve the outstanding BC land question and support First Nations governance and self-sufficiency. In this regard, we recommend that Canada, BC and the First Nations Summit attempt to address the meaning and scope of good faith negotiations as the foundation for a path forward.

Recommendation 12

Canada and BC must take a meaningful step of shifting its language and discourse in relation to First Nations-Crown treaty negotiations in all its engagements with First Nations and Canadians, in government documentation and other materials by abandoning words such as "Final Agreement". From a First Nations perspective, there is nothing to suggest that the conclusion of a treaty is final to the relationship with the Crown.

Recommendation 13

Government bureaucracy is not always equipped to overcome certain issues or obstacles to progress and political intervention and direction is necessary. With political will and clear direction, it is hoped that many obstacles can be addressed. In this regard, it is key that the Prime Minister has committed to a new nation-to-nation relationship and it is recommended that all Ministers, government departments, officials and members of the public administration are instructed as to what that statement means to the Liberal Government and on mechanisms and opportunities to breathe life into such statements. Further, it will be critical to ensure that such political will and direction is consistently delivered through all areas of the public service and that there is effective coordination among the various departments, with the assistance of the Minister of Justice and Attorney General. This high-level participation and engagement will form an integral part of ensuring success.

Capacity Building

Context and considerations

52. It is important to note that First Nations-Crown treaty negotiations in BC provide important capacity building opportunities that are provided to First Nations and their citizens to undertake through the various stages of negotiations. Community members are often employed in various capacities as negotiators, support team members and office personnel. This helps prepare Nations for self-government by building the foundation of an Indigenous public service within the Nations.

53. Understanding who we are as people, what we must do to exercise dominion over our futures as governing nations and to fully realize the potential of reconciliation, can only be accomplished with knowledge, support and capacity building. These elements are critical to assisting First Nations in learning to transition and move beyond *Indian Act* imposed governance structure.

Recommendation 14

It is recommended that Canada proactively work with First Nations who express interest in taking incremental steps by entering into incremental agreements (e.g. on fish, parcels of land, or self-governance) as a path to building capacity with the objective of reaching a comprehensive treaty (i.e. a "stepping stone" approach identified through the multilateral engagement initiative), or such agreements as stand-alone. These types of arrangements offer First Nations opportunities to build much needed capacity and to exercise jurisdictions in a manner that works for that nation.

Recommendation 15

Canada and BC should invest resources that are consistent, accessible and reliable and provide other supports to First Nations throughout the course of negotiations to specifically target essential capacity building in relation to public service and administration.

PROCESS ISSUES

Multilateral Engagement Initiative

54. In 2015 the Principals to the made-in-BC treaty negotiations framework (the First Nations Summit, Canada, BC) established a multilateral engagement initiative to develop proposals to improve and expedite treaty negotiations in BC. Work under this initiative focuses primarily on "process" issues, challenges and solutions.

55. The multilateral engagement work led to the development of a report, entitled "Multilateral Engagement Process to Improve and Expedite Treaty Negotiations in British Columbia" (attached) which includes a total of 24 proposals and action items to improve and expedite treaty negotiations in BC for the Principals' consideration. In May 2016, the Principals endorsed the report.

56. The Multilateral Engagement Report covers the following five topic areas:

    1. process efficiencies;
    2. negotiation support funding;
    3. shared territory and overlap issues;
    4. certainty; and
    5. the role of the British Columbia Treaty Commission

57. The 24 proposals fall along a spectrum of modest changes to broader, more complex policy changes. The multilateral engagement initiative continues and work is underway to implement a number of the proposals set out in this report.

58. Closely tied to the work carried out under the multilateral engagement initiative is the issue of treaty negotiation loan forgiveness and a new path forward for funding First Nations' participation in First Nations-Crown treaty negotiations in BC. The urgency and importance of addressing treaty negotiation loan forgiveness and finding a new path forward for funding First Nations' participation in First Nations-Crown treaty negotiations in BC has never been greater. As such, a tripartite funding working group has been established to review the negotiation support funding structure and prepare options to address this critical issue. The issue of negotiation support funding is addressed in greater detail below.

SUBSTANTIVE ISSUES

Lands and Resources

Context and considerations

59. Land is a central issue for all parties in First Nations-Crown treaty negotiations in BC and is a core matter that must be resolved in order to reach agreements that meet all parties' goals. A workable comprehensive land package must provide First Nations with a secure and sufficient land base to meet the First Nation's needs for the present and into the future, including the ability to develop an economy to support its people and to continue their way of life. This will not be achieved if measures are not taken to ensure that an adequate land base is available at the time a treaty is concluded. The acquisition and protection of land is a vital component of any treaty settlement and governments must work to make lands available.

60. Currently, four key government policy barriers are preventing significant progress at treaty tables with respect to lands. They are:

- a lengthy and uncertain land selection process and for providing land and cash offers to First Nations,
- lack of effective use of interim land protection,
- an unworkable and inappropriate formula approach to valuation of land and cash offers, and
- inflexible positions on the status of lands held under treaty.

Land Quantum

61. Federal and provincial negotiators continue to deny that Aboriginal title exists over any specific lands in BC. Canada and BC have taken the arbitrary position that no more than five

per cent of the lands within British Columbia would be made available for land selection by First Nations.[5]

Recommendation 16

Canada must abandon its position on the quantum of land on offer at treaty negotiating tables. Canada's land selection model is arbitrary and contributes to transfers of limited amounts of land to First Nations. These small selections cannot sustain our distinct societies.

Interim Measures

Context and considerations

62. The Principals accepted Recommendation 16 of the 1991 BC Claims Task Force Report, which recommended that the *parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process*. The BCTC has been clear in urging the governments of BC and Canada to protect available Crown land, both surplus and underutilized land, on an interim basis pending the settlement of treaties and to consider potential economic opportunities for First Nations in buildings now owned by either the federal or provincial governments.

63. Yet, the Crown continues to alienate lands that may be important to concluding treaties. Crown policy must recognize the existing Aboriginal interest in the lands and resources and Crown representatives and negotiators must actively and consistently incorporate existing interim measures to protect these lands in order to increase the likelihood of successfully concluding agreements.[6] Further, there needs to be particular recognition of the urgent need for protecting lands for First Nations situated in urban locations.

64. The reluctance to meaningfully implement Recommendation 16 (i.e. by failing to set aside land prior to the conclusion of Agreements-in-Principle and refusing to transfer all but small parcels of land prior to treaties coming into effect) is inconsistent with Articles 26, 29 and 32 of the United Nations *Declaration on the Rights of Indigenous Peoples* and highly problematic in that:

    - once lands are sold they can only become part of a treaty package if land owners are willing to sell their lands at a price that the parties are prepared to pay; and
    - governments are very rarely, if at all, willing to expropriate certain interests held by third parties as part of First Nations-Crown treaty negotiations in BC.

[5] BC Ministry of Aboriginal Affairs, "The Benefits and Costs of Treaty Settlements in British Columbia: A Summary of the KPMG Report" online at: http://web.uvic.ca/clayoquot/files/volume2/V.B.2.pdf.

[6] The current lack of land protection is having serious consequences in the treaty negotiation process. For example, in BC, the Musqueam First Nation was previously forced to litigate in an effort to protect key lands that the First Nation intends to be subject to treaty negotiations from alienation by Land and Water BC, a provincial Crown corporation.

Recommendation 17

An updated policy must also provide for a diversity of land tenure options for treaties and otherwise, including section 91(24) and section 35 land status and incorporate the express recognition of the inherent right of self-government – which it is currently lacking. Land and governance are inextricably linked and, so, federal policy guiding its participation in First Nations-Crown treaty negotiations must reflect this connection.

Land Selection and Earlier Land and Cash Offers

Context and considerations

65. The Crown's land selection process has hindered progress at many tables. In particular, the governments have stated that they have no specific land/cash mandate until a table is near conclusion of an Agreement-in-Principle (AIP). Many tables have been engaged in First Nations-Crown treaty negotiations in BC for over 20 years and still do not have a land and cash offer from the Crown. This makes it difficult for First Nations to understand how the governments' mandate will be implemented at their table and to assess its acceptability from its own perspective.

66. Although land and cash amounts differ from table to table, there are some common elements. An offer is made without prejudice. It is made on the understanding that a final agreement on any of the following matters is conditional on the Parties resolving all outstanding issues in negotiation. Acceptance of an offer would only be a first step toward achieving an AIP. There is significant disagreement at some tables over whether "offer" is even the right word to describe what is being put forward by Canada and BC. Some First Nations negotiators say that "proposal" is a more accurate term, given the preliminary nature of the talks.

67. Further, the governments are insisting that certain key land issues are not on the table for negotiation, contrary to Recommendation 2 of the 1991 BC Claims Task Force Report, which provides that each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship. Currently, the governments will not negotiate issues such as federal Crown lands, rights to water bodies or riparian rights. Some of these lands and water issues may be viewed as essential to a land package for First Nations and making them available for negotiation may help the parties make progress.

68. Small land offers that are not balanced with options that provide certainty and recognition that First Nations' have continuing aspirations to have meaningful connections to, jurisdiction over and accessible benefits derived from their territories. Without such options, First Nations are faced with the additional pressure in the negotiation process of having to prioritize economic, residential and cultural land uses. While certain lands may have a high potential value from a development perspective (and economic development is generally important to First Nations), First Nations with small land offers will be put into the compromised position of having to choose between using lands for much needed economic development purposes and future residential or cultural uses.

69. Further, the small land quantum and lack of serious discussions about intergovernmental arrangements for the management of lands and resources would place considerable strain on the small parcels of land that First Nations would retain through their treaties. First Nations would be left with no certainty that they could continue to exercise their Aboriginal or other rights negotiated under the treaty – the fundamental purpose of treaties – as the land base they control would be too small and their ability to influence the activities carried out elsewhere in their traditional territory would be minimal, if not negligible.

Recommendation 18

As recommended through the multilateral engagement initiative, early knowledge of the proposed land package is essential for First Nations to negotiate the integrally connected resource and jurisdictional issues in a treaty. First Nations require timely and full disclosure in order to make informed decisions about land. Such disclosure must include at a minimum:

- information on current land status, including subsurface status,
- identification of land which the Crown may consider 'essential' to retain ownership of post-treaty, and
- clear and full information on valuation of lands so that informed decisions can be made regarding lands (e.g. choosing between willing-seller lands and Crown lands).

Recommendation 19

Canada must revise or abandon its current surplus lands policy which currently promotes the sale of Crown lands to third parties, so that it is not a barrier to progress in negotiations. Further, the governments insist that existing Indian reserves will form part of the land package. Given their per capita formulas that strongly influence land quantum, this is problematic and unacceptable.

Constitutional Status of Lands

Context and considerations

70. The issue of constitutional status of lands continues to be an outstanding issue. The governments' current proposed model for defining the constitutional status of lands under a treaty as either section 91 or section 92 does not recognize the underlying Aboriginal title of First Nations, which already has constitutional status under section 35. It is a legal interest in the land itself, held collectively by each First Nation, and arises from the First Nation's connections to its lands.

71. While there is interest among some First Nations in retaining certain lands under section 91(24), there is concern about the Department of Indigenous and Northern Affairs Canada continuing to have a role in matters related to the First Nation's land.

72. Most, if not all, First Nations have expressed concern that bringing their lands under section 92 will expose First Nations to provincial and municipal interference.

73. It is very concerning that the governments are not seriously considering the option of clearly defining a unique allodial-type[7] of land status that would be neither section 91 or 92, but, rather, a status that is clearly already recognized and affirmed by section 35. Not only do the governments want all Aboriginal lands to be either section 91 or 92, they are also seeking to eliminate the reserve status of section 91(24) lands. These approaches do not address First Nations' interests or provide them the certainty they seek.

Recommendation 20

a. Canada and BC must recognize and affirm the existence of Aboriginal title and that this title exists throughout the entire traditional territories of each and every First Nation, including foreshore, seabed and other water bodies.

b. Canada and BC must fulfill the Crown's constitutional responsibility to conclude land and resource negotiations with First Nations and adopt policies and mandates to ensure that land and resource components in treaties will be sufficient to ensure First Nation sustainability and self-sufficiency. This includes:

   i. negotiating lands and resources according to First Nations' present and future cultural and economic needs, not a formula approach – in particular, flexible mandates that allow for increasing the quantum of land and cash available in order to provide for viable treaties,

   ii. negotiating all issues of interests to First Nations in order to increase the likelihood of concluding treaties, including, but not limited to:

      - putting all federal Crown lands, including surplus and non-surplus lands, on the table for negotiation,
      - negotiating rights to the foreshore and seabed, and
      - negotiating riparian and other water rights.

   iii. in addition to negotiating ownership of and access to lands, negotiating intergovernmental arrangements for the management of lands and resources, and other arrangements (e.g. revenue-sharing) with First Nations regarding the entirety of their traditional territories and with respect to all natural resources – prior to treaty (e.g. interim measures, treaty-related measures) and within the treaty itself,

   iv. consistent with Recommendation 16 of the 1991 BC Claims Task Force Report, implement early, interim protection of land and resources, prior to the signing of an Agreement-in-Principle, and

[7] Dukelow & Nuse, The Dictionary of Canadian Law (Carswell: 1991) defines "Allodial lands" as "lands held absolutely and not the estate of any lord or superior."

v. negotiating with First Nations regarding the range of diverse constitutional land tenure options in agreements that includes section 35 and section 91(24).

c. Canada and BC must provide early disclosure of their mandates regarding land and cash in order for a First Nation to make informed decisions with respect to First Nations-Crown treaty negotiations.

Intergovernmental Management of Lands & Resources

Context and considerations

74. *Delgamuukw* confirms that this is a legal interest in the land itself and includes the right to choose the uses to which the land will be put, as well as an inescapable economic component. The Crown has authority to decide upon certain land uses under its sphere of constitutional jurisdiction. These two constitutional levels of authority must be reconciled to be consistent with the shifting legal and political landscape as reflected in the *Declaration* and in *Tsilhqot'in Nation*. With respect to sharing and making decisions about lands and resources, there must be intergovernmental arrangements for the management of lands and resources both prior to and within treaties.

75. Interim agreements and treaties must provide for formal First Nation participation, on a government-to-government basis, in strategic level decision-making on all planning, development, use or disposition of lands and resources, including aquatic resources, to ensure the preservation of treaty rights, the protection of First Nations' cultural and economic interests, and access and use for future generations.

76. Government mandates must allow for creative opportunities for intergovernmental management of lands and resources through practical joint decision-making processes at a strategic level.

Recommendation 21

Canada and BC must:

i. negotiate meaningful arrangements with First Nations where the First Nations are full managers of certain lands and in other instances co-managers, with supporting jurisdiction, of the lands and resources throughout the entirety of their traditional territories, including the foreshore, seabed and other water bodies,

ii. include sufficient funding to ensure long-term, meaningful participation by First Nations in intergovernmental arrangements for the management of lands and resources, and

iii. include sufficient funding in future federal and provincial budgets to ensure effective federal and provincial participation in intergovernmental arrangements for the management of lands and resources.

Compensation

Context and considerations

77. Historically, governments maintain that they do not need to align treaty negotiations mandates with court decisions because negotiations are "voluntary" and not a proof of rights-based process. Currently, Canada and BC maintain that treaty negotiations must be forward-looking, with a former federal Minister characterizing negotiations as a political exercise within a "non-rights based" treaty negotiations process.[8]

78. This position precludes any negotiation of compensation for the past taking of lands and resources, or past or ongoing infringements, which is a critical issue for First Nations. The federal government considers that, "there is no basis to establish such compensation since negotiations are not based on rights."

79. The SCC has confirmed that the above reflections of reconciliation are the central purpose of section 35 and, consequently of treaty making. Moreover, while governments continue to refuse to negotiate compensation for past wrongs on the basis that treaties should be forward-looking, they nonetheless seek a release of all past claims in the treaty and a commitment that the treaty constitutes the full and final settlement in respect of First Nations' Aboriginal rights.

80. As observed by the federal Auditor General in November 2006, "the two governments base their participation in the treaty process on their own policies, and do not recognize the Aboriginal rights and title claimed by the First Nations". As the legal and political climates have shifted, so too must this approach to compensation.

81. Further, we reiterate *Article 28* of the *Declaration* provides that:

> 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.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources.

Recommendation 22

[24] [8] See: Letter from federal Minister Chuck Strahl, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians to Grand Chief Stewart Phillip, Chief Robert Shintah and Chief Mike Retasket (25 October 2007).

Canada must recognize that, in regard to Canada's historic and generally ongoing "full and final" settlement approach to treaties, it is unreasonable to expect First Nations to agree to a treaty settlement when compensation is not offered for violations and infringements of their constitutionally-protected rights. The Crown must be prepared to engage on this fundamental issue of compensation early in negotiations.

Canada's Role in Treaty Negotiations – 91(24) issues

Context and considerations

82. Canada's ongoing refusal to assert and give appropriate expression to its constitutional authority under section 91(24) of the *Constitution Act, 1867* in relation to First Nations-Crown treaty negotiations in BC represents a significant weakness of the negotiation process. Federal treaty negotiators appear to not appreciate the important implications of Canada's exclusive jurisdiction over "Indians and Lands reserved for the Indians" to First Nations-Crown treaty negotiations in BC and, as the result, there are a number of challenges facing First Nations-Crown treaty negotiations in BC.

83. Under section 91(24), the Government of Canada has the constitutional authority to address the continued existence of First Nations' Aboriginal title, rights and other interests in and to their respective traditional territories in BC. Canada can negotiate a treaty with First Nations in respect of their rights and interests, even without the consent or involvement of the province, as was demonstrated by the negotiation of Treaty 8.

84. We support the continuation of tripartite First Nations-Crown treaty negotiations. However, in order to make the treaty negotiation process work, it is essential that Canada assert the leadership role which its exclusive constitutional authority under section 91(24) entitles it to in relation to the treaty negotiation process in BC.

Recommendation 23

In order to meet its constitutional and legal obligations to Aboriginal people, Canada must:

i. reaffirm its exclusive constitutional authority under section 91(24) of the *Constitution Act, 1867* for the negotiation and conclusion of treaties in BC,
ii. recommit to the 19 recommendations of the BC Claims Task Force and to the full implementation of those recommendations,
iii. be proactive in protecting Aboriginal rights, title and interests pending treaties (e.g. through interim protection measures), and
iv. abandon:
    - the requirement of proof of Aboriginal rights and title by First Nations,
    - the notion that Aboriginal peoples abandoned their traditional territories and their Aboriginal rights and title,
    - unworkable certainty techniques/ policies in any form.

Certainty

Context and considerations

85. Previously, Canada's approach to developing certainty models has focused on meeting the certainty and finality requirements of its outdated comprehensive claims policy. Canada's previously established approach of the "non-assertion/fall-back release" model has achieved substantially the same finality as either the "modification/release" technique or the "up-front surrender" in other land claim agreements - therefore meeting the certainty and finality requirements of Canada's comprehensive claims policy.

86. Further, Canada's position that the release for past infringement of any land-based rights in its new technique is essential to provide certainty for third parties, developers and the Crown with regard to the use of land and other resources, but offers nothing in return to Aboriginal title and rights holders.

87. From a First Nations perspective, it is not acceptable that a government negotiated model or mechanism can legally extinguish, modify or suspend inherent Aboriginal rights and title, which are not granted or created by a Crown statute.

88. In her 2016 address at the BC Cabinet-First Nations gathering in Vancouver, BC, Minister Wilson-Raybould offered meaningful perspective about the enduring nature of the treaty relationship as follows:

> *"New Zealand has been in a national conversation aimed at redefining the relationship between the Crown and the Māori…I think it is fair to say that they have built their success less on ideology and more on trying to build a framework that endures… They believe that settlements are not "full and final," but require on-going maintenance and dialogue to be enduring. They do not try and foresee everything or where they might end up on their journey. I think we can learn from this."*

89. The insistence that every subject-matter be finally negotiated in the treaty, leaving no room for future change which could be achieved without having to formally amend the treaty is inconsistent with the "living tree" approach to treaty interpretation.

90. Each and every right, area of jurisdiction and exercise of power cannot be contemplated at the time that the treaty is being negotiated and there are legal mechanisms that can enable the treaty to evolve in response to legal or other changes without formal amendment. This would enable the parties to keep the treaty viable and relevant. To require otherwise would mean that decisions First Nations make today regarding their constitutionally protected rights, as defined in a treaty, may be rendered valueless by changes in conditions over the long term. Some of these changes may be within the control of Canada or BC (e.g. land use decisions), while others may not (e.g. climate change).

91. Certainty is a two-way street and treaties must provide certainty to First Nations that they will be able to preserve their distinct cultures, achieve self-sufficiency and protect the exercise of their negotiated and unknown rights. Governments, acting honourably, cannot continue to seek certainty only for themselves and third parties through the negotiation of treaties and other agreements.

92. Flexibility and recognition of the need for change and adaptation to unforeseen circumstances are fundamental aspects of constitutional interpretation in Canada.[9] The "frozen rights" approach to constitutional interpretation was rejected by the Privy Council and the courts set out the "living tree" doctrine which recognizes that the Canadian Constitution is indeed capable of evolution with the changing circumstances of the country.[10]

93. As constitutional documents, treaties must retain the flexibility to adapt to changing circumstances. Failure to draft a treaty with a view to both the present and to the (unknown) future would fail to achieve the ongoing reconciliation purpose that the courts have mandated for section 35.[11]

94. In order to achieve a measure of certainty for all parties, there needs to be sufficient protection of the substance of the treaty and full implementation of the commitments. This can be achieved in a number of ways. For example, intergovernmental arrangements for the management of lands and resources throughout a First Nation's traditional territory can be a means of recognizing a First Nation's legitimate role in the management of lands important for the protection of treaty rights.

95. Another example of a protective mechanism would be the adoption of orderly processes that do not require formal amendment of the treaty to deal with such things as unforeseen issues, changes in the international legal regime or changes in the definition of particular Aboriginal or treaty rights. This would allow for the parties to expressly leave open issues related to the definition of specific rights that may be difficult or impossible to define at the present (for example, rights related to presently commercially non-viable fish species). The BCTC observes that "an orderly process for the consideration or addition of rights not included in a treaty has been identified as a key issue in these negotiations."[12]

96. Work on a new non-assertion legal certainty technique in the context of First Nations-Crown treaty negotiations in BC is underway through the Common Table process. However, substantial elements are yet to be addressed through that initiative and we look forward to the outcome of that work.

97. Canada has expressed interest to the First Nations Summit in exploring a new "rights recognition framework" in the context of developing new certainty techniques. A working dialogue on a new rights recognition framework has yet to begin, but the First Nations Summit has indicated to Canada its willingness to engage in such discussions.

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[9] Options for making changes within a treaty, prepared by Bob Freedman (Cook, Roberts), August 19, 2004.
[10] *Ibid. See Edwards v. Attorney-General for Canada,* [1930] A.C. 124 at 136.
[11] *Ibid.*
[12] *Supra* note 9.

Recommendation 24

It is recommended that Canada, BC and the First Nations Summit carefully examine common law interpretive principles and common law findings in commercial and contract law regarding elements of good faith as potential instructive aids and tools for negotiating sound and effective certainty provisions in treaties, agreements and other constructive arrangements. Further, concentrated efforts of Canada, BC and First Nations to determine meaning, scope and application of good faith negotiations and a political shift in focus to a rights recognition framework will greatly contribute to reshaping a certainty approach.

Recommendation 25

Canada and BC must review and modify their approaches to certainty in First Nations-Crown treaty negotiations in BC as follows:

i. expressly abandon the extinguishment approach to certainty adopted in the historic treaties, including "backdoor" or "two-step" forms of extinguishment, such as the "modification and release", and "backup release", approaches to certainty;

ii. accept the principle that modern treaties must recognize and affirm existing Aboriginal title and rights and treaty rights and bring them forward into the modern treaty;

iii. consistent with the principles set out in the 1991 BC Claims Task Force Report, adopt an approach to certainty negotiations which allows for flexible mandates from table to table and which allows for efficiently obtaining changes to the certainty mandate as necessary;

iv. negotiate certainty models which provide for the First Nation's interests in ensuring certainty of benefits in the face of changing and evolving circumstances by (for example):

- flexible definitions of rights,
- inclusion of intergovernmental arrangements for the management of lands and resources, and a legitimate and distinct role for First Nations in decision making in matters affecting their traditional territories and treaty rights, and
- inclusion of orderly processes regarding Aboriginal rights and title issues not addressed in the treaty or where replacement rights are necessary due to changing circumstances (ending with binding dispute resolution, if necessary).

Negotiation Support Funding

Context and considerations

98. The First Nations Summit's long-standing mandate is to pursue the full forgiveness of treaty negotiation loans and fund First Nations' participation in negotiations going forward with non-repayable contributions. This continues to be the First Nations Summit's objective. The

First Nations Summit recognizes that addressing loans would demonstrate significant goodwill and have a positive effect on negotiations, but these changes alone will not transform the process, as the Crown's negotiation mandates continue to be a real barrier to progress.

99. First Nations have accumulated substantial treaty loan debts (over $528 million is outstanding and $100 million has already been repaid). This averages out to more than $10 million per negotiation table (although some of the larger tables further along in the process owe considerably more). The current loan funding approach to First Nations-Crown treaty negotiations in BC and the accumulation of treaty loan debt have had very negative impacts on First Nations. The current approach is not sustainable and has failed to expedite negotiations.

100. Work to address the negotiation loan funding structure – a long-standing and exceptionally challenging barrier in negotiations – has begun, with implementation of some of the negotiation support funding proposals under the Multilateral Engagement Report underway.

101. In July 2016, federal officials from Indigenous and Northern Affairs (INAC) advised that Canada was renewing its comprehensive claims authorities and that a memorandum to Cabinet (MC) was being prepared to support this renewal. The authority for negotiation support funding, which includes both funding going forward and the treatment of First Nations negotiation debt, will be going forward as a separate MC in the near future.

102. Further, INAC officials asked the First Nations Summit and BC to inform its internal policy development in parallel with implementing the direction to explore funding models arising from the multilateral engagement initiative. The result of that engagement was the November 2016 technical report entitled "Negotiation Support Funding for First Nations Negotiating Treaties in BC: Assessment of the Current Approach and Options for Reform" (the Technical Report).

103. As part of the funding MC, INAC officials have also been examining the approach to allocating negotiation support funding. In this regard, the First Nations Summit's position is that the independence of the BCTC's allocation of negotiation support funding must be maintained in order to ensure fair and impartial negotiations. The First Nations Summit is committed to upholding the principles, set out in the 1991 BC Claims Task Force Report, that no one party should have unilateral control over First Nations-Crown treaty negotiations in BC and no party should have their expenditures reviewed by another party to the negotiations.

104. The First Nations Summit offers the following in support of its mandate, as directed by the First Nations Summit Chiefs in Assembly:

- Forgiveness is the only option that meaningfully addresses all of First Nations' concerns.
- Forgiveness would be viewed as an act of good faith and would help reinvigorate First Nations-Crown treaty negotiations in BC.

- Conversion (unless paired with an increase in the capital transfer) will not address the erosion of the capital transfer. In the aftermath of the *Tsilhqot'in* decision First Nations are looking for larger land and cash packages.
- Conversion is another form of deferment which, like loans, does not address the fact that most First Nations do not have the revenues to fund their own negotiations. In the end, if a First Nation does not reach a treaty, the "advances" will not be recouped by Canada.
- Conversion continues to place First Nations in the position where they must unfairly bear the brunt of the cost of delays, which lead to mounting negotiation costs and a further erosion of the treaty package.

105. On May 2, 2017, a focus group of First Nations Chiefs, Leadership, and Chief Negotiators met with Joe Wild (federal Senior Assistant Deputy Minister) and Neilane Mayhew (provincial Associate Deputy Minister) to discuss outstanding negotiation loans, and how First Nations' participation in negotiations will be supported on a go-forward basis.

106. The First Nations Summit's longstanding mandate has consistently been the full forgiveness of negotiation support loans and that negotiations should not be funded with loans. Canada has indicated that it has heard loud and clear the calls for forgiveness of all outstanding debt and a shift to 100% non-repayable funding going forward. While it does not have a mandate for either of these approaches, Canada is willing to explore with First Nations to determine what is needed to implement them in the future. However, Canada has stressed that the BCTC's current allocation process does not meet the level of accountability and transparency that Canada needs to present a convincing case for 100% non-repayable funding on a go-forward basis and full forgiveness. In this regard, Canada has asked First Nations to help determine what appropriate accountability mechanisms could be developed to address these concerns. Federal senior officials intend to prepare a proposal addressing go-forward funding and forgiveness in time for consideration in the 2018 budget. Canada has requested First Nations' input on a funding model by September 2017, and the First Nations Summit is actively seeking First Nations' feedback to respond to this request.

Recommendation 26

Canada and BC must forgive all outstanding treaty negotiation debt and implement non-repayable contribution funding for First Nations' participation in negotiations going forward.

Recommendation 27

Canada and BC must meaningfully commit to the independence of the BC Treaty Commission's allocation of negotiation support funding and the principles that no one party should have unilateral control over First Nations-Crown treaty negotiations in BC and no party should have their expenditures reviewed by another party to the negotiations.

Fiscal Issues

Context and considerations

107. Colonialism has caused First Nation communities to now exist in social and economic disparity. The *Indian Act* was devised in part to remove Indigenous Peoples' jurisdiction over our lands and resources. It is important to note that the 1927 *Indian Act* revisions prevented First Nations from raising revenues to pursue land claims and hiring lawyers to assist.

108. First Nations communities experience the most rapid population growth with the youngest, fastest growing demographic. Yet resourcing for social programs and services and infrastructure in our communities does not reflect population growth or inflation rates. Key matters around revenue sharing, own-source revenue offsets, jurisdiction over taxation and services, funding caps and securing the necessary revenue streams to overcome the comparability gap and to adequately support First Nations governments remain unresolved.

109. In reference to reconciliation, Minister Wilson-Raybould has stated that, *"This work also necessarily includes developing a new fiscal relationship with Indigenous governments."* (Excerpt from 2016 opening address to the general assembly at the United Nations Permanent Forum on the Rights of Indigenous Issues)

110. Further, the Minister has also indicated that, *"As we implement the Declaration, we need to look to the lands and resources that Indigenous peoples have rights to and that can further support their economies and the ability to raise money to provide programs and services to meet the needs of their citizens. We need to consider what the court -- referred to as the inescapable economic component of Aboriginal title, in Delgamuukw – And how we can broaden the applicability of that concept to the ancestral lands…"* (Excerpt from Minister Wilson-Raybould's February 2017 address to the Public Policy Forum "Reconciliation: A Sure Path to Economic Growth" - Investing in Canada's Future: The Next 150 Years)

111. Such statements, along with the Prime Minister's directive to his government to work toward a new nation-to-nation relationship provide strong support for reconciliation of the Crown-First Nations fiscal relationship, which is critical to supporting First Nations governments.

112. An improved fiscal relationship that supports First Nations becoming self-determining, and that supports economic growth, will improve the fiscal position of all orders of government by increasing revenues, increasing a First Nation's control over its circumstances, and reducing the costs associated with poverty.

113. Within the context of First Nations-Crown treaty negotiations in BC and financing such arrangements, this is not a straightforward discussion point. It is noted that Canada's current federal financing policies are currently under review. However, given the

importance of financing arrangements as a critical element to a successful government, it merits some commentary.

114. The Fiscal Financing Agreements (FFAs) set out the self-government finance arrangements, and generally take effect at or shortly after Effective Date. The principles that guide these negotiations are set out in the negotiated treaty. FFAs are accompanied by other fiscal arrangements such as the fiscal transfer agreements (provide for one time funds, implementation funding, annual program and service transfers).

115. Frequently expressed concerns by First Nations in regard to FFAs include issues around comparability; the application of the federal Own Source Revenue (OSR) Policy and the significant underfunding of Nation governments through FFAs – which create continued dependency.

116. Funding is not based on actual expenditure need, but on specific provisions and activities listed in the treaty and on existing funding authorities. This gives rise to the need for Canada and BC to provide dedicated resources to First Nations to carry out a costing of governance exercise, which is an essential activity to determine the feasibility of the government model. In particular, there is a need to provide adequate resourcing to allow nations to undertake separate reviews of: (i) cost of core institutions/jurisdiction and authority and (ii) cost of providing programs and services.

117. Further, First Nations with experience on this issue have indicated that the start-up costs associated with implementing a treaty post-Effective Date are much higher than the parties anticipated, resulting in significant gaps between actual start up activities versus the level of funding received.

118. It is acknowledged that since 2010, Canada has been reconsidering its approach to fiscal relations with self-governing Indigenous Governments. From 2011 to 2015, this was referred to as “fiscal harmonization”. In July 2015, Canada released “Canada’s Fiscal Approach to Self-Government Arrangements”. Since then, Canada has established a process to collaboratively review its fiscal policy for self-governing Indigenous groups (those with modern treaties and self-government agreements).

119. These working groups report to a Policy Drafting Group, a Senior Representatives Group and a Political Direction table. Although Canada has held several meetings with BC First Nations that are negotiating treaties during this process, these First Nations were only offered a participatory role after the fact in the collaborative process. In addition, we also note that additional work is underway at the joint fiscal group between Indigenous and Northern Affairs Canada and the Assembly of First Nations. However, it is worth mentioning that the current climate of government mandates which have historically, and continue to, fall short of facilitating movement toward this improved relationship which gives rise to work under those initiatives.[13]

[13] Despite extensive tripartite work through the Fiscal Relations Working Group (BC, Canada and representatives of the First Nations Summit), government mandates remain inflexible and inadequate for meeting First Nations’ needs.

120. First Nations Governments, pursuant to their inherent right of self-government, have all of the duties and responsibilities as other governments do in terms of providing adequate levels of services for its citizens, such as health, housing, and education. As well, they have decision-making authority with respect to their homelands, and a right to an economy derived from those lands.

121. Currently First Nations' socio-economic circumstances are far below the national average. First Nations require the practical ability to govern themselves and build economic bases to significantly improve the standard of living in their communities. As such, they require the "hallmarks" of governments in treaties, which include such things as:

- taxation authority and decision-making power,
- immunity from taxation by other governments,
- fiscal transfer,
- a workable approach to OSR, and
- participation in all forms of revenue-sharing.

122. As articulated by some First Nations, the fundamental objective in all cases, regardless of the size or circumstances of a First Nation, is that every First Nation must be able to implement fully its treaty in a sustainable and rational manner over time. Failure to meet this objective will render a treaty unworkable where the parties encounter those aspects of implementation that have not been appropriately resourced. The parties cannot possibly predict the full costs associated with the implementation of the treaty over time and, so, they cannot reasonably expect to negotiate specific, detailed provisions at the time of signing that will achieve certainty into the future.

123. The fiscal relationship in a treaty must ensure that First Nations have the necessary tools and funding sources to establish and maintain credible and effective systems of government for their citizens and to participate meaningfully in the economy. First Nations must be in a position to generate sufficient funds from a range of sources including resource revenues, taxation and business development.

124. Tax jurisdiction is a critical aspect of any government. It also must be designed to enable First Nations to achieve socio-economic indicators that they set as goals for themselves.

125. First Nations need a guarantee that transfers will be adequate to provide support for programs and services up to national standards over time.

126. First Nations require certainty with respect to the tax room, where Canada cannot take back the tax room at its discretion, in a range of areas (e.g. income, property, commodities).

127. First Nations must be in a position to make informed decisions and must be treated fairly in comparison to other governments. Canada must revise its OSR Policy to ensure it does not put First Nations in a worse position than they are now. Problems with the ongoing federal approach to OSR includes the following:

- it threatens the independence of First Nations by making all programs jointly funded,
- it limits the ability of First Nations to generate income and invest in programs and services,
- it does not enable First Nations to make informed decisions about the real value of the capital transfer - since any income earned by the investment of the capital transfer into a settlement trust will be subject to offsets, and since there is no certainty about offset rates beyond the first (and possibly several) agreements, and
- it prejudices the nature of economic activity a First Nation engages in since First Nation corporations will be subject to double-taxation: taxation through the corporate tax regime and taxation through OSR offset.

As well, a baseline for comparability must be established and taken into account.

128. Further, part of this issue includes the need to acknowledge infringements of Aboriginal rights and title. Compensation for such infringements is an essential part of embarking on a new Crown-Aboriginal relationship in BC and advancing reconciliation.

Recommendation 28

a. Canada and BC must have flexible mandates that recognize that:

   i. the fundamental objective in all cases, regardless of the size or circumstances of a First Nation, is that every First Nation must be able to fully implement its treaty in a viable, sustainable and rational manner over time,

   ii. First Nations must be supported in becoming self-determining and in reaching their goals regarding the socio-economic indicators in their communities,

   iii. treaties must incorporate planning cycles to reflect the fact that the parties cannot possibly predict the full costs associated with the implementation of the treaty over time, and

   iv. fiscal relationships in treaties must be able to respond to the economic circumstances in the same way that other levels of government operate.

b. Canada and BC must work with First Nations to develop a process to focus on negotiating fiscal models for treaties that:

   i. meet First Nations' present and future needs,

   ii. support the First Nation Government,

   iii. reflect the principles set out in (a) above, and

   iv. address the following issues:

- First Nations require opportunities for direct taxation. Currently, taxation is by way of a side agreement, not contained in a constitutionally protected treaty. Nations require direct taxation arrangements that provide ability to tax non-First Nation citizens living on treaty settlement lands, including businesses/corporations operating on those lands. Treaties provide that Nations can tax their own citizens living on treaty settlement lands, but to tax non-citizens, there is a requirement to enter into an agreement with the government. First Nation governments need access to taxation revenues, we will not create strong and stable governments by simply negotiating program and service dollars,
- areas of exclusive and concurrent tax jurisdiction to ensure that tax room cannot be removed by other governments, access to taxation revenues,
- priority of laws provisions necessary to support First Nations Governments,
- ongoing fiscal transfers that meet a First Nation's growth and needs over time,
- First Nation Governments require access to federal funding for infrastructure in our communities,
- establishing a fiscal relationship that is capable of evolving as a First Nation reaches the socio-economic indicators it has identified for itself,
- all sources of revenue sharing through arrangements that are ongoing,
- own source revenue (OSR) (including the definition of OSR, certainty of inclusion rates, linking of phasing in of certainty rates to offsets, and creating a level playing field),
- tax exemption and immunity (including determining the value of the section 87 exemption),
- compensation for past, current and proposed infringements of Aboriginal rights, title and interests,
- Transfer agreements and funds must take into account the real scope of governance responsibilities, actual government expenditure needs and must respect a First Nation Government's independence/ability to set its own budget agenda consistent with the needs of the community, and
- the federal Finance Minister should be included as a member to the Federal Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples to help address these issues.

Dispute Resolution

Context and considerations

129. There is currently no effective, meaningful dispute resolution mechanism in the BC treaty negotiations framework.

130. The BCTC has a mandate to assist the parties in obtaining dispute resolution services, but only at the request of all the parties. Where there is no such agreement, the BCTC has advised the Standing Senate Committee on Aboriginal Peoples that it will aim to take a more active role in proposing dispute resolution at tables where there is not progress in negotiations.

131. Canada has refused to implement dispute resolutions mechanisms as set out in treaties (or include effective ones in treaties being negotiated). Many First Nations identify this as "one of the most significant barriers impeding the effective implementation of Agreements." The Auditor General found it inconsistent with the honour of the Crown, the Crown's fiduciary relationship with Aboriginal peoples and destructive to the process of reconciliation.

Recommendation 29

Canada and BC must be prepared to implement dispute resolution mechanisms as set out in treaties (and include effective ones in treaties being negotiated) in order to assist the negotiating parties in overcoming obstacles in negotiations. The Principals should consider exploring options for establishing and managing such a process. Further, a workable mechanism is a critical and constructive element of a new rights recognition framework as such a framework is built around the notion of relationship building, management and trouble-shooting.

Implementation Issues

Context and considerations

132. Canada must commit to achieve the broad objectives, spirit and intent of treaties within the context of a new relationship, as opposed to be merely complying with narrowly defined obligations at a technical level.[14] This commitment and follow-through is necessary for successful treaties to be concluded.

133. Many First Nations – with both historic and modern treaties – have raised challenges they face in implementing their agreements. First Nation signatories to the Douglas Treaties, Nisga'a Final Agreement, Treaty 8 and Tsawwassen Final Agreement are among those voicing concerns and frustration about the implementation of their treaties. In particular, First Nations with modern treaties are experiencing chronic problems in securing timely and adequate funding for the implementation of their treaties.

134. In addition, high-profile reports, such as those prepared by the Auditor General and the Standing Senate Committee on Aboriginal Issues, shine a light on the urgent need for significant policy shifts by governments to ensure these treaties are fully implemented so that First Nations can enjoy the range of benefits set out in their treaties and the honour of the Crown is upheld.

135. Successive reports of the Auditor General, and the report of the Standing Senate Committee on Aboriginal Peoples, have pointed to serious deficiencies in INAC's ability

[14] See Land Claim Agreement Coalition, "A New Land Claims Implementation Policy" (2004). See also the Auditor General of Canada's 2003 Report, which comments on the federal government's focus on discharging obligations rather than meeting objectives to be a matter of fundamental disagreement between the Auditor General's Office and the Department of Indian Affairs and Northern Development.

to facilitate the successful implementation of comprehensive land claim agreements, including: a lack of a strategic approach, a lack of horizontal coordination, lack of stability and continuity in senior level offices, and inadequate reporting on the costs of implementation. The reports highlight and discuss Canada's "narrow" and "technical" approach to treaty implementation, rather than adhering to the "spirit and intent" of the treaty.

136. Lack of full implementation limits a First Nation's ability to properly discharge their treaty responsibilities and restricts enjoyment of the rights which were hard fought through negotiations and promised through treaties. Meanwhile, benefits of "certainty" to the Crown are immediate and ongoing.

137. The Crown's approach to treaty implementation is inconsistent with Article 37 of the *Declaration*, which states that Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors. Furthermore, Indigenous peoples have the right to have States honour and respect such treaties, agreements and other constructive arrangements.

Recommendation 30

a. Canada must commit to the full and proper implementation of historic and modern treaties, while protecting the legal interests of neighboring First Nations.

b. Consideration of implementation issues must begin as early as possible in the process. The Crown must engage in negotiations with an understanding of its responsibility to ensure that the various components of the treaty provide First Nations governments with sufficient revenue, resources and capacity to be self-governing and to implement their treaties. Moreover, Canada and BC must work with First Nations to make the implementation of the governance component workable and affordable. For example, orderly processes must be negotiated to enable the governance component to evolve with changing circumstances.

c. The parties must ensure there is adequate funding to effectively implement treaties, including costs related to First Nations' exercise of jurisdiction through law-making.

CONCLUSION

138. In order for the implementation of this framework to be successful, there needs to be high-level commitment and representation by Canada and BC to address the issues. They cannot become mired in bureaucracy. The newly established government structures must play a central and active role.

139. The First Nations Summit takes the commitments made by the new Liberal Government under the leadership of Prime Minister Justin Trudeau seriously and is fully prepared to participate in developing a concrete plan for a more prosperous future for Indigenous Peoples in BC.

140. We hope the Prime Minister is sincere that Canada's will is resolute and its focus will not falter.

LISTING OF CONSOLIDATED RECOMMENDATIONS

TOOLS AND INITIATIVES TO SUPPORT RECONCILIATION

Recommendation 1

With this in mind, on behalf of First Nations in BC who participate in First Nations-Crown treaty negotiations in BC, the First Nations Summit seeks confirmation that a new reconciliation framework will create space to strengthen and improve, rather than displace or jeopardize, the made-in-BC treaty negotiations framework. As part of its engagement with First Nations, it is recommended that Canada issue a statement to First Nations in BC reflecting this commitment.

Recommendation 2

What is required now is a demonstrable shift in Crown policies, mandates in regard to land and rights issues, and the commitment to negotiate treaties, agreements and other constructive arrangements with First Nations, ***reflective of a duty of good faith***, fairness and the spirit of cooperation in seeking to reconcile Aboriginal title and rights with the assertion of Crown sovereignty. This, coupled with federal efforts to ensure that Canada's laws, negotiation and litigation policies and mandates reflect the principles of rights recognition and affirmation as mandated by section 35 of the *Constitution Act, 1982*, will greatly assist all parties in moving toward the expeditious resolution of the outstanding land question in BC.

Recommendation 3

Reconciliation will also require various supports to First Nations in BC to resolve the outstanding land question, including:

a. A dedicated source of resources to establish an institution to support First Nations in BC in defining their respective homelands/territory and to address overlapping issues;

b. Issuance of a federal statement of actual, unequivocal recognition of Indigenous Peoples as the original owners and occupants of the land now known as British Columbia, giving rise to special and unique rights that are recognized, affirmed and protected under the *Constitution Act, 1982*.

Recommendation 4

As a further demonstration of commitment to a new relationship with Indigenous Peoples, Canada must separate Treaties and Aboriginal Government – Negotiations West from the Department of Indigenous and Northern Affairs and place it under the oversight of the Minister of Attorney General or the Prime Minister's Office to focus on the broader objectives of building a new Crown-Aboriginal treaty relationship, improving the lives of Aboriginal people, concluding treaties and facilitating the coordination of efforts across federal departments. Such a separation would send a clear signal that the federal government

is sincere in wanting to conclude treaties and establishing a new and more positive relationship with First Nations.

Recommendation 5

As a demonstration of the commitment that no relationship is more important to the Prime Minister, the First Nations Summit requests that Canada work with First Nations in BC to host an annual meeting among the Prime Minister, federal Ministers and First Nations in BC, similar to the annual BC Cabinet - First Nations meeting, to discuss issues of common concern. Such a request is also supportive of Minister Wilson-Raybould's remarks at the 2016 BC Cabinet-First Nations Gathering at which the Minister stated, "…*it goes without saying that these types of political gatherings are an important opportunity for leaders to meet face-to-face, deal with pressing issues and build partnerships. Equally, they are also an important opportunity for leaders to reflect, to hold each other to account and, in so doing, speak truth to power*."

Recommendation 6

a. Consistent with operating paragraph 8 of the UN World Conference on Indigenous Peoples 2014 Outcome Document, Canada must take steps to create a national action plan and begin to develop a strong national approach to implementation, working collaboratively in partnership with Indigenous governments on the development of the action plan and its subsequent implementation.

b. Further, Canada must work with Indigenous Peoples to:

   i. develop a high-level awareness raising and education initiative to inform the federal public service about issues of importance to Indigenous Peoples and the necessity of the *Declaration*;
   ii. develop key messages and reiterate its commitment to the *Declaration*;
   iii. incorporate key messaging regarding Indigenous issues and corresponding articles of the *Declaration* into all existing capacity development activities and training programs for federal public service employees; and
   iv. raising awareness and education of other government officials, parliamentarians, the judiciary and other public institutions such as universities.

c. Whether First Nations are pursuing resolution of an issue through litigation, negotiated treaties, agreements or other constructive arrangements, we are collectively in a position to determine the content of accompanying documents. In this regard, as a party to a negotiation or litigation, Canada should:

   i. insist on inclusion of relevant articles of the *Declaration* in treaties, agreements and other constructive arrangements entered into with federal government, the provincial government and third parties; and

   ii. where possible, include references to relevant articles of the *Declaration* in documents prepared for litigation.

Recommendation 7

The First Nations Summit strongly urges the federal government to actively and meaningfully engage with First Nations throughout the process of harmonizing federal laws, polices and mandates with the *Declaration*. Opportunities for engagement must include the participation of First Nations representatives on key working groups tasked with reviews and harmonization activities. In addition, we call on the federal government to enact legislation to implement the *Declaration*.

Recommendation 8

As directed by Chiefs and Leadership in BC, the First Nations Summit remains committed to advocating that any provincial or federal re-engagement structure, processes, agreements, or frameworks for engagement must be fully informed and directly influenced by the four foundational principles. It is recommended that Canada with the free and effective participation of Indigenous Peoples carefully consider and reflect the Four Principles accordingly.

Recommendation 9

Significant elements which are sought through the process of First Nations-Crown treaty negotiations in BC, including revenue and benefit sharing, shared decision-making and dispute resolution, are noticeably absent from the Ten Principles. Although such elements could be arrived at through active negotiations, they must be clearly identified and written directly into any process that is relied upon as a basis or framework for negotiations.

TREATY NEGOTIATION ISSUES

Recommendation 10

a. Canada must revisit its comprehensive claims policy through its work on a new federal reconciliation framework and it must work in collaboration with First Nations, to revise that policy and ensure consistency with and be reflective of current conventions and common law, including, but not limited to:

- articles of the United Nations *Declaration on the Rights of Indigenous Peoples*;

- explicit and unequivocal recognition of Aboriginal Peoples and Aboriginal title and rights, including the inherent right of self-government and, in particular, that:

    - Aboriginal title is a legal interest in the land itself and extends throughout the entire traditional territory of each First Nation, including the foreshore, seabed and other water bodies,
    - First Nations have a right to choose how the land is used, and
    - Aboriginal title has an inescapable economic component

- interim land protection, and

- a diversity of land tenure options, including recognition that First Nations' authority over their lands may stem from section 35 and section 91(24).

b. Adopt a revised comprehensive claims policy that:

- recognize and affirms Aboriginal Title and Rights;

- expressly acknowledges and accommodates the need for a variety of negotiating mandates designed to meet the differing circumstances in the various regions of BC – no "one size fits all" approach, and

- provides that Canada will implement and live up its legal obligations, including:

    - international conventions, and
    - the objectives, spirit and intent of existing and new treaties.

Recommendation 11

In the BC context, the First Nations Summit position is that BC and Canada must live up to the original commitments set out in the 1991 BC Claims Task Force Report. In our view, *good faith negotiation* of treaties, agreements and other constructive arrangements remains the most effective way to resolve the outstanding BC land question and support First Nations governance and self-sufficiency. In this regard, we recommend that Canada, BC and the First Nations Summit attempt to address the meaning and scope of good faith negotiations as the foundation for a path forward.

Recommendation 12

Canada and BC must take a meaningful step of shifting its language and discourse in relation to First Nations-Crown treaty negotiations in all its engagements with First Nations and Canadians, in government documentation and other materials by abandoning words such as "Final Agreement". From a First Nations perspective, there is nothing to suggest that the conclusion of a treaty is final to the relationship with the Crown.

Recommendation 13

Government bureaucracy is not always equipped to overcome certain issues or obstacles to progress and political intervention and direction is necessary. With political will and clear direction, it is hoped that many obstacles can be addressed. In this regard, it is key that the Prime Minister has committed to a new nation-to-nation relationship and it is recommended that all Ministers, government departments, officials and members of the public administration are instructed as to what that statement means to the Liberal Government and on mechanisms and opportunities to breathe life into such statements. Further, it will be critical to ensure that such political will and direction is consistently delivered through all areas of the public service and that there is effective coordination among the various

departments, with the assistance of the Minister of Justice and Attorney General. This high-level participation and engagement will form an integral part of ensuring success.

Recommendation 14

It is recommended that Canada proactively work with First Nations who express interest in taking incremental steps by entering into incremental agreements (e.g. on fish, parcels of land, or self-governance) as a path to building capacity with the objective of reaching a comprehensive treaty (i.e. a "stepping stone" approach identified through the multilateral engagement initiative), or such agreements as stand-alone. These types of arrangements offer First Nations opportunities to build much needed capacity and to exercise jurisdictions in a manner that works for that nation.

Recommendation 15

Canada and BC should invest resources that are consistent, accessible and reliable and provide other supports to First Nations throughout the course of negotiations to specifically target essential capacity building in relation to public service and administration.

Recommendation 16

Canada must abandon its position on the quantum of land on offer at treaty negotiating tables. Canada's land selection model is arbitrary and contributes to transfers of limited amounts of land to First Nations. These small selections cannot sustain our distinct societies.

Recommendation 17

An updated policy must also provide for a diversity of land tenure options for treaties and otherwise, including section 91(24) and section 35 land status and incorporate the express recognition of the inherent right of self-government – which it is currently lacking. Land and governance are inextricably linked and, so, federal policy guiding its participation in First Nations-Crown treaty negotiations must reflect this connection.

Recommendation 18

As recommended through the multilateral engagement initiative, early knowledge of the proposed land package is essential for First Nations to negotiate the integrally connected resource and jurisdictional issues in a treaty. First Nations require timely and full disclosure in order to make informed decisions about land. Such disclosure must include at a minimum:

- information on current land status, including subsurface status,
- identification of land which the Crown may consider 'essential' to retain ownership of post-treaty, and
- clear and full information on valuation of lands so that informed decisions can be made regarding lands (e.g. choosing between willing-seller lands and Crown lands).

Recommendation 19

Canada must revise or abandon its current surplus lands policy which currently promotes the sale of Crown lands to third parties, so that it is not a barrier to progress in negotiations. Further, the governments insist that existing Indian reserves will form part of the land package. Given their per capita formulas that strongly influence land quantum, this is problematic and unacceptable.

Recommendation 20

a. Canada and BC must recognize and affirm the existence of Aboriginal title and that this title exists throughout the entire traditional territories of each and every First Nation, including foreshore, seabed and other water bodies.

b. Canada and BC must fulfill the Crown's constitutional responsibility to conclude land and resource negotiations with First Nations and adopt policies and mandates to ensure that land and resource components in treaties will be sufficient to ensure First Nation sustainability and self-sufficiency. This includes:

   i. negotiating lands and resources according to First Nations' present and future cultural and economic needs, not a formula approach – in particular, flexible mandates that allow for increasing the quantum of land and cash available in order to provide for viable treaties,

   ii. negotiating all issues of interests to First Nations in order to increase the likelihood of concluding treaties, including, but not limited to:

      1. putting all federal Crown lands, including surplus and non-surplus lands, on the table for negotiation,
      2. negotiating rights to the foreshore and seabed, and
      3. negotiating riparian and other water rights.

   iii. in addition to negotiating ownership of and access to lands, negotiating intergovernmental arrangements for the management of lands and resources, and other arrangements (e.g. revenue-sharing) with First Nations regarding the entirety of their traditional territories and with respect to all natural resources – prior to treaty (e.g. interim measures, treaty-related measures) and within the treaty itself,

   iv. consistent with recommendation 16 of the 1991 BC Claims Task Force, implement early, interim protection of land and resources, prior to the signing of an Agreement-in-Principle, and

   v. negotiating with First Nations regarding the range of diverse constitutional land tenure options in agreements that includes section 35 and section 91(24).

c. Canada and BC must provide early disclosure of their mandates regarding land and cash in order for a First Nation to make informed decisions with respect to First Nations-Crown treaty negotiations.

Recommendation 21

Canada and BC must:

i. negotiate meaningful arrangements with First Nations where the First Nations are full managers of certain lands and in other instances co-managers, with supporting jurisdiction, of the lands and resources throughout the entirety of their traditional territories, including the foreshore, seabed and other water bodies,

ii. include sufficient funding to ensure long-term, meaningful participation by First Nations in intergovernmental arrangements for the management of lands and resources, and

iii. include sufficient funding in future federal and provincial budgets to ensure effective federal and provincial participation in intergovernmental arrangements for the management of lands and resources.

Recommendation 22

Canada must recognize that, in regard to Canada's historic and generally ongoing "full and final" settlement approach to treaties, it is unreasonable to expect First Nations to agree to a treaty settlement when compensation is not offered for violations and infringements of their constitutionally-protected rights. The Crown must be prepared to engage on this fundamental issue of compensation early in negotiations.

Recommendation 23

In order to meet its constitutional and legal obligations to Aboriginal people, Canada must:

i. reaffirm its exclusive constitutional authority under section 91(24) of the *Constitution Act, 1867* for the negotiation and conclusion of treaties in BC,
ii. recommit to the 19 recommendations of the BC Claims Task Force and to the full implementation of those recommendations,
iii. be proactive in protecting Aboriginal rights, title and interests pending treaties (e.g. through interim protection measures), and
iv. abandon:
    - the requirement of proof of Aboriginal rights and title by First Nations,
    - the notion that Aboriginal peoples abandoned their traditional territories and their Aboriginal rights and title,
    - unworkable certainty techniques/ policies in any form.

Recommendation 24

It is recommended that Canada, BC and the First Nations Summit carefully examine common law interpretive principles and common law findings in commercial and contract law regarding elements of good faith as potential instructive aids and tools for negotiating sound and effective certainty provisions in treaties, agreements and other constructive

arrangements. Further, concentrated efforts of Canada, BC and First Nations to determine meaning, scope and application of good faith negotiations and a political shift in focus to a rights recognition framework will greatly contribute to reshaping a certainty approach.

Recommendation 25

Canada and BC must review and modify their approaches to certainty in First Nations-Crown treaty negotiations in BC as follows:

i. expressly abandon the extinguishment approach to certainty adopted in the historic treaties, including "backdoor" or "two-step" forms of extinguishment, such as the "modification and release", and "backup release", approaches to certainty;

ii. accept the principle that modern treaties must recognize and affirm existing Aboriginal title and rights and treaty rights and bring them forward into the modern treaty;

iii. consistent with the principles set out in the 1991 BC Claims Task Force Report, adopt an approach to certainty negotiations which allows for flexible mandates from table to table and which allows for efficiently obtaining changes to the certainty mandate as necessary;

iv. negotiate certainty models which provide for the First Nation's interests in ensuring certainty of benefits in the face of changing and evolving circumstances by (for example):

- flexible definitions of rights,
- inclusion of intergovernmental arrangements for the management of lands and resources, and a legitimate and distinct role for First Nations in decision making in matters affecting their traditional territories and treaty rights, and
- inclusion of orderly processes regarding Aboriginal rights and title issues not addressed in the treaty or where replacement rights are necessary due to changing circumstances (ending with binding dispute resolution, if necessary).

Recommendation 26

Canada and BC must forgive all outstanding treaty negotiation debt and implement non-repayable contribution funding for First Nations' participation in negotiations going forward.

Recommendation 27

Canada and BC must meaningfully commit to the independence of the BC Treaty Commission's allocation of negotiation support funding and the principles that no one party should have unilateral control over First Nations-Crown treaty negotiations in BC and no party should have their expenditures reviewed by another party to the negotiations.

Recommendation 28

a. Canada and BC must have flexible mandates that recognize that:

   i. the fundamental objective in all cases, regardless of the size or circumstances of a First Nation, is that every First Nation must be able to fully implement its treaty in a viable, sustainable and rational manner over time;

   ii. First Nations must be supported in becoming self-determining and in reaching their goals regarding the socio-economic indicators in their communities;

   iii. treaties must incorporate planning cycles to reflect the fact that the parties cannot possibly predict the full costs associated with the implementation of the treaty over time; and

   iv. fiscal relationships in treaties must be able to respond to the economic circumstances in the same way that other levels of government operate.

b. Canada and BC must work with First Nations to develop a process to focus on negotiating fiscal models for treaties that:

   i. meet First Nations' present and future needs,

   ii. support the First Nation Government,

   iii. reflect the principles set out in (a) above, and

   iv. address the following issues:

   - First Nations require opportunities for direct taxation. Currently, taxation is by way of a side agreement, not contained in a constitutionally protected treaty. Nations require direct taxation arrangements that provide ability to tax non-First Nation citizens living on treaty settlement lands, including businesses/corporations operating on those lands. Treaties provide that Nations can tax their own citizens living on treaty settlement lands, but to tax non-citizens, there is a requirement to enter into an agreement with the government. First Nation governments need access to taxation revenues, we will not create strong and stable governments by simply negotiating program and service dollars;
   - areas of exclusive and concurrent tax jurisdiction to ensure that tax room cannot be removed by other governments, access to taxation revenues;
   - priority of laws provisions necessary to support First Nations Governments;
   - ongoing fiscal transfers that meet a First Nation's growth and needs over time;
   - First Nation Governments require access to federal funding for infrastructure in our communities;
   - establishing a fiscal relationship that is capable of evolving as a First Nation reaches the socio-economic indicators it has identified for itself;

- all sources of revenue sharing through arrangements that are ongoing;
- own source revenue (OSR) (including the definition of OSR, certainty of inclusion rates, linking of phasing in of certainty rates to offsets, and creating a level playing field);
- tax exemption and immunity (including determining the value of the section 87 exemption);
- compensation for past, current and proposed infringements of Aboriginal rights, title and interests;
- Transfer agreements and funds must take into account the real scope of governance responsibilities, actual government expenditure needs and must respect a First Nation Government's independence/ability to set its own budget agenda consistent with the needs of the community; and
- the federal Finance Minister should be included as a member to the Federal Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples to help address these issues.

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Canada and BC must be prepared to implement dispute resolution mechanisms as set out in treaties (and include effective ones in treaties being negotiated) in order to assist the negotiating parties in overcoming obstacles in negotiations. The Principals should consider exploring options for establishing and managing such a process. Further, a workable mechanism is a critical and constructive element of a new rights recognition framework as such a framework is built around the notion of relationship building, management and trouble-shooting.

Recommendation 30

a. Canada must commit to the full and proper implementation of historic and modern treaties, while protecting the legal interests of neighboring First Nations.

b. Consideration of implementation issues must begin as early as possible in the process. The Crown must engage in negotiations with an understanding of its responsibility to ensure that the various components of the treaty provide First Nations governments with sufficient revenue, resources and capacity to be self-governing and to implement their treaties. Moreover, Canada and BC must work with First Nations to make the implementation of the governance component workable and affordable. For example, orderly processes must be negotiated to enable the governance component to evolve with changing circumstances.

c. The parties must ensure there is adequate funding to effectively implement treaties, including costs related to First Nations' exercise of jurisdiction through law-making.

APPENDIX 1 – MULTILATERAL ENGAGEMENT PROCESS TO IMPROVE AND EXPEDITE TREATY NEGOTIATIONS IN BRITISH COLUMBIA

Multilateral Engagement Process to Improve and Expedite Treaty Negotiations in British Columbia

Proposals for the Principals' Consideration

Endorsed by the Principals on May 24, 2016

Canada

BRITISH COLUMBIA

FIRST NATIONS SUMMIT

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Executive Summary

The history and process of modern-day treaty making in British Columbia is unique. In 1990, the British Columbia Claims Task Force was created to recommend how Canada, British Columbia and First Nations in British Columbia could negotiate treaties and what topics should be addressed. The Task Force completed its report in 1991, and Canada, British Columbia and the First Nations Summit accepted all of its 19 recommendations. These included the creation of the made-in-British Columbia treaty negotiations process to resolve the outstanding land question, and the establishment of the British Columbia Treaty Commission. Treaty negotiations under this process have proven to be complex, lengthy and costly for all parties. The challenges faced in these negotiations have been articulated in several previous reviews and reports.

On May 29, 2015, the Principals to the made-in-British Columbia treaty negotiations process (Minister of Indigenous and Northern Affairs, Canada; Minister of Aboriginal Relations and Reconciliation, British Columbia; and the First Nations Summit Task Group) agreed to establish a multilateral engagement process to improve and expedite treaty negotiations in British Columbia. This engagement process took place from June 2015 to March 2016. Representatives from Canada, British Columbia, and the First Nations Summit participated in the engagement process, along with representatives from the British Columbia Treaty Commission, who participated in an advisory capacity.

The commitment of the Principals to the multilateral engagement process is an acknowledgement that the status quo is not acceptable. The current reality of treaty negotiations in British Columbia necessitates changes in order to advance reconciliation. Under the terms of reference for the engagement process, officials were mandated to focus on: process efficiencies; negotiation support funding; shared territory and overlap issues; certainty; and the role of the British Columbia Treaty Commission. This report contains jointly developed proposals for consideration by the Principals, as well as action items to be undertaken by Senior Officials. These proposals and action items are intended to improve and expedite treaty negotiations in British Columbia by:

1. committing, at the Principals' level, to the treaty negotiations process and to expediting negotiations;
2. employing greater flexibility to reach treaties faster and more efficiently, and to reach agreements in advance of, or outside, a modern comprehensive treaty through the use of:
    (a) a stepping stone approach to treaty making;
    (b) constitutionally protected core treaties supported by side agreements;
    (c) sectoral treaties and agreements and incremental treaty agreements to address the exercise and recognition of rights in defined subject areas;
    (d) scoping discussions and proposals to determine earlier on whether parties share enough common ground to move forward; and
    (e) condensed Agreements-in-Principle which contain the key elements of an agreement, with less focus on process-related chapters;

3. enhancing tools that could address shared territory and overlap issues by:
   (a) exploring options for a dedicated, cost-shared source of funds to support the resolution of shared territory or overlap issues;
   (b) creating a best practices guide and a public database of shared territory and overlap agreements;
   (c) assessing efforts of First Nations to address shared territory and overlap issues, as well as Canada and British Columbia's support of First Nations' efforts; and
   (d) exploring new approaches to provide incentives to non-negotiating First Nations to reach agreements with their neighbours;
4. opening the door for, and signaling a willingness to consider, reforms to negotiation mandates and/or broader, national policy reforms on substantive matters;
5. addressing issues related to negotiation support funding by:
   (a) exploring alternative funding models to support First Nations' participation in negotiations; and
   (b) modifying the funding process to, among other objectives, provide greater transparency and accountability;
6. establishing a forum to explore an alternative rights recognition approach to certainty; and
7. clarifying the roles and responsibilities of the British Columbia Treaty Commission.

The proposals and action items set out in this report are not meant to be mutually exclusive, and many of them will work most effectively in combination. It should be noted that there are a number of issues causing delays in and challenges to treaty negotiations that are not within the mandate of the multilateral engagement process, including issues with respect to the parties' internal mandates and mandating processes. Such substantive issues may be addressed through future exploratory initiatives.

To demonstrate commitment to improving the treaty negotiations process, this report proposes that the Principals issue a public statement confirming their support for treaty negotiations in British Columbia. It also proposes that the Principals release public materials on the outcomes of their discussions following their review of this report. The conclusion of work under the multilateral engagement process and submission of this report does not signal an end to dialogue on these important issues, rather, it serves as an opportunity to build a strong and collaborative relationship as we move forward toward reconciliation.

Introduction

On May 29, 2015 the Principals to the British Columbia treaty negotiations process (Minister of Indigenous and Northern Affairs, Canada; Minister of Aboriginal Relations and Reconciliation, British Columbia; and the First Nations Summit Task Group) agreed to establish a multilateral engagement process and directed a Senior Officials Group to oversee a Technical Working Group to develop options to improve and expedite treaty negotiations in British Columbia. The purpose of this final report is to put forward proposals and fulfill the Terms of Reference agreed to by the Principals.

Since the establishment of the British Columbia treaty negotiations process in 1992, the negotiation of modern day treaties has proved to be a complex and lengthy process for all parties. The investment has been significant. These challenges are well-known and have been articulated in several previous reports and reviews. The most recent reports include: the Eyford Report, 2015; the Lornie Report, 2011; and various annual reports of the British Columbia Treaty Commission. The Principals have also produced discussion papers on how to address specific challenges in treaty negotiations in British Columbia.

As these reports have indicated, the history and process of treaty making in British Columbia is unique. With the exception of the Douglas Treaties on Vancouver Island and the extension of Treaty 8 into northeastern British Columbia, no other historic treaties were concluded in British Columbia. Furthermore, the province has a large number of diverse First Nations in comparison to other provinces, resulting in a high number of First Nations whose Aboriginal title and rights have not been reconciled through treaty negotiations and whose territories cover most of British Columbia. Today, 58 tables representing approximately half of the First Nations in the province continue to be engaged in the treaty negotiations process.

The recent commitment of the Principals to the multilateral engagement process is an acknowledgement that the status quo is not acceptable; the current reality of British Columbia treaty negotiations necessitates changes in order to advance reconciliation. Delays in treaty negotiations are common and caused by many factors. For example, negotiators have indicated that limitations and inflexibility in mandates on all sides and frequent delays in the mandating process of the parties impede completion of modern-day treaties. As well, unresolved shared territory and overlap issues are causing delays, particularly at tables closer to completion. The proposals seek to expedite and improve treaty negotiations by increasing flexibility in approaches used to reach a treaty and the range of mechanisms available to the negotiating parties, as well as focusing efforts to address some of the key impediments in negotiations.

There are issues causing delay and challenges to treaty negotiations that are not within the mandate of the Technical Working Group for the multilateral engagement process, including issues with respect to the parties' internal mandates and mandating processes. It is hoped that through dialogue and collaboration, and with the positive momentum gained through this process, the parties can continue to address outstanding issues as we move forward.

Background to treaty making in British Columbia

In December 1990, a Task Force was created with representatives from First Nations in British Columbia, the Government of British Columbia, and the Government of Canada. The terms of reference mandated the Task Force to recommend how the three parties could begin negotiations and what topics should be addressed in negotiations.

The British Columbia Claims Task Force released its report in 1991 (the "Task Force Report"). Canada, British Columbia and the First Nations Summit all accepted its 19 recommendations, including the creation of the current six-stage treaty negotiations process to resolve the outstanding land question and un-extinguished Aboriginal rights in British Columbia, and the establishment of the British Columbia Treaty Commission to oversee the process.

British Columbia Treaty Commissioners were first appointed in April 1993, and the British Columbia Treaty Commission formally began accepting "Statements of Intent to negotiate treaties" from First Nations in December 1993. A foundational principle of the British Columbia treaty negotiations process is that neither Canada nor British Columbia is to play a gatekeeper role by assessing the strength of a First Nation's rights and title in advance of engaging in treaty negotiations. Rather, negotiations are open to all First Nations. The British Columbia Treaty Commission accepts First Nations[1] into the negotiations process and determines when all of the parties are ready to commence negotiations.

At the time treaty negotiations began, it was anticipated that treaty making would be completed by 2000. After more than 20 years of negotiations, it is clear that those expectations have not been met. Treaty negotiations have proven to be complex and challenging undertakings. Still, important lessons have been learned.

There have also been numerous changes since the Task Force Report was released and the treaty negotiations process in British Columbia was initiated. Evolution in the legal environment both domestically and internationally, evidenced by important legal decisions such as *Tsilhqot'in, Haida* and *Taku*, and development and adoption of instruments such as the United Nations Declaration on the Rights of Indigenous Peoples, contribute to a growing recognition of Aboriginal rights and title and the need for new approaches to address outstanding rights.

Despite the changes impacting the negotiating environment, the fundamental principles in the Task Force Report continue to be relevant, including the critical importance of establishing a new relationship among the negotiating parties. The treaty negotiations process in British Columbia has the potential to be at the forefront of resetting the relationship between Canada, British Columbia and First Nations and advancing a nation-to-nation approach. Given the shifting legal and political environment, resolving

[1] It should be noted that the British Columbia Treaty Commission may only refuse to accept a Statement of Intent from a body if that body does not meet the definition of "First Nation."

the outstanding land question in British Columbia is more important than ever, and advancing reconciliation is a commitment expressed by all parties.

Multilateral Engagement – Context and Process

On May 29, 2015, the Principals of the British Columbia treaty negotiations process agreed to establish a multilateral engagement process with the goal of improving and expediting treaty negotiations in British Columbia (see Annex A for Terms of Reference).

This engagement process took place from June 2015 to March 2016. Two committees were established to undertake the work: a Senior Officials Group to monitor progress and provide direction and a Technical Working Group to develop proposals based on guidance from the Senior Officials Group. Representatives from Canada, British Columbia, and the First Nations Summit participated on both committees. The British Columbia Treaty Commission participated in committee meetings in an advisory capacity.

Under the Terms of Reference, the Technical Working Group was mandated to focus on the following subject areas:

- Process Efficiencies;
- Negotiation Support Funding;
- Shared territory and overlap issues;
- Certainty; and
- Role of the British Columbia Treaty Commission.

Proposed Approach

Proposals for improvements to the above listed areas were developed by the Technical Working Group through a collaborative approach. Initial proposals and action items fell along a spectrum from more modest changes to broader, more complex policy changes. The Senior Officials Group focused the proposals and action items and provided feedback on them. This report contains proposals and action items jointly developed by the parties in accordance with the Terms of Reference.
These proposals and action items are intended to improve and expedite treaty negotiations in British Columbia by:

1. committing, at the Principals' level, to the treaty negotiations process and to expediting negotiations;
2. employing greater flexibility to reach treaties faster and more efficiently, and to reach agreements in advance of, or outside, a modern comprehensive treaty;
3. enhancing tools that could address shared territory and overlap issues;
4. opening the door for, and signaling a willingness to consider, reforms to negotiation mandates and/or broader, national policy reforms on substantive matters;

5. addressing issues related to negotiation support funding;
6. establishing a forum to explore an alternative rights recognition approach to certainty; and
7. clarifying the roles and responsibilities of the British Columbia Treaty Commission.

Many of these proposals and action items will work most effectively if they are combined.

Process Efficiencies

Treaty negotiations have taken far longer than originally anticipated, resulting in lost opportunities for First Nations, Canada and British Columbia. All parties have an interest in improving the effectiveness of negotiations as well as expediting the pace of negotiations in British Columbia. This includes increasing flexibility within the existing negotiations process by employing a broader range of tools to address diverse interests.

Improving flexibility is intended to address some of the interests the parties have identified as important in advancing and expanding opportunities for reconciliation – for example, recognition of existing section 35 rights, incremental opportunities that enable agreements to evolve more easily, and a focus on the post-treaty relationship. Proposals and action items to improve the efficiency and effectiveness of negotiations include new tools to streamline the negotiation of agreements, as well as more flexible tools and approaches that support reaching a wider range of negotiated agreements in advance of concluding a comprehensive treaty.

Scoping Proposal

To improve the efficiency of negotiating substantive issues, it would be helpful for the parties to gain a better understanding as soon as possible of whether there is sufficient common ground on the main components of an agreement before carrying on with further costly negotiations. The parties should be up-front earlier in the negotiations process with respect to their interests, capacities and negotiating mandates or bottom lines. This would be the intent of a “scoping discussion”. If the parties agree it would be helpful, this could be followed by Canada and British Columbia presenting a “scoping proposal” to First Nations that could provide for an exchange of information regarding key mandate areas, such as land and cash, and possibly fish and fiscal (see Annex B - Scoping Proposal – for a more detailed description).

Condensed Agreements-In-Principle

In seeking to address the lengthy process to negotiate an Agreement-in-Principle, the parties could consider negotiating a “condensed” Agreement-in-Principle that would contain the core elements of an agreement and give minimal attention to process chapters, unless one or more of these chapters is particularly important to one of the

parties (see Annex C - Condensed Agreement-in-Principle – for a more detailed description).

The core elements could include:

- Capital transfer amount;
- Quantum and general location of land to be owned and governed by the First Nation;
- Recognition of right to self-government and general listing of areas of Aboriginal jurisdiction;
- Framework for the relationship of laws;
- Fiscal arrangements to support implementation and self-government;
- Description of territory and nature of the First Nation's rights on lands that are not treaty settlement lands;
- Role in decision-making in respect of, and benefits derived from, lands that are not treaty settlement lands;
- Fisheries arrangements – access to resources and role in decision making;
- Techniques for reconciling pre-existing Aboriginal or Douglas Treaty rights with the rights set out in the treaty; and
- Process for addressing shared territory and overlap issues between Agreement-in-Principle and Final Agreement.

Process chapter language

Treaty negotiating tables spend a great deal of time, effort, and resources negotiating relatively standard process chapters. The availability of previously used process chapter language could potentially increase the availability of time and resources for all the parties to have a more focused discussion on matters identified by a table as substantive and unique to their circumstances.

Multi-year strategy for Stage 5

Consideration could be given to agreeing to set a time frame for Final Agreement negotiations (Stage 5) based on an agreed-upon, tripartite, multi-year strategy. Multi-year strategies could also be endorsed through a political commitment by the parties to the negotiation time frame following the signing of an Agreement-in-Principle.

Options for Reaching and Building a Treaty

The benefits accrued from reaching a comprehensive treaty are still a long way off for many First Nations who have indicated that it is challenging to maintain community support when they are not able to demonstrate incremental progress. Some First Nations have suggested that it may not be practical to take over all the responsibilities in a comprehensive treaty at once. Implementing parts of the agreement on an incremental basis could help to build the community's capacity to manage additional responsibilities.

The parties could consider a stepping stone approach that enables them to reach negotiated agreements that address specific shared interests. A stepping stone approach could involve the use of various types of agreements and arrangements to reach a comprehensive treaty in an incremental manner.

A number of proposals contained in this report, which are directed at incremental approaches to reconciliation, could be implemented without losing sight of the long-term vision of reaching a comprehensive treaty through the British Columbia treaty negotiations process. For example, a stepping stone approach could involve the use of incremental treaty agreements, sectoral treaties or agreements, and core treaties (see below) to reach a comprehensive treaty. However, while these types of agreements could be used as building blocks (i.e., stepping stones) for building an eventual comprehensive treaty, they do not necessarily need to be used as part of a stepping stone approach. For example, sectoral treaties or agreements might be negotiated on a stand-alone basis under an alternative path to reconciliation, rather than as part of a stepping stone approach.

Incremental treaty agreements

Provincial incremental treaty agreements allow First Nations and British Columbia to enjoy shared benefits in advance of reaching a treaty. They are an important indicator of the sincerity and commitment of the parties to the negotiation of treaties. They are intended to build trust among the parties, create incentives to reach further milestones, promote economic development opportunities for First Nations, encourage partnerships with industry and local government, provide direct benefits for First Nation communities, and provide increased certainty over land and resources.

Similarly, in 2014, the federal government announced measures that allow for the negotiation of incremental treaty agreements on a bilateral or tripartite basis in areas of federal interest. Federal incremental treaty agreements can address First Nation interests while negotiations are ongoing, promote cooperative relations during treaty negotiations before a comprehensive treaty is reached, remove barriers to progress in negotiations, provide for the implementation of certain negotiated elements of a treaty in advance of a comprehensive treaty, and help prepare First Nations to implement treaties. These agreements can be considered at any stage of the broader treaty negotiations.

Sectoral agreements and treaties

Sectoral agreements and treaties could address sub-sets of pre-existing rights by providing for their recognition and exercise in agreements addressing a smaller sub-set of rights or in defined subject areas. Sectoral agreements could be tripartite or bilateral and could be entered into with individual First Nations or groups of First Nations. Where the parties are seeking a greater degree of permanence and/or certainty over the exercise of rights, a sectoral agreement could be constitutionally protected as a treaty

under section 35 of the *Constitution Act, 1982.* In some cases, an incremental treaty agreement could also be a sectoral agreement or treaty.

The concept of sectoral treaties is also being explored at the Nova Scotia Mik'maq tripartite negotiation table. To date, there has not been a constitutionally protected sectoral treaty negotiated in British Columbia (see Annex D – Sectoral Agreements and/or Treaties – for a more detailed description).

Core treaties

Another potential route to reaching treaties could be the negotiation of constitutionally-protected core treaties that are supported by non-constitutionally protected side agreements. The core treaty could include:

- Recognition of existing section 35 rights;
- Specific parameters for exercise of rights for some areas;
- Broad parameters in other areas that would be supplemented by agreements that could be periodically renegotiated to adapt to changing circumstances or interests;
- Land ownership and management;
- Core governance (e.g., financial management, membership, and elections);
- Rights to resources and role in decision making regarding fish, and on lands that are not treaty settlement lands;
- The resolution of disputes;
- Evolution of the treaty; and
- Other matters that the parties see as important to include in the core treaty.

Side agreements could address matters such as the details regarding the exercise of the recognized rights and implementation of jurisdiction in respect of matters that may or may not be directly addressed in the core treaty. The core treaty could also include principles to guide the renegotiation of these side agreements or their future incorporation into the core treaty. Core treaties and their side agreements could address an interest of the parties to establish predictable processes that can adapt to future changing circumstances or interests of the parties (see Annex E - Core Treaty – for a more detailed description).

The concept of a "core" treaty with time-limited, renewable, or evergreen side agreements is novel and has not been adopted in any modern comprehensive treaties in Canada. This concept would therefore require further consideration and development at individual treaty negotiating tables to determine the viability of this approach for negotiations in British Columbia. The concept of a core treaty is being explored elsewhere in Canada at the Nova Scotia Mik'maq tripartite negotiation table.

Action Items for Senior Officials:

1. Senior Officials will request that the British Columbia Treaty Commission develop and maintain a database of completed Final Agreement chapters and make them publicly available on their website with support from Canada, British Columbia, and the First Nations Summit.

2. Senior Officials will continue to support the initial development and exploration of process efficiency measures. In exploring process efficiencies, a number of funding related issues will need to be addressed, including:

   (a) funding to support negotiations and implementation of agreements other than comprehensive treaties; and
   (b) existing loans, and eligibility for extensions of loan due dates where the negotiating parties adopt an alternative approach to comprehensive treaty negotiations.

Proposals for the Principals' consideration:

3. The Principals will instruct the British Columbia Treaty Commission to request, at Agreement-in-Principle signing, a Stage 5, multi-year, tripartite strategy to conclude a Final Agreement within a specified time frame, endorsed by the leadership of the First Nation and federal and provincial ministers.

4. Canada and British Columbia will make best efforts to discuss or table, wherever possible, a "scoping" proposal, early in Stage 4, on the key components of an Agreement-in-Principle. This proposal would include land and cash, and may include other components, e.g., fish and fiscal.

5. The Principals will endorse further development and exploration, to be undertaken jointly with interested negotiating tables, of the concept of a condensed Agreement-in-Principle.

6. The Principals will endorse further development and exploration, to be undertaken jointly with interested negotiating tables, of a stepping stone approach, incremental treaty agreements, sectoral agreements and treaties, and core treaties.

Negotiation Support Funding

The administration and allocation of negotiation support funding by the British Columbia Treaty Commission to First Nations to support their participation in the treaty negotiation process is one of the key elements of the made-in-British Columbia treaty negotiations process.

First Nations' participation in negotiations is primarily funded through loans and, as noted above, treaty negotiations have taken longer than originally anticipated. One result is that First Nations have accumulated significant negotiation support funding debt. The magnitude of debt and uncertainty about the repayment of the loans are significant concerns for all parties.

Canada and British Columbia have expressed a strong interest in increasing accountability and transparency measures in respect of both the allocation and expenditure of negotiation support funding in order to meet the parties' accountability obligations related to the expenditure of public funds by the British Columbia Treaty Commission.

The parties have agreed that the starting point for a discussion around improving administration and allocation of negotiation support funding should follow jointly agreed upon principles. These principles include:

- First Nations should be an adequately resourced negotiating partner.
- Negotiation support funding should not influence a First Nation's decision to remain in – or withdraw from – treaty negotiations.
- Negotiation support funding should not include incentives for First Nations to incur unnecessary costs or to delay the conclusion of treaty negotiations.
- Negotiation support funding should provide for reasonably equitable treatment among Aboriginal groups in British Columbia and elsewhere in Canada.
- Canada and British Columbia have sufficient mechanisms in place within the negotiation support funding model(s) to ensure accountability to the public.

Proposals and action items developed to address issues with the allocation and administration of negotiation support funding should be considered in light of the principles noted above, as well as by how they improve and/or expedite treaty negotiations in British Columbia.

Action items for Senior Officials:

7. Senior Officials will work with the British Columbia Treaty Commission to link funding decisions more closely to activities in a tripartite work plan. In the absence of a tripartite work plan, the British Columbia Treaty Commission will consider other information provided by any of the negotiating parties.

8. Senior Officials will request that the British Columbia Treaty Commission provide, where appropriate, a brief explanatory note to funding agreements setting out a summary of internal First Nation activities that were taken into account in making a Negotiation Support Funding allocation decision.

9. Senior Officials will work to clarify which activities, including those undertaken during pauses or transitions in negotiations, will be considered eligible for negotiation support funding to be allocated by the British Columbia Treaty Commission.

10. Senior Officials will ensure that Canada, British Columbia and the British Columbia Treaty Commission improve information sharing on various programs and initiatives that provide funding to First Nations that may duplicate negotiation support funding (e.g., British Columbia Capacity Initiative or Treaty Related Measures) to avoid unnecessary double funding and to reduce the reliance on loan funding where possible.

11. Senior Officials will make best efforts to prepare revised master funding agreements, which incorporate the agreed approaches to tripartite work plans, explanatory notes, and extensions to the loan due dates, for the 2016-2017 fiscal year. Any other changes or new approaches that cannot be implemented by April 1, 2016, will be implemented through changes to the master funding agreements for subsequent fiscal years.

Proposals for the Principals' consideration:

12. The Principals will instruct Canada and the British Columbia Treaty Commission, with input from British Columbia and the First Nations Summit, to develop negotiations cost guidelines to support First Nations' assessment and management of costs. Guidelines would be based on experience gathered at negotiating tables with comparable or analogous circumstances in British Columbia and across Canada, on:

(a) average rates for honoraria, consultants and experts; and
(b) typical costs for specified activities or initiatives.

13. The Principals will instruct officials to explore funding models to support First Nations' participation in treaty negotiations that are consistent with the jointly agreed upon principles.

Shared Territory and Overlap Issues

Shared territory and overlap issues are challenging to mitigate and resolve, and contribute to delays in treaty negotiations. First Nations are best placed to reach agreements among themselves to address shared territory and overlap issues, with the support of Canada and British Columbia. The British Columbia Treaty Commission is actively engaged in facilitating and assisting First Nations, when requested, to resolve shared territory or overlap issues. This includes facilitation of specific disputes, encouraging First Nations to engage with each other regarding shared territory or overlap issues, assisting First Nations in establishing processes for resolution, and bringing greater awareness and information to shared territory and overlap issues.

There are a number of challenges associated with resolving shared territory and overlap issues. For example, there is no one source of funds dedicated to assisting First Nations with these disputes. Rather, funding to support First Nations' efforts is often part of a broader funding authority serving multiple purposes. In recent years, funding support from the British Columbia Treaty Commission has been small, contribution-only allocations to some First Nations when surplus funds are identified and made available. A dedicated source of funds, cost-shared by both Canada and British Columbia, could address some of these concerns. Canada and British Columbia would need to obtain internal approvals for such new funding and to determine if and how such funding may be cost-shared.

The parties negotiating a treaty should engage early in the process with neighbouring First Nations on any shared territory or overlap issues. The British Columbia Treaty Commission could assist by summarizing and assessing efforts of First Nations to address shared territory and overlap issues with their neighbours, as well as Canada and British Columbia's support of First Nations' efforts. This assessment, as well as recommendations for further action, could be included in a report. These steps could help focus efforts on resolving these issues earlier in the treaty negotiations process, and avoid protracted delays at the Final Agreement stage.

Some First Nations that are not participating in treaty negotiations have stated that they do not want these issues resolved through processes that are directly linked to the treaty negotiations process. These First Nations may view treaty negotiations as creating a "first past the post" scenario in which the First Nation that first concludes a treaty secures rights and benefits within shared or overlapping territories at the expense of other First Nations. Governments should consider measures that provide incentives for First Nations not in treaty negotiations that could encourage their participation in efforts to resolve disputes. This could include considering the negotiation of agreements that provide for recognition of the rights of First Nations not negotiating a treaty (see Annex F – Supporting the Resolution of Shared Territory and Overlap Issues – for a more detailed description).

In some cases, even where shared or overlapping territory agreements are reached among First Nations, governments and other parties are not aware of the agreement

and may act in a way that does not respect them. Awareness of and respect for these agreements could be fostered through the creation of a publicly available repository of these shared or overlapping territory agreements.

It should be noted that Canada and British Columbia have an ongoing and separate duty to fulfil their consultation obligations and, where appropriate, accommodate First Nations when treaty negotiations have the potential to adversely impact the rights of a First Nation that shares territory or has territory that overlaps with the First Nation in negotiations. These obligations are not altered by the following proposals and action items.

Action items for Senior Officials:

14. Senior Officials will explore options for a dedicated, cost-shared source of funds for supporting First Nations' efforts to resolve shared territory and overlap issues (in accordance with Recommendation 8 of the Task Force Report).

15. Senior Officials will jointly develop a best practices resource on shared territory and overlap issues, and provide this to First Nations through the British Columbia Treaty Commission

Proposals for the Principals' consideration:

16. The Principals will instruct the British Columbia Treaty Commission to assess efforts of First Nations to address issues among themselves and Canada and British Columbia's support of First Nations' efforts. This could include the provision of a report with an assessment of efforts made and recommendations for further action to address outstanding issues.

17. The Principals will instruct officials to approach a First Nations representative organization in British Columbia about creating a publicly available repository of shared territory and overlap arrangements made between First Nations with shared or overlapping territories to increase awareness of and ensure respect for these agreements.

18. The Principals will instruct officials to explore approaches jointly with First Nations that: (a) provide for recognition and protection of the rights of First Nations that are not party to treaty negotiations (e.g., shared decision-making between Canada, British Columbia and First Nations), (b) result in multi-party shared decision-making agreements that could include First Nations in treaty negotiations, First Nations not participating in treaty negotiations, British Columbia, and/or Canada, and (c) reflect shared ownership and governance of specific parcels of land by both First Nations with and without treaties.

Certainty

Although the topic of certainty is included as part of the Terms of Reference for the multilateral engagement process, discussion on specific certainty models has been set aside at the direction of the Senior Officials Group. Senior Officials agreed it would be more appropriate to address this issue as part of the federal government's broader engagement process on reforming the *Comprehensive Land Claims Policy.*

First Nations have expressed concern that if a new legal certainty technique is developed, they would be precluded from considering other certainty models that may be available under the British Columbia treaty negotiations process. Representatives for both Canada and British Columbia have assured the First Nation Summit that First Nations would not be precluded from discussing or negotiating different certainty models that have been endorsed by Canada and British Columbia. Additionally, a "comfort clause" for inclusion in Agreements-in-Principle has been available to First Nations that makes clear that the parties are not precluded from considering other certainty models prior to concluding a Final Agreement.

Proposals for the Principals' consideration:

19. The Principals agree that negotiating tables in British Columbia are able to select from any certainty technique[s] that are, or may be, approved by Canada, British Columbia and First Nations in the future.

20. The Principals will instruct officials to establish a forum to explore an alternative, rights recognition approach to certainty, stemming from and contributing to the federal national policy reform process. This forum will be informed by on-going work at the British Columbia Common Table (e.g., work on orderly process, periodic review and non-assertion).

Role of the British Columbia Treaty Commission

The British Columbia Treaty Commission was created to ensure that the treaty negotiations process is fair and impartial, that all parties have sufficient resources to negotiate and implement a treaty, and that the parties work effectively to reach agreements. The role of the British Columbia Treaty Commission was further clarified in the 1992 *British Columbia Treaty Commission Agreement* (the "British Columbia Treaty Commission Agreement"), which was based on the recommendations from the Task Force Report, and in the ratifying legislation and resolutions of the Principals.

The role of the British Columbia Treaty Commission is to facilitate negotiations, allocate negotiation support funding, and provide public education and communication. Over the past 20 years, the role has evolved to deal with new challenges the parties have faced.

Section 12 of the British Columbia Treaty Commission Agreement states that, "the Principals shall review the effectiveness of the Commission at least once every three

years following its establishment." In 2003, the Principals belatedly undertook their first joint review of the British Columbia Treaty Commission's effectiveness. A second review was conducted in 2012. The British Columbia Treaty Agreement does not elaborate on how a review must be conducted or reported.

Through discussions at the Technical Working Group and Senior Officials level, there is agreement that the British Columbia Treaty Commission continues to play an important role in advancing and achieving treaties in British Columbia. The activities taken on by the British Columbia Treaty Commission have evolved over time as treaty negotiations have also evolved. Developing a current, mutually agreed upon articulation of the British Columbia Treaty Commission's role in facilitation, public education and communication, and the allocation of negotiation support funding, could encourage more effective use of the British Columbia Treaty Commission and its expertise to advance treaty negotiations.

Action Items for Senior Officials

21. Senior Officials will develop a document, for approval by the Principals, that clarifies the roles and responsibilities of the Commission in the following areas:

    (a) Facilitation (including ratification, and supporting First Nations in addressing shared territory and overlap issues);
    (b) Allocation of negotiation support funding; and
    (c) Public education and communication.

The document, once approved, would be issued by the Principals to the British Columbia Treaty Commission. The document would also be reviewed and updated on a regular basis or upon agreement of the Principals.

Proposal for the Principals' consideration:

22. The Principals agree that the process undertaken under the Terms of Reference for this multilateral engagement will fulfill the requirement in the British Columbia Treaty Commission Agreement for the 2016 effectiveness review.

Reporting on Progress

In order to follow the progress of the proposals endorsed by the Principals, Senior Officials will provide a report on progress to date, a year after conclusion of the multilateral engagement process, and when requested by the Principals.

Action Item for Senior Officials

23. Senior Officials will report in 2017 on progress in advancing proposals endorsed by the Principals.

Concluding Comments

All parties acknowledge that treaty making in British Columbia is unique. British Columbia is home to a large number of diverse First Nations communities whose Aboriginal title and rights have not been reconciled through treaty negotiations and whose territories cover most of the province. As a result, there are more First Nations engaged in treaty negotiation in British Columbia than there are in the rest of Canada. There have been numerous calls to increase flexibility in both approaches to, and outcomes of, negotiations in part to address the number of First Nations at negotiating tables and the diversity among them.

In order to improve and expedite treaty negotiations in British Columbia, this report attempts to create the flexibility that is necessary to meet these objectives. Officials from Canada, British Columbia and the First Nations Summit have explored more flexible process options for reaching treaties and other types of agreements that could support dialogue with interested First Nations, and advance reconciliation. The proposals in this report also aim to encourage the resolution of shared or overlapping territory issues. Increasing flexibility in approaches to negotiations and encouraging the resolution of shared or overlapping territory issues is critical to advancing treaty negotiations.

The proposals in this report also aim to address the continued interest in exploring an alternative rights recognition approach to certainty through the establishment of a forum. The proposals in this report are intended to support efforts by all parties to promote innovation and evolution of approaches to advance reconciliation through negotiations.

The role of the British Columbia Treaty Commission has evolved since its inception and remains an integral part of treaty negotiations in British Columbia. As part of the multilateral engagement process, officials have reviewed and clarified the role and responsibilities of the British Columbia Treaty Commission. Also addressed, are issues related to negotiation support funding, including modifying the funding process to provide greater transparency and accountability in the allocation and administration of funding.

All parties remain committed to treaty negotiations and to the overarching goals of renewing and reconciling the relationship between First Nations, Canada, and British Columbia, and promoting a nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership. The proposals introduced in this report are meant to continue a dialogue with First Nations to foster reconciliation processes that support sustainable First Nations governments, healthy and prosperous communities, and respectful government-to-government relationships.

Public Statement

Proposal for Principals' consideration:

24. To demonstrate their commitment to improving the treaty negotiations process, the Principals will issue a public statement confirming support for treaty negotiations in British Columbia, and public materials on the outcomes of discussions on this report.

Consolidated List of Proposals and Action Items

Process Efficiencies

Action items for Senior Officials:

1. Senior Officials will request that the British Columbia Treaty Commission develop and maintain a database of Final Agreement chapters and make them publicly available on their website with support from Canada, British Columbia, and the First Nations Summit.

2. Senior Officials will continue to support the initial development and exploration of process efficiency measures. In exploring process efficiencies, a number of funding related issues will need to be addressed, including:

    (a) funding to support negotiations and implementation of agreements other than comprehensive treaties; and
    (b) existing loans, and eligibility for extensions of loan due dates where the negotiating parties adopt an alternative approach to comprehensive treaty negotiations.

Proposals for the Principals' consideration:

3. The Principals will instruct the British Columbia Treaty Commission to request, at Agreement-in-Principle signing, a Stage 5, multi-year, tripartite strategy to conclude a Final Agreement within a specified time frame, endorsed by the leadership of the First Nation and federal and provincial ministers.

4. Canada and British Columbia will make best efforts to discuss or table, wherever possible, a "scoping" proposal, early in Stage 4, on the key components of an Agreement-in-Principle. This proposal would include land and cash, and may include other components, e.g., fish and fiscal.

5. The Principals endorse further development and exploration, to be undertaken jointly with interested negotiating tables, of the concept of a condensed Agreement-in-Principle.

6. The Principals endorse further development and exploration, to be undertaken jointly with interested negotiating tables, of a stepping stone approach, incremental treaty agreements, sectoral agreements and treaties, and core treaties.

Negotiation Support Funding

Action items for Senior Officials:

7. Senior Officials will work with the British Columbia Treaty Commission to link funding decisions more closely to activities in a tripartite work plan. In the absence of a tripartite work plan, the British Columbia Treaty Commission will consider other information provided by any of the negotiating parties.

8. Senior Officials will request that the British Columbia Treaty Commission provide, where appropriate, a brief explanatory note to funding agreements setting out a summary of internal First Nation activities that were taken into account in making a Negotiation Support Funding allocation decision.

9. Senior Officials will work to clarify which activities, including those undertaken during pauses or transitions in negotiations, will be considered eligible for negotiation support funding to be allocated by the British Columbia Treaty Commission.

10. Senior Officials will ensure that Canada, British Columbia and the British Columbia Treaty Commission improve information sharing on various programs and initiatives that provide funding to First Nations that may duplicate negotiation support funding (e.g., British Columbia Capacity Initiative or Treaty Related Measures) to avoid unnecessary double funding and to reduce the reliance on loan funding where possible.

11. Senior Officials will make best efforts to prepare revised master funding agreements, which incorporate the agreed approaches to tripartite work plans, explanatory notes, and extensions to the loan due dates, for the 2016-2017 fiscal year. Any other changes or new approaches that cannot be implemented by April 1, 2016, will be implemented through changes to the master funding agreements for subsequent fiscal years.

Proposals for the Principals' consideration:

12. The Principals will instruct Canada and the British Columbia Treaty Commission, with input from British Columbia and the First Nations Summit, to develop negotiations cost guidelines to support First Nations' assessment and management of costs. Guidelines would be based on experience gathered at negotiating tables with comparable or analogous circumstances in British Columbia and across Canada, on:

    (a) average rates for honoraria, consultants and experts; and
    (b) typical costs for specified activities or initiatives.

13. The Principals will instruct officials to explore funding models to support First Nations' participation in treaty negotiations that are consistent with the jointly agreed upon principles.

Shared Territory and Overlap Issues

Action items for Senior Officials:

14. Senior Officials will explore options for a dedicated, cost-shared source of funds for supporting First Nations' efforts to resolve shared territory and overlap issues (in accordance with Recommendation 8 of the Task Force Report).

15. Senior Officials will jointly develop a best practices resource on shared territory and overlap issues, and provide this to First Nations through the British Columbia Treaty Commission.

Proposals for the Principals' consideration:

16. The Principals will instruct the British Columbia Treaty Commission to assess efforts of First Nations to address issues among themselves and Canada and British Columbia's support of First Nations' efforts. This could include the provision of a report with an assessment of efforts made and recommendations for further action to address outstanding issues.

17. The Principals will instruct officials to approach a First Nations representative organization in British Columbia about creating a publicly available repository of shared and overlap arrangements made between First Nations with shared or overlapping territories to increase awareness of and ensure respect for these agreements.

18. The Principals will instruct officials to explore approaches jointly with First Nations that:

    (a) provide for recognition and protection of the rights of First Nations that are not party to treaty negotiations (e.g., shared decision-making between Canada, British Columbia, and First Nations),
    (b) result in multi-party shared decision-making agreements that could include First Nations in treaty negotiations, First Nations not participating in treaty negotiations, British Columbia, and/or Canada, and
    (c) reflect shared ownership and governance of specific parcels of land by both First Nations with and without treaties.

Certainty

Proposal for the Principals' consideration:

19. The Principals agree that negotiating tables in British Columbia are able to select from any certainty technique[s] that are, or may be, approved by Canada, British Columbia and First Nations in the future.

20. The Principals instruct officials to establish a forum to explore an alternative, rights recognition approach to certainty, stemming from and contributing to the federal national policy reform process. This forum will be informed by on-going work at the British Columbia Common Table (e.g., work on orderly process, periodic review, and non-assertion).

Role of the British Columbia Treaty Commission

Action items for Senior Officials:

21. Senior Officials will develop a document, for approval by the Principals, that clarifies the roles and responsibilities of the Commission in the following areas:

    (a) Facilitation (including ratification, and supporting First Nations in addressing shared territory and overlap issues);
    (b) Allocation of negotiation support funding; and
    (c) Public education and communication.

The document, once approved, would be issued by the Principals to the British Columbia Treaty Commission. The document would also be reviewed and updated on a regular basis or upon agreement of the Principals.

Proposal for the Principals' consideration:

22. The Principals agree that the process undertaken under the Terms of Reference for this multilateral engagement will fulfill the requirement in the British Columbia Treaty Commission Agreement for the 2016 effectiveness review.

Reporting on Progress

Action item for Senior Officials:

23. Senior Officials will report in 2017 on progress in advancing proposals endorsed by the Principals.

Public Statement

Proposal for the Principals' consideration:

24. To demonstrate their commitment to improving the treaty negotiations process, the Principals will issue a public statement confirming support for treaty negotiations in British Columbia, and public materials on the outcomes of discussions on this report.

Annex A – Terms of Reference

TERMS OF REFERENCE
MULTILATERAL ENGAGEMENT TO IMPROVE AND EXPEDITE BRITISH COLUMBIA TREATY NEGOTIATIONS

Objective

The objective of this engagement is to consider options to improve and expedite British Columbia treaty negotiations and interim measures, including options to address the role of the British Columbia Treaty Commission.

This engagement is not intended to hinder negotiations currently underway or to preclude the Principals from making key decisions or carrying out additional actions to strengthen and improve treaty negotiations.

Guiding Principles

The following principles will guide work carried out under this engagement:

- The status quo is not acceptable.
- Negotiations leading to treaties and other agreements are productive means for reconciling rights and developing a new constructive relationship between First Nations, Canada and British Columbia.
- The negotiation and successful conclusion of treaty agreements is a national and collective priority for all of the Principals.
- Negotiations leading to a new relationship must be fair, productive and efficient for First Nations and for the citizens of British Columbia and Canada.
- Impediments to achieving progress in negotiations and the conclusion of treaties must be identified, addressed and removed.
- The Principals are committed to bringing about positive and lasting change in the political, social and economic structures of First Nations, British Columbia and Canada through concrete actions to achieve the desired outcome.

Structure and Membership

The Minister of Aboriginal Affairs and Northern Development Canada, the Minister of Aboriginal Relations and Reconciliation and the First Nations Summit Political Executive (collectively the “Principals”) will oversee the process and provide overall strategic direction.
The Principals will establish two committees:

- a Senior Officials Group to monitor progress and provide direction to the Technical Working Group; and
- a Technical Working Group to develop options for consideration by the Senior

Officials Group.

The Technical Working Group will provide monthly progress reports to the Senior Officials Group. Any options developed by the Technical Working Group will require approval by the Senior Officials Group before being presented to the Principals for their consideration. The Principals will meet as required to consider options and provide overall strategic direction.

Representatives of Canada, British Columbia and the First Nations Summit will participate on both committees. The British Columbia Treaty Commission, as an independent body, will participate as required on both committees in an advisory capacity based on their knowledge and experience.

A **Senior Officials Group** will be established to oversee the joint review and provide direction to the Technical Working Group.

- For Canada, participation in this group will be at the Senior Assistant Deputy Minister level.
- For British Columbia, participation in this group will be at the Associate Deputy Minister and Chief Operating Officer or Assistant Deputy Minister level.
- For the First Nations Summit, participation in this group will be at the Executive Director level.

A **Technical Working Group** will be established to consider options to strengthen and improve treaty negotiations in British Columbia. This Technical Working Group will be comprised of working level officials.

- For Canada, participation in this group will be at the Director General level with Director and Senior Analyst level support.
- For British Columbia, participation in this group will be at the Executive Director level with Director and Senior Analyst support.
- For the First Nations Summit, participants in this group will be members of the First Nations Summit policy team.
- Subject matter experts may be brought in as necessary by all parties.

Mandate and Deliverables

The parties will develop proposals for improving and expediting treaty negotiations in British Columbia, in the following priority areas:

1. Process efficiencies, including mandate development, streamlining, and entry and exit criteria for claims;
2. The role and mandate of the British Columbia Treaty Commission;
3. The authorities for, and the administration and allocation of, negotiation support funding, including loans;
4. Shared territories and overlapping claims; and

5. Certainty.

In developing proposals for these priority areas, the Technical Working Group will take into account the recommendations directly related to improving and expediting the British Columbia treaty process contained in Mr. Doug Eyford's April 2, 2015 report on renewing the Comprehensive Land Claims Policy, and will consider recommendations made in the documents set out in, and any other relevant material.

Action Plan and Time Frame

The Technical Working Group will prepare an action plan, including clear milestones, by July 2, 2015 for review and approval by the Principals to guide the development of proposals for strengthening and improving British Columbia treaty negotiations. The action plan would also include proposals on what is required to support negotiating tables that wish to move towards the conclusion of treaties within an expedited timeframe.

This engagement will remain in effect until December 15, 2015, unless otherwise decided by consensus of the Principals.

Other Matters

Schedule of Meetings

1. The Technical Working Group will meet on an as-required basis in order to meet established milestones and timelines.
2. The Senior Officials Group will meet on a monthly basis. As circumstances require, members may request additional meetings.
3. The Principals will meet as required.

Record of Discussion

Concise joint records of discussion shall be maintained for the Principals' Meetings and Senior Officials Group by a secretariat comprised of three members of the Technical Working Group. No Record of Discussions will be prepared for Technical Working Group meetings.

Funding

Each of the parties is responsible for funding its participation in discussions.

Communications

1. In order to promote candid, open and respectful dialogue, meetings will be without prejudice and confidential. Only the Principals, in consultation with one another, will act as spokespeople.
2. The parties will develop mechanisms for ensuring the First Nations Summit representatives are able to communicate with their constituents, including First Nations Chief Negotiators, as needed during the engagement.
3. No social media or public communications will take place based on the meetings without joint consent.
4. A communications plan may be developed by the Principals for this engagement.

Annex B – Scoping Proposal

Currently, land and cash offers are provided by Canada and British Columbia to Stage 4 First Nations, generally after many years of negotiating.

To improve the efficiency of the negotiations process, it would be helpful to determine whether there is sufficient common ground among the parties on the main components of an agreement through a scoping discussion before carrying on with negotiations. If there is sufficient common ground and the parties agree, a scoping discussion could be followed up with a scoping proposal that could provide for the exchange of information regarding key mandate areas such as land and cash, and possibly fish and fiscal elements.

A **scoping proposal** is

- intended to build on information provided by a First Nation to Canada and British Columbia on its interests in land and cash, and possibly other elements e.g. fish allocation.
- not a detailed land and cash offer. In order to provide a scoping quantum proposal to a First Nation earlier in Stage 4, the land detail that would normally be included in a land and cash offer (all specific parcels, maps and exact quantums) would not be provided at the time of the proposal. This information would be provided later in a formal offer if the First Nation expresses interest in moving forward with such an offer.

Considerations

Currently, prior to making a formal land and cash offer, Canada and British Columbia need to do a significant amount of detailed land analysis work to demonstrate that the offer is within respective financial or other mandates. A scoping proposal, while not an offer, may require similar authorities in some cases. However, the intention is to explore whether these proposals can be made with streamlined approval processes.

Since the timeliness of a scoping proposal is key to making it useful, Canada and British Columbia would need to develop an agreed upon approach that meets the interests of their respective authorities, without compromising timeliness and the provision of useful information.

Note: For some negotiating tables, a formal land and cash offer may continue to be the best approach.

Annex C - Condensed Agreement-in-Principle

Introduction

Canada, British Columbia and First Nation Summit officials are exploring new approaches for improving and expediting negotiations in the British Columbia treaty process. The concept of "condensed" Agreements-in-Principle that focus on achieving agreement on the key elements of a treaty earlier in negotiations is being explored as a mechanism for streamlining negotiations and ensuring all parties' negotiating resources are employed constructively.

Analysis

There is a high volume of treaty negotiations being undertaken concurrently in the British Columbia treaty process. Most negotiations are currently in the Agreement-in-Principle stage. For various reasons, often associated with slow mandating and approval processes to support land, cash, fish and fiscal offers, negotiators spend significant time and resources in the Agreement-in-Principle stage negotiating detailed language for each of the chapters that would be contained in a Final Agreement.

A condensed Agreement-in-Principle could reduce the time and resources necessary to determine whether the parties have sufficient agreement to proceed to Final Agreement drafting. The process of negotiating towards a condensed Agreement-in-Principle can also support a more effective use of resources by assisting the parties in determining whether other approaches to reconciliation, such as incremental or sectoral agreements or treaties, would be warranted (e.g., where the parties are unable to agree to all the key terms of a comprehensive agreement, but determine there is common ground on a sub-set of the comprehensive agreement, such as fish or self-government).

Description

A condensed Agreement-in-Principle would focus on seeking agreement on the key terms of a treaty in sufficient detail to ensure a meaningful ratification of this key step in the negotiating process and to support discussions and consultation on the resolution of issues related to shared territory and overlapping issues. These terms could include:

- Capital transfer amount;
- Quantum and general location of land to be owned and governed by the First Nation;
- Recognition of the right to self-government and general listing of areas of Aboriginal jurisdiction;
- Framework for the relationship of laws;
- Fiscal arrangements to support implementation and self-government;
- Description of the territory and the nature of the First Nation's rights on lands that are not treaty settlement lands;

- Role in decision-making in respect of, and benefits derived from, lands that are not treaty settlement lands;
- Fisheries arrangements – e.g., access to resources and role in decision making;
- Techniques for reconciling pre-existing Aboriginal or Douglas Treaty rights with the rights set out in the treaty; and
- Process for addressing shared territory and overlap issues between Agreement-in-Principle and Final Agreement.

Annex D - Sectoral Agreements and/or Treaties

Introduction

Federal, provincial and First Nation Summit officials are exploring opportunities for supporting a broader array of approaches to reconciliation that address federal, provincial and First Nations interests in recognition, and provide clarity and predictability with respect to the exercise of Aboriginal and treaty rights. Sectoral agreements and/or treaties have been identified as a potential alternative to comprehensive treaties, or for use as part of a stepping stone approach to building comprehensive treaties.

Definition

The model for treaties negotiated to date under the British Columbia treaty process addresses the pre-existing section 35 rights of an Aboriginal group comprehensively in a single, constitutionally protected, tripartite agreement. Sectoral agreements could address sub-sets of pre-existing rights by providing for their recognition and exercise in agreements addressing a smaller sub-set of rights, or in defined subject areas. Sectoral agreements could be tripartite or bilateral and could be entered into with individual First Nations or groups of First Nations. As such, Aboriginal groups could be parties to more than one sectoral agreement.

Where the parties desire a greater degree of permanence and/or certainty over the exercise of rights, a sectoral agreement could be constitutionally protected as a treaty under Section 35 of the *Constitution Act, 1982.*

Examples of Sectoral Agreements and/or Treaties

Sectoral agreements and/or treaties could include:

- Fish agreements and/or treaties with a single First Nation setting out access to resources and a role in management.
- Fish agreements and/or treaties with multiple First Nations in a management area.
- Land ownership and management agreements and/or treaties with a single First Nation or aggregate.
- Core or comprehensive self-government agreements and/or treaties with a single First Nation or aggregate.
- Self-government sectoral agreements and/or treaties in areas such as health, education, child and family welfare, administration of justice, with multiple First Nations in a province, territory or region.

Annex E - Core Treaty

Introduction

Canada, British Columbia and First Nations have indicated an interest in exploring options for greater flexibility in the negotiating outcomes available through the British Columbia treaty process. A core treaty concept has been identified for further exploration as one means to address this interest. The core treaty concept set out in this report is also intended to address other interests the parties have identified as important in advancing and expanding opportunities for reconciliation (for example, recognition of existing section 35 rights, incremental opportunities that enable agreements to evolve more easily, and a focus on the post-treaty relationship).

Definition

The current treaty model provides for a comprehensive listing and exhaustive description of all section 35 rights and the parameters for their exercise by a First Nation after the effective date of a treaty. The core treaty would recognize existing section 35 rights, and in some areas set out only broad parameters for the exercise of those rights in the treaty – providing for the negotiation of supplementary agreements that could be renegotiated periodically to adapt to changing circumstances or interests of the parties.

What's in the Core

Determining the core components of the treaty should be responsive to the interests of the parties. Where parties desire greater certainty and less flexibility the description of the rights in the treaty will be more clearly and comprehensively articulated.

Suggested core components include:

- Recognition of Aboriginal title lands – a complete description of lands owned by the First Nation, expressed as recognized Aboriginal title lands as modified or supplemented by the description in the treaty.
- Recognition of the right to self-government including an articulation of the jurisdictions necessary for supporting governing institutions and for the use and management of lands owned by the First Nation.
    - The treaty should also include key components of the relationship of federal, provincial and First Nation laws (e.g., a concurrent law model).
    - The treaty could also include a list of additional areas of First Nation jurisdiction with limited or no details regarding implementation.
- Recognition of fishing rights – recognition of rights to fish for specific purposes with parameters for the exercise of the right, along with a commitment to negotiate a time-limited or evergreen supplementary agreement for additional operational details around issues such as:
    - Food social and ceremonial purposes;
    - Commercial purposes;
    - Subject to conservation; or

    - Role in fisheries management decision making.
- Recognition of rights to resources on lands within the First Nation's territory that are not treaty settlement lands, with broad parameters for exercise, and a commitment to negotiate a non-treaty agreement with:
    - Harvesting rights;
    - Rights to resource revenues or other benefits associated with development (e.g. commitments to Impact Benefit Agreements);
    - Rights to other resources; and
    - Role in lands and resource decisions.
- Technique for reconciling pre-existing Aboriginal or Douglas Treaty rights with the rights set out in the treaty.
- Dispute resolution mechanisms.
- Provisions respecting eligibility for treaty benefits.
- Evolution of the treaty.
- Other matters that the parties see as important to include in the core treaty.

<u>Supplementary Agreements/Non-Core Components</u>

Depending on the scope and extent of the core elements of the treaty, supplementary agreements could include:

- Fisheries agreements setting out details regarding allocation and structures for a First Nation's role in fisheries management and decision making.
- Self-government agreements addressing additional areas of jurisdiction, and program and service delivery agreements including fiscal arrangements.
- Resource access and benefits arrangements for lands and resources within the First Nation's territory, but not within treaty settlement lands.
- Consultation/accommodation and other shared decision-making arrangements for lands and resources within the First Nation's territory, but not within treaty settlement lands.

Annex F - Supporting the Resolution of Shared Territory and Overlap Issues

Introduction

In the context of treaty negotiations, Canada, British Columbia and the First Nations Summit are exploring approaches for recognizing and protecting the existing rights of First Nations not currently participating in treaty negotiations to facilitate reconciliation and assist in the resolution of shared territory and overlap issues.

Analysis

One of the key challenges in supporting the resolution of shared territory and overlap issues in treaty negotiations is the lack of incentive for a First Nation not currently participating in treaty negotiations to agree to a resolution that may prejudice its own legal claims in the future, or potentially result in less protection for its rights over a shared or overlapping territory compared to the rights of the treaty First Nation. Some First Nations have raised concerns that treaties create a “first past the post” system, indicating a perception that Canada and British Columbia will favour established treaty rights over existing Aboriginal or Douglas Treaty rights.

Potential Approaches – Overlapping Aboriginal Rights

Recognition of existing rights and consultation/shared decision-making and/or benefit sharing agreements with First Nations not currently participating in treaty negotiations: Where Canada and British Columbia are negotiating defined treaty rights over a territory that is shared or overlaps with another First Nation’s territory, the federal and/or provincial government could enter into an agreement recognizing the existing Aboriginal or Douglas Treaty rights with the First Nation that is not currently participating in treaty negotiations. Such an agreement could include: (a) processes for consultation, shared decision-making and/or land or resource use planning regarding decisions that could impact the recognized rights; and (b) benefit sharing from development in the shared or overlapping territory.

Negotiation of consultation/shared decision-making and/or benefit sharing agreements with First Nations that are negotiating and those that are not currently participating in treaty negotiations:

Similar to the approach set out above, the federal and provincial government could enter into agreements setting out processes for consultation, shared decision-making and/or benefit sharing agreements with both the treaty First Nation (addressing their treaty rights) and the First Nation not currently participating in treaty negotiations (addressing their existing Aboriginal or Douglas Treaty rights) over the territory where their rights are shared or overlap.

Potential Approach – Overlapping Aboriginal Title

Where the First Nations support this approach, negotiation of agreements that reflect shared ownership and governance of specific parcels of land by both First Nations with and without treaties

Some of the most intractable disputes in the British Columbia treaty process result from competing identification of Aboriginal title lands. Some of the most challenging disputes result from negotiations with First Nations who are sub-sets of larger historic collectives, where the larger collective asserts ownership of Aboriginal title on behalf of the smaller group. In order to facilitate the conclusion of a treaty over Aboriginal title lands identified by affiliated groups, Canada and British Columbia could negotiate agreements that reflect shared ownership and governance of specific parcels of land by both First Nations with and without treaties.