

# **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



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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<sup>1</sup> 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

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<sup>1</sup> 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 quantum) 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.

#### Supplementary Agreements/Non-Core Components

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.