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Summary Analysis of the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia*

Background

- Pursuant to Resolutions 2019-30, 2018-37, 2016-30, 2016-25, and 2016-02, the UBCIC Executive continues to prepare analysis and strategy for the UBCIC Chiefs Council regarding addressing outstanding concerns regarding the British Columbia Treaty Process (BCTC Process).

- A foundation of this work is that mechanisms for establishing proper relations between Indigenous peoples and the Crown – that are grounded in recognition of Indigenous sovereignty, self-determination, and legal orders – must be established and open to all First Nations. Such mechanisms must be consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) and must not infringe or impact the rights of other Nations.

- To further advance this work, the UBCIC Executive commissioned an expert review of the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (Policy) announced by Canada, BC, and the First Nations Summit in 2019, with a particular focus on how the Policy addresses the outstanding issue of shared territories and overlaps.

- This document provides a short summary analysis of the Policy. A second document provides a more detailed commentary on the UN Declaration, the Policy, and issues of shared territories and overlaps.

The Development of the Policy

- The Policy was co-developed by Canada, BC and the First Nations Summit (on behalf of First Nations within the BCTC Process) and was endorsed on September 4, 2019. The Policy presents itself as a reform of the framework for negotiations under the BCTC Process that applies to "Participating Indigenous Nations" (those who are negotiating modern treaties).

- In 2018 Canada began a process of legal policy reform through its commitment, made by the Prime Minister on February 14, 2018 to develop a recognition and implementation of rights framework. In response to that announcement, First Nations in BC, including through coordination by the First Nations Leadership Council, began the internal processes of building shared approaches, positions, and perspectives on the development of a potential framework. This included the passing of resolutions by the BCAFN, First Nations Summit, and UBCIC, All-Chiefs forums, the use of shared and respective legal experts including Louise Mandell Q.C., and the development and advancement of some shared positions.

  Such collective work amongst First Nations in BC, while always challenging, has many precedents, including on significant legal and policy shifts. Indeed, the successful passage of the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) in November 2019 is one such example.

- The federal governments' recognition and implementation of rights framework faced significant challenges throughout summer and early Fall 2018. Concerns began to be raised from multiple directions, including respected experts and leadership.

- The Policy – while certainly containing aspects and directions long advocated for by First Nations within the BCTC Process – appears to have begun to advance more formally as Canada's framework initiative was stalling. In December, 2018 the *Principals' Accord on Transforming Treaty Negotiations in British Columbia* was signed by Canada, BC, and the First Nations Summit. The Accord included the following commitment

> 14. Agree to work in collaboration to:
>
> a. advance legal and political reconciliation;
>
> b. ensure that the made-in-BC treaty negotiations framework and treaty mandates are reflective of the recognition, affirmation and implementation of Aboriginal title and rights, including the economic component and decision-making authority arising from Aboriginal title;
>
> c. address challenges that arise in treaty negotiations, including any issues that one or more Principals identify as a priority;

d. discuss the impact and application of any current and future recognition or reconciliation initiatives on the made-in-BC treaty negotiations framework; and

e. come together to support and celebrate the efforts and achievements of First Nations in British Columbia.

- While many of the shifts in the Policy have long been advocated for by many Nations, the Policy can also partially be seen as part following through on the *Accord* and the commitments within it.

  This apparent shift by Canada from a focus on developing broad and revitalizing legal and policy foundations inclusive of all First Nations, to focusing on policy development with smaller groupings of First Nations and within the context of existing processes, is not an unusual pattern. Indeed at this same time, BC had commenced a "Treaty Transformation" process which did not fully recognize that treaty-making in its true sense is the prerogative of the Crown and all First Nations – part of reconciling sovereignties and legal orders – and not the domain of any particular process.

- This conduct by the Crown – which is typical of past conduct that has been to the detriment of all First Nations in various ways – remains a lost opportunity. Effectively it risks reinforcing elements of Crown action that have been sources of division in the past. It is also a lost opportunity to build more principled, powerful, and shared processes for doing the real work of legal and policy reform that must transform all aspects of Crown – Indigenous relations. Importantly, at the same time, First Nations collectively continue to advocate for revitalized and principled approaches to Indigenous – Crown relations, including as seen in DRIPA.

Summary Analysis of the Policy

- The Policy includes language and principles that reflect progressive directions that have been increasingly occurring in Crown-Indigenous relations. This includes an explicit commitment to act based on recognition of rights, the affirmation of the standards of the UN Declaration including self-determination and the inherent right of self-government, the necessity to work together through co-development, and the broad affirmation of the need for principled approaches to negotiations, treaty-making, and reconciliation. In these, and other ways, the Policy responds to many critiques and concerns levelled by those both within and outside the BCTC Process.

- Yet, the degree to which the Policy will succeed in transforming treaty negotiations – including in particular to meet the standards of the UN Declaration – remains uncertain.

  Like many policies, the Policy is very broad in its language. There is a long history of the Crown interpreting progressive language in minimalist and even dishonourable ways. The meaning of statements regarding the UN Declaration and the recognition and implementation of Indigenous rights in the Policy can only really be measured through examining Crown conduct going forward regarding the Policy is implemented in

negotiations and treaty-making. It will be some time before the patterns of Crown conduct under the Policy can be fully analyzed.

- Some more specific observations can be made about whether the Policy represents shifts towards implementing the standards of the UN Declaration through examining how the Policy addresses long-standing historic concerns about the BCTC Process.

- There are four longstanding historic concerns that have been raised about the BCTC Process. These concerns have been raised by many Indigenous Nations, including those within and outside the BCTC Process, as well as the UBCIC and other Indigenous organizations.

    1. The Statement of Intent Stage: Two challenges exist with the SOI stage of the BCTC Process: (1) the acceptance to negotiate a treaty based on territorial maps without consideration of the Indigenous connection to the lands and resources in the territorial map area. This is one root cause of challenges of shared territories and overlaps; and (2) the acceptance to negotiate a modern treaty without full consideration of the issue of the proper title and rights holder, or the representative government of the proper title and rights holder.

    2. Overlaps and Shared Territories: Concerns regarding how treaties may impact the rights of neighbouring Nations, and the lack of requirement or clear mechanisms to resolve such issues prior to completion of treaty. There has been no application of the standard of free, prior, and informed consent to treaties that may impact neighbouring Nations.

    3. Crown Negotiation Mandates: Concerns regarding how Crown mandates are created, and the impoverished and unprincipled nature of those mandates, which often have fallen below clear legal minimums. Such mandates have hindered negotiations and completion of agreements.

    4. Extinguishment, Surrender, and Release: Crown demands that First Nations extinguish, surrender, and release their title and rights in order to complete a treaty.

- The Policy addresses some elements of these historic concerns. For example, the Policy:

    - Explicitly rejects the use of extinguishment and surrender. It is less clear on the use of releases. Extinguishment, surrender and release of title and rights should all be understood as inconsistent with the UN Declaration and the recognition and implementation of Indigenous rights.

    - States many commitments and principles that require significant change to Crown negotiation mandates. The specificity of some of the principles in the Policy should provide some foundation for pushing the Crown to follow-through on

changing some mandates. The Policy also includes commitment to the co-development of mandates.

- The Policy does not sufficiently address some elements of these historic concerns. For example, the Policy:

    - Makes no practical or principled change to how shared territories and overlaps will be addressed, though it does indicate paths of further work. This raises issues about consistency with the UN Declaration. For example, there is no requirement or discussion of seeking to obtain how free, prior, and informed consent will be achieved regarding potential infringements from a treaty. This appears inconsistent with emerging Crown conduct and standards in other contexts.

    - Makes no changes to the Statement of Intent stage. The issues remain of structuring a process without consideration of the Indigenous connection to the lands that will be subject of negotiations, and without clarity regarding the proper title and rights holder as well as representation of the proper title and rights holder.

- There remains the necessity and opportunity to establish principled foundations for negotiations that are to the benefit of, and open to, all First Nations. There also remains a need to do further policy and legal work that moves all past the divisions and delay caused by how the Crown has pursued negotiations over many decades. Recommendations for moving forward include those related to the establishment of new institutions, further consideration of a few issues within the Policy through an inclusive process, and developing and clarifying the scope and accessibility of other principled approaches to negotiations.