VOLUME 16, ISSUES 4-9 APRIL-SEPTEMBER 2018

FIRST NATIONS STRATEGIC BULLETIN

FIRST NATIONS STRATEGIC POLICY COUNSEL

Trudeau Government "Rights Recognition Framework" a Plan to Entrench 4th Level of Indigenous Government and Permanent Subjugation of First Nations

AFN National Chief Bellegarde gives an AFN Jacket to Prime Minister Justin Trudeau at AFN Special Assembly on Legislation March 1, 2018.

By Russell Diabo

In October 2015, a Liberal government came into power with promises of reconciliation and a new "***nation to nation***" relationship with Indigenous Peoples.

In a revealing interview that has gone unremarked, Prime Minister Justin Trudeau made clear what he meant by this "***nation to nation***" relationship. At a public event organized by "***The Economist***" magazine in Toronto in the summer of 2016, the interviewer asked the Prime Minister how his government was going to liberalize and deregulate inter-provincial trade within Canada. Trudeau responded:

> ***The way to get that done is not to sit there and impose, the way to have that done is to actually have a good working relationship with the Premiers, with municipal governments, with Indigenous leadership, because Indigenous government's are the fourth level of government in this country***. [emphasis added] [Source: http://www.cpac.ca/en/programs/headline-politics/episodes/47793606]

First Nations have never demanded a "***fourth level***" government after municipalities. First Nation demands for self-determination have sometimes, as in the **Penner Report on Indian Self-Government** in 1980s, been characterized as third-order government, with jurisdictional authority alongside the provincial and federal governments. But this Liberal PR term is nothing but a cover for a termination agenda, as with so much else about the Trudeau government's plans.

As the Liberal government pushes ahead with their so-called "**Rights *Recognition Framework***", aiming to have a bill before Parliament by December, First Nation Peoples need to see through the spin and get straight about the threat to their Inherent and Treaty Rights.

Special points of interest:

- **Trudeau's "Nation to Nation" Plan is 4th Level Subjugation After Municipalities**
- **Indigenous Lawyers Call on PMJT to "Reset" Process and Start Over**
- **Federal Response to Indigenous Lawyers is to Push Ahead and Release an "Overview" of "Recognition Framework"**

Inside this issue:

'Permanent Subjugation' continued from page 1

Pierre & Justin Trudeau, father & son.

The White Paper Redux

It should be noted that when the term "***Indigenous Governments***" is used by the federal politicians and officials it does not refer to band's under the **Indian Act** because the federal government considers **Indian Act** bands to be non-governing groups:

> ***"Indigenous Governments" are defined as those Indigenous Governments operating under various self-government regimes, including:***
>
> ***- A comprehensive land claim agreement which includes a comprehensive self-government component;***
>
> ***- A comprehensive agreement on self-government; or***
>
> ***- A legislated comprehensive self-government arrangement.*** **[Source: DRAFT Self-Government Fiscal Policy, Proposal for Federal Review, Collaborative Fiscal Policy Development Process, December 13, 2017]**

"While the majority of Indian Act bands in Canada have not entered into self-government agreements or "modern treaties", hundreds of bands are negotiating or have already opted out of many sections of the Indian Act into the only alternative federal legislation"

While the majority of **Indian Act** bands in Canada have not entered into self-government agreements or "***modern treaties***", hundreds of bands are negotiating or have already opted out of many sections of the **Indian Act** into the only alternative federal legislation for social and economic development purposes that the federal government has allowed, some of the legislative options include:

> **First Nations Fiscal and Statistical Management Act**
>
> **First Nations Land Management Act**
>
> **First Nations Commercial and Industrial Act**
>
> **First Nations Oil and Gas and Moneys Management Act**

In addition to these legislative options to go "***beyond the Indian Act***", since 2015, the Trudeau government has created a new category of negotiations:

> ***Canada has been co-developing mandates for discussion with Indigenous partners at over 70 Recognition of Indigenous Rights and Self-Determination tables with over 300 communities representing over 800,000 Indigenous people.*** [Emphasis added]

Former PM Chretien & current PM Trudeau

This diversity of relationships between First Nations and the federal and provincial governments (not to mention the Metis and Inuit) is what the federal government is trying to manage and control through the top down approach in developing the "***Recognition Framework***" that Prime Minister Justin Trudeau announced in Parliament on February 14, 2018.

For the last three years the federal government has bypassed First Nation Peoples and taken unilateral actions in developing the "***Recognition Framework***", such as: the imposition of the **federal 10 Principles on Indigenous Relationships**; the dissolving of the **Department of Indian Affairs** and replacement with two new federal departments; a secret law and policy review; agreements and increased funding with the three National Indigenous Organizations (First Nations, Metis, Inuit) to include them into the federal process; and now the creation of a "***Reconciliation***" Cabinet Committee, chaired by Jim Carr, the federal Minister of

'Permanent Subjugation' continued from page 2

International Trade Diversification (read pipelines).

It was Jim Carr, who on December 1, 2016, as the federal Minister of Natural Resources, who threatened the use of force on pipelines when he said:

> ***If people choose for their own reasons not to be peaceful, then the government of Canada, through its defence forces, through its police forces, will ensure that people will be kept safe…We have a history of peaceful dialogue and dissent in Canada. I'm certainly hopeful that that tradition will continue. If people determine for their own reasons that that's not the path they want to follow, then we live under the rule of law.***

Jim Carr while he was federal Minister of Natural Resources.

As a candidate in the last AFN election for National Chief I knew the Trudeau government was campaigning for the incumbent, Perry Bellegarde, to be re-elected, or for one of the other status quo candidates, anyone other than me, Minister Bennett was even blatantly campaigning in the Alberta Chiefs' Caucus for them to "***move forward***" with the "***Recognition Framework***" on election day in Vancouver. **[Source: Audio Recording]**

In my opinion, Perry Bellegarde's direct participation and partnership with the Prime Minister is a big part of the federal plan to get the "***Recognition Framework***" passed into law in 2019, which is also the **50th Anniversary of the 1969 White Paper on Indian Policy** a policy based on the **Trudeau-Chretien Termination Doctrine**.

"Perry Bellegarde's direct participation and partnership with the Prime Minister is a big part of the federal plan to get the "Recognition Framework" passed into law in 2019, which is also the 50th Anniversary of the 1969 White Paper on Indian Policy a policy based on the Trudeau-Chretien Termination Doctrine"

The **Trudeau-Chretien Doctrine** is to remove the legal distinctions between status Indians and Canadians, based upon egalitarian arguments. In a post-1982 constitutional context that means getting First Nations to consent to a "***new***" relationship to close the "***regulatory gap***" between "***Indians and lands reserved for the Indians***" and provincial/municipal governments, through agreements and now legislation that define the meaning of self-government and self-determination.

The Trudeau government is now stating the impending "***Recognition Framework***" will be "***opt-in***" enabling legislation, meaning once a band opts into the "***Recognition Framework***" they consent to the legislation. **Indian Act** bands will be coerced/convinced through the new fiscal relationship to enter into new ***recognition agreements***.

National Policy Forum on Affirming Rights, Title and Jurisdiction

On July 26, 2018, the day after the AFN election in Vancouver, the AFN Chiefs-in-Assembly gave direction through Resolution 39/2018, **First Nations Determination to the Path to Decolonization**. This Resolution calls for the following:

1. ***Confirm that only First Nations can determine the path to decolonization and reconciliation.***
2. ***Establish a First Nations' led process to draft a new Royal Proclamation binding on the Crown in right of Canada and all of the provinces and territories.***
3. ***Call on Canada to set-aside its Principles Respecting the Government of Canada's Relationship with Indigenous Peoples (Ten Principles) as the basis of the relationship going forward. Regions such as Ontario and British Columbia have their own principles that must be respected in their***

'Permanent Subjugation' continued from page 3

relationships going forward.

4. ***Halt the "Recognition and Implementation of Rights" process going forward and insist that Canada participates in a First Nation-led negotiation with Canada to mutually establish principles to observe and implement the United Nations Declaration on the Rights of Indigenous Peoples, including a joint action plan for such implementation.***

5. ***Call on Canada to confirm it is committed to an independent international arbitrator to resolve disputes between Treaty partners and within the Nation-to-Nation relationship.***

6. ***Call on Canada to immediately convene a meeting with First Nations to discuss this issue.***

"The Agenda of the September 11 -12, 2018, AFN National Policy Forum on Affirming Rights, Title and Jurisdiction was controlled and developed by the AFN National Chief, Perry Bellegarde and the AFN Executive Committee, which is why the AFN Forum failed to significantly address all of the elements in the AFN Resolution 39/2018"

The Agenda of the September 11-12, 2018, **AFN National Policy Forum on Affirming Rights, Title and Jurisdiction** was controlled and developed by the AFN National Chief, Perry Bellegarde and the AFN Executive Committee, which is why the AFN Forum failed to significantly address all of the elements in the **AFN Resolution 39/2018**.

Instead of the AFN Forum Agenda leading off with First Nation speakers to discuss the decolonization elements of the AFN Resolution the focus was on the Trudeau government's "***Recognition Framework***" and the Minister for Bellegarde's Re-Election, Carolyn Bennett.

So, on September 11, 2018, the first day of the AFN National Forum, Crown-Indigenous Relations Minister Carolyn Bennett, flanked by her Senior Officials, delivered a speech to the AFN Forum delegates on the proposed federal "***Recognition Framework***" which prompted a delegate, Judy Sayers—who is a lawyer—to tell Minister Bennett, following her speech:

> ***...if you translated your speech into a paper, I think it would be a lot more acceptable than the one that we got and let me tell you why. You talk about the right of self-determination and that does mean that Canada gets out of the way because self-determination means that we, as a nation, decide our political status, our economic, social and cultural development. The paper you've presented does not do that.***
>
> ***You want us to come before you and say "Recognize us as a first nations government", that is really insulting. That is just not what recognition means and it's not what nation-to-nation means and then you go further on to say that if you can't decide it, we'll go to a committee. Why does a committee get to decide what our nation is? We tell you. You don't tell us. Nothing that – should allow you to do that, nor should we be told that we have the legal capacity of a natural person. We are a nation. Nations don't need to be legal persons to carry out what we need to do and I think that, if you're willing to be changing that whole recognition of having to***

Dr. Judtih Sayers, President of Nuu-Chal-Nulth Tribal Council

'Permanent Subjugation' continued from page 4

> ***come and be recognized by your government, we would be a lot further ahead, because what this reminds me of is the private member's bill that Jody Wilson-Raybould, Senator Gerry St-Germain and Tony (inaudible) put together, just the recognition of self-government. That's not our document. That was their document.***
>
> ***You need to listen to people and when I see you talk to hundred and ten different people or 101 or whatever it was, nations, they didn't tell you this stuff. This must have come from your government and I also want to ask you if – are we not moving past the status quo? Because you know, you keep on talking about us having to prove our aboriginal title. We have to prove our aboriginal rights, they haven't been proven? I thought we're recognizing rights as defined by our people, that we don't have to go back to court, that needs to be stated in that document, not going back to court because if we keep on going back to court, we're going to tie up the court system and that doesn't help our nations.***

The paper Judy Sayers was referring to is a federal document publicly released only a day before on September 10, 2018 entitled "***Overview of a Recognition and Implementation of Indigenous Rights Framework***". This document is a revision of a previous version of the "***Framework***" released in July 2018. [see text of federal "Overview" on page 18 of this Newsletter]

Exchange of Letters Between Indigenous Lawyers & Trudeau Government

In fact, the federal "***Overview of a Recognition and Implementation of Indigenous Rights Framework***" was released on September 7, 2018, to an "***Indigenous Legal Expert Group***" via Indigenous lawyer Mary Ellen Turpel-Lafond.

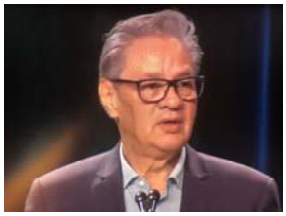
Accompanying the federal "***Overview***" document was a September 7, 2018, response letter from Minister Bennett to an August 21, 2018, letter sent to Prime Minister Justin Trudeau from Indigenous lawyers; Wilton Littlechild, Ed John and Mary Ellen Turpel-Lafond. [see full text of letter on page 9 of Newsletter]

The Indigenous lawyer's letter to the Prime Minister of August 21, 2018 raised serious concerns about the federal "***Engagement Process***" and the control of the drafting of documents by Senior federal officials. It called for a "***reset***" of the process the letter specifically made the following points to the Prime Minister:

> ***The engagement process since rolled out has fallen short…From the viewpoint of reflecting existing human rights, Treaties, constitutional law, and international norms and principles, the process does not align with the commitment you described. The substance of positions and approaches in the words, documents and processes which were reviewed by Indigenous legal experts over the past five months, were considered by the experts convened as legally inaccurate, short-sighted, and reflecting ongoing bureaucratic control and con-***

Mary Ellen Turpel-Lafond, Member, Indigenous Lawyers Expert Group

"The Indigenous lawyer's letter to the Prime Minister of August 21, 2018 raised serious concerns about the federal "Engagement Process" and the control of the drafting of documents by Senior federal officials. It called for a "reset" of the process"



Ed John, Member, Indigenous Lawyers Expert Group

Wilton Littlechild, Member, Indigenous Lawyers Expert Group

'Permanent Subjugation' continued from page 5

straint of rights.

Pressing ahead in this manner will result in setting back the work of recognition and implementation of Indigenous rights and Treaties.

... We urge you to take a look at the current path, and reset. This work needs to be placed on a proper legal, international and domestic human rights and constitutional footing. The Minister of Justice and Attorney General whom you have also mandated on this initiative must be engaged to provide the legal advice and direction for the Crown. We note that under section 4 of the Department of Justice Act, the Minister is the legal advisor to the Government and she must "see that the administration of public affairs is in accordance with the law."

Absent this, our concern is that the current initiative will only give rise to more litigation as it does not appear to be "in accordance with the law" of Canada. If this were to occur, we feel the initiative as reflected in current federal documents will undermine the intent of the Framework you contemplated on February 14, 2018.

...With greatest respect, we urge you to revise this particular form of "engagement" process and place it on a proper path. We are most willing to engage directly with your Ministers, whom you have mandated, including the Justice Minister and Attorney General and senior legal officials on these matters.

"Prime Minister Justin Trudeau did not respond to the August 21, 2018, letter from the Indigenous lawyer's, instead Crown-Indigenous Relations Minister, Carolyn Bennett, sent a response letter on September 7, 2018, to Indigenous lawyer's Wilton Littlechild, Ed John and Mary Ellen Turpel-Lafond"

Prime Minister Justin Trudeau did not respond to the August 21, 2018, letter from the Indigenous lawyer's, instead Crown-Indigenous Relations Minister, Carolyn Bennett, sent a response letter on September 7, 2018, to Indigenous lawyer's Wilton Littlechild, Ed John and Mary Ellen Turpel-Lafond, thanking them on behalf of the Prime Minister for their "***extremely valuable observations and recommendations***". [for full text of letter see page 13 of this Newsletter]

Carolyn Bennett, Federal Minister of Crown-Indigenous Relations

Minister Bennett also responded:

We want to put behind us the requirement for First Nations, Inuit, and Metis to claim their rights and then prove their rights in court. We want to replace the policies, attitudes, and language of the past with a legal and policy framework based on the recognition of Indigenous rights, respect, cooperation, and partnership.

As you know, this has been a whole-of-government project, with weekly meetings at the deputy minister level that included Justice Canada.

We agree that the recognition of rights cannot be contingent on the conclusion of a negotiation process. In-

'Permanent Subjugation' continued from page 6

Prime Minister Justin Trudeau & AFN National Chief Perry Bellegarde

> ***digenous rights are inherent and should be recognized at the outset. The Government of Canada must work together with First Nations, Inuit, and Metis to determine how to affirm and implement those rights.***
>
> ***The fundamental connection between Indigenous Peoples and the land must be an important component of this Framework. We must make space for Indigenous Peoples to be recognized as nations and to exercise jurisdiction. We must fulfill the promise of all treaties, both historic and modern. Rights can exist independently from Crown recognition, and space must be made for Indigenous nations and collectives to immediately occupy certain jurisdictions. We must be accountable for implementing treaties and recognizing rights. These are foundational pillars of the Framework and pillars on which we agree.***
>
> ***… I am pleased to share with you a revised engagement document based on your feedback and that of Indigenous technicians, leadership, and government departments, including the invaluable input of Justice Canada. Officials will be distributing the document to First Nation, Inuit, and Metis partners who have been involved in the engagement sessions and provincial and territorial governments. The document will also be posted online.***

While Minister Bennett's letter seems to address some of the concerns expressed by the Indigenous lawyers in their August 21, 2018, letter, the revised federal "***engagement document***" that came with the Minister's letter on September 7, 2018 doesn't—to paraphrase Judy Sayers—match the Minister's words. The Trudeau government is moving full steam ahead!

Conclusion

The September 10, 2018, federal document "**Overview of a Recognition and Implementation of Indigenous Rights Framework"** has been analyzed and a summary released by the **Indigenous Activists Networks Defenders of the Land, Truth Campaign, Idle No More** in an **INFORMATION SHEET #1** (see page xx)

During the second day of the AFN National Forum Indigenous lawyer Willie Littlechild informed the delegates that the **Indigenous Lawyers Expert Group** had sent Drafting Instructions to the federal government and other parties (presumably the "***other parties***" are the Metis National Council and the Inuit Tapiriit Kanatami, since the "***Recognition Framework***" legislation is to be applied to First Nations, Metis and Inuit, despite the federal so-called "***distinctions based***" approach).

Following her appearance at the AFN National Forum, Crown-Indigenous Affairs Minister, Carolyn Bennett, has reportedly said to media that her government wants to introduce the "***Recognition* Framework**" into Parliament before Christmas break and that the **Standing Committee on Indigenous Affairs** could hold hearings in the New Year. Minister Bennett also said to media that her government wold consider amendments to the "***Recognition Framework***" legislation at

"Crown-Indigenous Affairs Minister, Carolyn Bennett, has reportedly said to media that her government wants to introduce the "Recognition Framework" into Parliament before Christmas break and that the Standing Committee on Indigenous Affairs could hold hearings in the New Year"

'Permanent Subjugation' conclusion from page 7

the Standing Committee on Indigenous Affairs.

The problem with the federal legislative process is the Liberal majority government controls the House of Commons process and can ram through the version of the law they want to fit with their version of the federal Termination Plan.

The AFN has said they will hold their **Special Chiefs' Assembly** on December 4-6, 2018, so the AFN and federal calendars appear to coincide for introduction of a "***Recognition Framework***" Bill in early December, probably with First Nation, Metis and Inuit cheerleaders publicly supporting the Bill and the Trudeau government.

<u>If First Nation Peoples are truly concerned about their lands, Treaties, People and future generations, then maybe First Nation Peoples should plan on responding forcefully in December or before?</u>

"If First Nation Peoples are truly concerned about their lands, Treaties, People and future generations, then maybe First Nation Peoples should plan on responding forcefully in December or before?"

Indigenous Lawyers Letter to Prime Minister Justin Trudeau

Prime Minister Justin Trudeau upset with FSIN Chiefs in Saskatoon.

Email: justin.trudeau@parl.gc.ca

August 21, 2018

Rt. Honourable Prime Minister Justin Trudeau:

On August 10, 2018, we convened as Indigenous legal experts. Some of us as individuals have been consulted by the Hon. Minister Carolyn Bennett as an informal "reference group" over the past five months on Indigenous Rights Recognition. Our gathering of Indigenous legal experts was attended by leading legal experts from across Canada. Convened by Professor M.E. Turpel-Lafond, Director of the Indian Residential School Centre for History and Dialogue at the University of British Columbia, the session was held on the Musqueam First Nation territory and co-chaired by legal experts former TRC Commissioner Wilton Littlechild and Grand Chief Edward John. We were joined by others, notable among us was Commissioner Paul Chartrand, a leading Metis scholar, lawyer and the former Commissioner for the Royal Commission on Aboriginal Peoples.

The Indigenous legal experts gathered to exchange their views in their personal capacity as experts, scholars or long-term practitioners on Indigenous legal and constitutional issues and human rights. The subject of our discussion was your Government's initiative to develop an Indigenous Rights Recognition Framework. Prior to this meeting, a series of concerns regarding the engagement process underway were shared. While we appreciate the extensive work undertaken by your Ministers and senior officials, the emerging and growing concerns brought us together to delve deeper into the issues. Our overarching message is that there are substantial Indigenous peoples' concerns with what we have heard and seen over a number of months from senior government officials, and that the direction and elements of the Framework are not aligning with the clear messages in your speech of February 14, 2018. It is our view that this initiative as it is emerging must be reconsidered and be reset on a clear and proper legal foundation, with proper mechanisms for the full and effective engagement of Indigenous peoples.

"It is our view that this initiative as it is emerging must be reconsidered and be reset on a clear and proper legal foundation, with proper mechanisms for the full and effective engagement of Indigenous peoples"

We write to you in our private and personal capacity. While we are sending these comments, we are not purporting to represent the complete views of all Indigenous legal experts, only to relay some of the concerns aired at the session. We also have encouraged other Indigenous legal experts to write to you your Ministers and senior officials directly.

Your speech to the House of Commons on February 14, 2018, pointed to a new direction involving fundamental and transformative change grounded in the recognition and implementation of inherent rights and title. Your words described this endeavor as a "comprehensive and far-reaching" process:

> One of those questions is how we, as a government, recognize and implement the rights of Indigenous Peoples. We've seen those questions grow in number and intensity in just this past week, as more and more Canadians come to grips with the fact that we have so much more work to do….More work to push back against the systemic racism that is the lived reality for so many Indigenous Peoples. More work to deal with the fact that too many feel and fear that our country and its institutions

Prime Minister Justin Trudeau wearing a headdress.

'Indigenous Lawyers to PM' continued from page 9

Alberta Premier Rachel Notley & Prime Minister Justin Trudeau.

> will never deliver the fairness, justice, and real reconciliation that Indigenous Peoples deserve….To truly renew the relationship between Canada and Indigenous Peoples — not just for today, but for the next 150 years — we need a comprehensive and far-reaching approach. We need a government-wide shift in how we do things…We need to both recognize and implement Indigenous rights because the truth is, Mr. Speaker, until we get this part right, we won't have lasting success on the concrete outcomes that we know mean so much to people. (Rt. Hon. Prime Minister Justin Trudeau, House of Commons, Feb. 14, 2018)

"The engagement process since rolled out has fallen short of this far-reaching direction. From the viewpoint of reflecting existing human rights, Treaties, constitutional law, and international norms and principles, the process does not align with the commitment you described"

The engagement process since rolled out has fallen short of this far-reaching direction. From the viewpoint of reflecting existing human rights, Treaties, constitutional law, and international norms and principles, the process does not align with the commitment you described. The substance of positions and approaches in the words, documents and processes which were reviewed by Indigenous legal experts over the past five months, were considered by the experts convened as legally inaccurate, short-sighted, and reflecting ongoing bureaucratic control and constraint of rights.

Pressing ahead in this manner will result in setting back the work of recognition and implementation of Indigenous rights and Treaties.

The engagement process has yet to produce clear focus, despite the input of many of us. The basic materials we have been provided appear to misstate foundational legal and constitutional concepts. Specifically, views expressed to us by senior officials about the meaning of co-development, recognition, implementation, Indigenous laws, Indigenous jurisdiction Treaties, Aboriginal title, engagement, consultation, free prior and informed consent, self-determination and self-government, among other topics are not legally correct, nor could they serve as a foundation for new recognition and implementation legislation or policy. From our perspective, the initiative fails to appreciate or understand that legal rights have already been recognized by the Courts in Canada in a multitude of cases where inherent Aboriginal and Treaty rights have been consistently affirmed for Aboriginal peoples and Treaty First Nations peoples.

It is difficult for us to comprehend the sources for these government materials and the validity of positions advanced by Crown officials. We are left with a distinct impression that there is an absence of a proper legal, constitutional, normative, jurisprudential and theoretical context, and as a result there are basic deficiencies in documentation, development of options and dialogue. This "engagement" has drifted away from the promise for a comprehensive and transformative moment.

Prime Minister Justin Trudeau receiving a blanket from AFN Nat'l Chief Bellegarde.

The experts attended many of the regional or policy sessions and held discussions with senior officials about the existence of Aboriginal and Treaty rights as legal rights. We believe some of these senior officials do not have a full appreciation of or proper briefings on basic constitutional and international legal issues relating to these human rights matters. The feedback provided on written material in advance to this effect does not appear to be considered, and those materials have not improved over time, leading us to question whether there is proper legal input, feedback and guidance to the process underway. It is difficult for Indigenous peoples to feel safe or to trust the dialogue on rights recognition, affir-

'Indigenous Lawyers to PM' continued from page 10

mation and implementation when Crown senior officials continue to deny Indigenous peoples' inherent rights and freedoms.

We urge you to take a look at the current path, and reset. This work needs to be placed on a proper legal, international and domestic human rights and constitutional footing. The Minister of Justice and Attorney General whom you have also mandated on this initiative must be engaged to provide the legal advice and direction for the Crown. We note that under section 4 of the **Department of Justice Act**, the Minister is the legal advisor to the Government and she must "see that the administration of public affairs is in accordance with the law."

Absent this, our concern is that the current initiative will only give rise to more litigation as it does not appear to be "in accordance with the law" of Canada. If this were to occur, we feel the initiative as reflected in current federal documents will undermine the intent of the Framework you contemplated on February 14, 2018.

A pointed example is the recurring positions presented by CIRNA officials and in the prepared materials that suggest the rights of Indigenous self-government and self-determination are contingent on government recognition of whether there are legitimate "rights holders" or that rights in order to exist must be negotiated. This is a serious mistake. This is the model and mentality of the Indian Act. Government can acknowledge the existence of Indigenous rights as legal rights, and the collective rights and title holders, but it is not proper for it to gate-keep, define, or pre-determine this matter in a unilateral manner. Basic legal issues around representation and rights and title holders, and Treaty peoples, have been long resolved and the only issue of concern is who can seek to assert or seek to enforce those rights when competing representatives emerge –hardly a core concern or deserving such a degree of attention in this process (see 2018 BCCA 276 **Hwlitsum First Nations v. Attorney General Canada**). Further, this challenge is one that was created by Crown governments imposing colonial legal constructs on Indigenous peoples – including trying to define who we are and how we speak for ourselves. This challenge cannot be resolved by doing that again in a new way.

More troubling, we have been informed that this "recognition framework" will result in rights recognition only *after* the conclusion of a negotiation process. This is inconsistent with the major rulings of the Supreme Court of Canada and is a *denial* of rights approach which you renounced on February 14, 2018. For government to refer to or even tolerate discussion of such a flawed, outdated, and legally unsound approach, is harmful.

Aboriginal and Treaty rights are not conditional or inchoate, nor do they only become legal rights after the conclusion of a negotiated agreement. The Government of Canada must clearly recognize and acknowledge pre-existing and inherent Aboriginal and Treaty rights because they are existing legal rights and they are constitutionally recognized, affirmed and protected. There exists a legal duty on the federal Crown to negotiate in good faith and to act with honour toward Indigenous peoples - these are foundational long-standing Canadian legal principle.

Recognition of inherent Aboriginal rights, title and Treaty rights is not creating new legal obligations, but rather affirms existing obligations—as was already clearly acknowledged in the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples released in 2017. The process we contem-

Former PM Jean Chretien & Jody Wilson-Raybauld, Federal Justice Minister

"we have been informed that this "recognition framework" will result in rights recognition only after the conclusion of a negotiation process. This is inconsistent with the major rulings of the Supreme Court of Canada and is a denial of rights approach which you renounced on February 14, 2018"

PM Justin Trudeau announcing "Recognition Framework" in HoC, Feb. 14, 2018.

'Indigenous Lawyers to PM' conclusion from page 11

L to R: CIR Minister Carolyn Bennett, PM Justin Trudeau, Justice Minister Jody Wilson-Raybould

"The Rights Recognition Framework initiative must embrace this higher objective of supporting a future Canada grounded in respect for Indigenous self-determination through consultation and co-operation and free, prior and informed consent, and respect for Treaties"

plated following these developments was one consistent with cooperative federalism and is supported by Articles 3, 19, 25-32, and 37 of the **United Nations Declaration on the Rights of Indigenous Peoples**.

In 1998, in the **Secession Reference**, the Supreme Court of Canada noted that the federal system was only partially complete and the written constitution of Canada does not provide, in the narrow sense, the entire picture of Canada—it is a living tree and it grows and evolves with our knowledge and awareness of rights, history and modern challenges. For First Nations, the long and terrible shadow of the **Indian Act** has cast much harm. There should be no place in Canadian federalism for any construction of heads of powers other than through the understanding that the **Constitution of Canada** is a living tree, capable of change, which must include moving beyond the colonial imposition of laws, policies and practices on the Indigenous peoples of Canada. The Rights Recognition Framework initiative must embrace this higher objective of supporting a future Canada grounded in respect for Indigenous self-determination through consultation and co-operation and free, prior and informed consent, and respect for Treaties.

The adoption and full endorsement of the **United Declaration on the Rights of Indigenous Peoples** by your government has been a major step forward to denounce these past approaches. Taking legislative measures to bring Canadian law and policies in conformity with the Declaration is "the framework" for action as was called for by the Truth and Reconciliation Commission. The promise of your speech on February 14, 2018, was a further necessary commitment to take the legislative steps forward to entrench the recognition and implementation of rights throughout government.

With greatest respect, we urge you to revise this particular form of "engagement" process and place it on a proper path. We are most willing to engage directly with your Ministers, whom you have mandated, including the Justice Minister and Attorney General and senior legal officials on these matters.

Thank you for your attention.

(original signed by)

Wilton Littlechild

Grand Chief of the Treaty 6 Confederacy

Grand Chief Edward John

Former Commissioner of the Truth and Reconciliation Commission

INAC Minister Carolyn Bennett at Standing Committee on Aboriginal Affairs.

Mary Ellen Turpel-Lafond (Aki-Kwe)

Professor of Law, Director UBC Residential School Centre for History and Dialogue

cc. Hon. Carolyn Bennett, Crown-Indigenous Relations and Northern Affairs Canada

Hon. Jane Philpott, Indigenous Services Canada

Hon. Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada

Response Letter From Crown-Indigenous Affairs Minister Carolyn Bennett to Indigenous Lawyers

September 7, 2018

Grand Chief Wilton Littlechild
Confederacy of Treaty Six First Nations
17533-106 Avenue
EDMONTON AB T5S 1 E7

wilton.littlechild@xplornet.ca

Grand Chief Edward John
First Nations Summit
First Nations Leadership Council
1200 - 100 Park Royal South
WEST VANCOUVER BC V7T 1 A2

edjohn@fns.bc.ca

Ms. Mary Ellen Turpel-Lafond
Professor of Law
Allard School of Law
1822 East Mall
VANCOUVER BC V6T 1Z1

Turpel-lafond@allard. ubc. ca

Dear Grand Chief Littlechild, Grand Chief John, and Ms. Turpel-Lafond:

The Prime Minister has asked me to thank you for your letter and your extremely valuable observations and recommendations. We are committed to ensuring that the Framework reflects Government of Canada commitments to enshrining the recognition and implementation of Indigenous rights into legislation and policy in a distinctions-based approach.

We want to put behind us the requirement for First Nations, Inuit, and Metis to claim their rights and then prove their rights in court. We want to replace the policies, attitudes, and language of the past with a legal and policy framework based on the recognition of Indigenous rights, respect, cooperation, and partnership.

As you know, this has been a whole-of-government project, with weekly meetings at the deputy minister level that included Justice Canada.

We too value the importance of a strong constitutional foundation for the Framework. We see the need to put the pervasive paternalistic approach behind us and move forward with a legal framework that will truly recognize and implement Indigenous rights and accelerate the progress of self-determination and the nation-to-nation relationships with First Nations, government-to-government relationships with Metis, and the Inuit-Crown relationship.

We agree that the recognition of rights cannot be contingent on the conclusion of a negotiation process.

'Minister Bennett to Indigenous Lawyers' conclusion from page 13

Joe Wild, Senior Assistant Deputy Minister, Treaties and Aboriginal Governance, Crown-Indigenous Relations.

Indigenous rights are inherent and should be recognized at the outset. The Government of Canada must work together with First Nations, Inuit, and Metis to determine how to affirm and implement those rights.

The fundamental connection between Indigenous Peoples and the land must be an important component of this Framework. We must make space for Indigenous Peoples to be recognized as nations and to exercise jurisdiction. We must fulfill the promise of all treaties, both historic and modern. Rights can exist independently from Crown recognition, and space must be made for Indigenous nations and collectives to immediately occupy certain jurisdictions. We must be accountable for implementing treaties and recognizing rights. These are foundational pillars of the Framework and pillars on which we agree.

Indigenous Peoples are best placed to decide for themselves their path forward to self-determination, and the optimal processes to be recognized should be developed in collaboration with Indigenous Peoples. There can be no place for prescriptive approaches in the Framework. We must create the space for First Nations, Inuit, and Metis to develop or rebuild their systems of governance based on their legal traditions, practices, and systems of governance.

"I am pleased to share with you a revised engagement document based on your feedback and that of Indigenous technicians, leadership, and government departments, including the invaluable input of Justice Canada. Officials will be distributing the document to First Nation, Inuit, and Metis partners who have been involved in the engagement sessions and provincial and territorial governments"

I am pleased to share with you a revised engagement document based on your feedback and that of Indigenous technicians, leadership, and government departments, including the invaluable input of Justice Canada. Officials will be distributing the document to First Nation, Inuit, and Metis partners who have been involved in the engagement sessions and provincial and territorial governments. The document will also be posted online.

Once again, I want to thank you for your expertise, vision, and values and for your candour.

As you know, this is an iterative process, and the Framework will continue to evolve with the invaluable input from you and others. We want to get this right, and with your help, I know we can.

Sincerely,

(Original Signed By)

Hon. Carolyn Bennett, M.D. , P.C., M.P.

Crown-Indigenous Relations Minister Carolyn Bennett at Manitoba Metis Federation.

David Chartrand, President of Manitoba Metis Federation & Carolyn Bennett, Crown-Indigenous Relations Minister sign an agreement.

Indigenous Activists Networks—Information Sheet #1

Defenders of the Land, Truth Campaign, Idle No More

INFORMATION SHEET #1

Federal Recognition and Implementation of Rights Framework

What Is It?

On February 14, 2018, Prime Minister Justin Trudeau announced his plan to "***chart a new way forward***" for the federal government by creating a new **Recognition and Implementation of Indigenous Rights Framework** to include new laws and policies to define what federal "***recognition***" means in a law adopted by Parliament and what the federal government will and won't include in "***negotiations***" of Indigenous Rights with First Nations, Metis and Inuit.

Top Down-Secretive Approach:

For the past three years the Trudeau government has operated in secret, using public relations techniques to hide its real intentions about their renewed federal-First Nations Termination Plan from our First Nation Peoples, the media and the public.

The Trudeau government has manipulated the term "***Nation-to-Nation***" by going around our Original Nations and negotiating two top down agreements with the **Assembly of First Nations** (**AFN**). One on developing a new funding policy for First Nations and one on shared priorities with the Trudeau government.

The Trudeau government also created a new **Federal-AFN Cabinet Committee** to include **AFN** into the federal decision-making process to develop new law and policy. The **AFN** budget has been substantially increased to implement these two agreements with the federal government.

The Trudeau government has imposed **10 Principles for Indigenous Relationships** (First Nations, Metis, Inuit) to "***form a foundation for transforming how the federal government partners with and supports Indigenous peoples and governments***". The federal "**Rights Recognition Framework**" is based on these "***10 Principles***".

The "***10 Principles***" are a continuation of settler government attempts to sever our relationship with our lands and Treaties by eliminating Aboriginal Title and our existing right of sovereignty and self determination; as well as, a fair and just, interpretation of our sacred Treaties.

The Trudeau government is dissolving the federal **Department of Indian Affairs** by creating two new federal bureaucracies: 1) The **Department of Indigenous Services** to take over on-reserve program delivery and funding until existing Indian Bands are forced/convinced to sign new agreements under new law and policy to become federally recognized "***Indigenous Governments***". What Prime Minister Justin Trudeau calls the "***fourth level of government***" in Canada after the federal government, provincial governments and municipalities, "***a new order of government***", 2) and after new agreements are signed, the former Indian Bands will be moved under the **Department of Crown-Indigenous Relations**.

Trudeau Government's "***Rights Recognition Framework***":

'Information Sheet' continued from page 15

According to a September 2018, federal "***Overview Document***" the federal "***Rights Recognition Framework***" law will—if passed—form the basis for ALL RELATIONS between the federal Crown (government) and Indigenous Peoples (First Nations, Metis, Inuit) including "***pre-1975***" Treaties and:

Will contain federal "***definitions***" of "***key terms***" [like "***Inherent Right to Self-Government***", "***Self-Determination***" "***Aboriginal Title and Rights***", "***Treaty Rights***"].

Federal and Provincial/Territorial powers and jurisdictions will continue to dominate over First Nations and provincial governments have a veto over any agreements affecting their jurisdiction.

A federally established advisory committee or institution would be created to decide what Indigenous Nations or "***Collectives***" would be federally recognized and have the authority of a government possessing "***the legal capacity of a natural person***", meaning a federal corporation. This will all be subject to agreements with the federal and provincial governments (where their jurisdiction is affected). The federal legislation will include a "***list of powers***" for "***Indigenous Governments***", which can be amended by the federal government.

"Prime Minister has said these "Indigenous Governments" are a lower order of government than municipalities (City Council) as the "4th level" of government in Canada. A "new" order of government"

The Prime Minister has said these "***Indigenous Governments***" are a lower order of government than municipalities (City Council) as the "***4th level***" of government in Canada. A "***new***" order of government.

New funding arrangements are to go with new agreements and Indian Band's tax exemption will be removed to promote the new "***Indigenous Governments***" exercising powers to collect "***own source revenue***" the same as existing "***Indigenous Governments***" under self-government agreements, comprehensive land claims settlements or federal legislation.

The new law will likely use existing, or new federally created national institutions for First Nations, Metis and Inuit to: 1) provide an advisory role to the federal government, 2) oversight of Indigenous Rights implementation, 3) dispute resolution and 4) public education.

The federal government is now completing a selective National Engagement Process that included the provinces and territories, non-Indigenous Canadians: people from civil society, from industry and the business community, and the public at large.

According to media reports the federal Minister of Crown-Indigenous Relations, Carolyn Bennett has stated the Trudeau government wants to introduce the "***Rights Recognition Framework***" legislation into Parliament before Christmas break and hold Committee hearings in the New Year.

During an **AFN National Forum on First Nation Rights** held September 11-12, 2018, Treaty #6 Grand Chief Wilton Littlechild announced that proposed **DRAFTING INSTRUCTIONS** on the "***Scope and content of a federal Recognition of Indigenous Rights Act***" has already been sent to the federal government (and other parties).

Time For Action!

This whole process is false "***Reconciliation***" and our Peoples have been deliberately misled and bypassed in this secret-top down approach of the Trudeau government who is using AFN, selected Chiefs/Leaders and Chiefs' organizations!

'Information Sheet' conclusion from page 16

There is not much time left for grassroots First Nation Peoples to stop Trudeau's "***Rights Recognition Framework***" **Termination Plan**! **It's Time for Action! What will you do to Protect Our Children, Our Peoples and Future Generations?**

RESOURCES - Here are links to Key Documents/References:

Government of Canada to create Recognition and Implementation of Rights Framework: https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework

Federal Overview of a Recognition and Implementation of Indigenous Rights Framework: https://www.aadnc-aandc.gc.ca/eng/1536350959665/1536350978933

IDLE NO MORE, DEFENDERS OF THE LAND & TRUTH BEFORE RECONCILIATION - JOINT STATEMENT:

http://www.idlenomore.ca/inm-dol-joint-statement

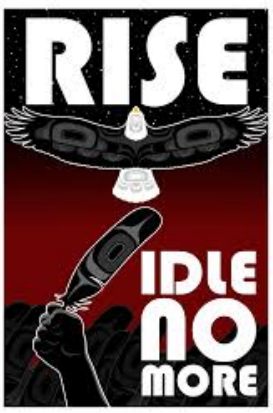
DEFENDERS OF THE LAND & IDLE NO MORE CONDEMN GOVERNMENT OF CANADA'S 10 PRINCIPLES:

http://unsettling150.ca/defenders-of-the-land-idle-no-more-condemn-government-of-canadas-10-principles/

FOR MORE INFORMATION CONTACT:

Communications Contact: Tori Cress at E-Mail: info@IdleNoMore.ca

---



Defenders of the Land is a network of Indigenous communities and activists in land struggle across Canada dedicated to building a fundamental movement for Indigenous rights, was founded at a historic meeting in Winnipeg from November 12-14, 2008. **Idle No More** was founded by four women (three of whom are Indigenous and one of whom is White) in November 2012 in response to several bills passed in Canada that undermine Indigenous rights and environmental protection. The movement grew quickly, and by January 2013 there were tens of thousands of Indigenous and non-Indigenous people taking part in locally-based actions and mass mobilizations around the world. **The Truth Campaign** is a core team of people who worked on Russ Diabo's 2018 campaign for the position of AFN National Chief and who are now working to get Crown governments and Canadian society to address "***Truth Before Reconciliation***" because the **Truth and Reconciliation Commission** and its Calls to Action are not sufficient to address the colonization that First Nations have historically experienced and which continues today particularly under the colonial policies and legislation passed under the **Constitution Act 1867**.

Government of Canada: Overview of a Recognition and Implementation of Indigenous Rights Framework

Background

The Government of Canada is committed to renewing the relationship with First Nations, Inuit and Métis based on the recognition of rights, respect, cooperation and partnership. To live up to this commitment, the Government of Canada is reforming its laws and policies to ensure the rights of Indigenous peoples, and the treaties[Footnote1] and agreements we have signed together are upheld. The recognition and implementation of Indigenous rights is central to Canada's relationship with First Nations, Inuit and Métis peoples and to advancing the vital work of reconciliation[Footnote2].

As stated by the Prime Minister on February 14, 2018, the Government of Canada will develop a Recognition and Implementation of Indigenous Rights Framework consisting of legislation and policy, in partnership with First Nations, Inuit and Métis peoples. We will also be working with our provincial and territorial partners on this framework, as well as engaging with stakeholders. The framework will ensure that the Government of Canada recognizes, respects and implements Indigenous rights, including inherent and treaty rights, and provides mechanisms to support self-determination. The framework will support Indigenous peoples' rights as recognized and affirmed in section 35 of the *Constitution Act*, 1982, while also aligning with the articles outlined in the United Nations Declaration on the Rights of Indigenous Peoples. It will also be consistent with the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples.

In recent years, Canada has shifted its approach to engaging with Indigenous peoples on their rights with a focus on co-developed paths forward and flexible solutions. For instance, since 2015, Canada has been co-developing mandates for discussion with Indigenous partners at over 70 Recognition of Indigenous Rights and Self-Determination discussion tables with over 300 communities representing over 800,000 Indigenous people. In addition, Budget 2018 provided $101.5 million over five years to support activities that will facilitate Indigenous peoples in reconstituting their Nations or Collectives. The framework will build on these and other initiatives.

The legislative element of the framework would contain statutory principles and impose obligations on the Government of Canada to ensure that the recognition and implementation of rights is the basis of all relations between the federal crown and Indigenous peoples. To support the legislation and ensure consistency, the policy element would follow and complement the legislation. It will consist of a new distinctions-based Policy on the Recognition and Implementation of Indigenous Rights to replace the Comprehensive Land Claims and Inherent Right Policies. This new policy would guide federal officials in engaging with Indigenous peoples in discussions and negotiations that support Indigenous self-government, self-determination and treaty rights. The policy will facilitate the implementation and exercise of Indigenous rights, which includes building upon and strengthening Canada's approach to implementing existing and new treaties and agreements. Moreover, the new policy will recognize Indigenous lawmaking power; their inherent rights to land; and, in many instances, title within their traditional territories. In all, the legislation and policy will support the implementation of the new United Nations Declaration on the Rights of Indigenous Peoples Act. The declaration is an international human rights instrument that identifies rights of Indigenous peoples. In November 2017, the Government of Canada committed to supporting and implementing it in Canada. These objectives are being advanced through several approaches, including the alignment of federal laws and policies with the declaration.

Further, the legislation would build on other legislative initiatives such as Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous peoples. The focus on recognition of rights, self-determination and keeping the government accountable would contribute to the further implementation of the declaration in Canada. These potential approaches would remain within Canada's current constitutional framework, including with respect to the division of powers.

'Federal Overview' continued from page 18

The government intends to take a comprehensive whole-of-government approach that supports flexibility in the expression of self-determination and ensures the recognition and implementation of rights is the basis for relations going forward. Structural barriers created with the intent to deny rights and that prevent the government from proceeding with the important work of respecting and upholding Indigenous and treaty rights will be removed. This work will be undertaken in a manner that will not undermine or impact existing treaties and agreements.

It is intended that through the framework:

- Canada will remove barriers that have prevented the exercise of Indigenous rights, including inherent and treaty rights, and the achievement of true self-determination by Indigenous Nations and Collectives.
- Indigenous peoples will have flexibility to determine their own paths forward and governance systems for their Nations and Collectives.
- Rights-holding Indigenous Nations and Collectives will have the choice to immediately exercise certain jurisdictions, consistent with their constitutions.
- Canada will impose accountability measures on itself to ensure that rights, treaties and agreements are fully implemented.
- Independent bodies could be established to keep Canada further accountable.

New dispute mechanisms could become available so that Indigenous peoples have access to remedies outside of costly, adversarial court processes.

The framework will:

- create new tools and mechanisms for supporting self-determination through both law and policy
- support distinctions-based approaches for First Nations, Inuit and Métis
- advance the implementation of treaties and agreements
- support new approaches to the evolution of treaties and agreements
- keep the Government of Canada accountable

The framework will not:

- define and limit the rights of Indigenous peoples
- create municipal-style governments
- infringe on provincial or territorial jurisdiction
- alter, without the agreement of the parties, any treaties, agreements or arrangements concluded under existing policies, or tables currently operating under existing policies
- preclude Indigenous peoples or provinces and territories from pursuing other opportunities to advance their priorities
- extinguish rights or seek the cession, release or surrender of rights
- impose solutions

What follows is a description of the potential parameters for the legislative and policy components of the

'Federal Overview' continued from page 19

Recognition and Implementation of Indigenous Rights Framework.

Structure of legislation

Definitions

When developing legislation, Canada could work with a set of specific definitions of key terms in order to ensure consistency and reflect what we have heard from Indigenous peoples. These definitions would be for the purposes of guiding the development of the proposed act and would not necessarily be included in the legislation itself.

Preamble and purpose

What we have learned

Indigenous peoples have repeatedly expressed that recognition legislation must be framed by an understanding that rights, including title, are inherent and not premised on Crown understandings, standards or recognition. We have also heard from Indigenous peoples that legislation should include affirmations of the intent to implement treaties, the United Nations Declaration on the Rights of Indigenous Peoples, and the Truth and Reconciliation Commission Calls to Action. Finally, embedding a continuing commitment to collaborative approaches is seen as critical.

There has also been an interest expressed in ensuring that recognition legislation respects the constitutional division of powers. At the same time, we have heard that space is needed for Indigenous communities to exercise jurisdiction over a variety of areas, such as child and family services, in line with the inherent right to self-government and relevant court decisions.

Potential approaches

The preamble could anchor the legislation in the enduring relationship between the Government of Canada and Indigenous peoples and could outline how the legislation will advance reconciliation. It could affirm that the inherent and treaty rights of Indigenous peoples are tied to their relationships with the land, which may include title.

The preamble could include a narrative that describes the diversity of Indigenous peoples, including their cultures and systems of governance. It could outline the history of relationships between Indigenous peoples and European settlers, including the importance of treaties and other agreements between the Crown and Indigenous peoples. It could also discuss the negative impacts of colonial practices, including the denial of rights and unfulfilled promises, and how these approaches continue to negatively impact Indigenous peoples today. It could also highlight the contributions of Indigenous peoples to the development of Canada.

The preamble could document the importance of decades of tireless advocacy by Indigenous leaders and communities, as well as reports and studies, particularly the reports of the Special Committee on Indian Self-Government (commonly known as the Penner Report), the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission, which have all, over the course of nearly 30 years, called for a shift in the way the Government of Canada recognizes and implements Indigenous rights.

These expert sources have emphasized, time and again, that Canada must support the renewal and development of self-determining Indigenous communities making their own decisions for their own people.

The preamble could recognize that the Government of Canada must implement federal rights-related obligations in a manner which respects those rights, and is consistent with agreements signed with Indigenous peoples and the Honour of the Crown. It could make reference to the rights enshrined in the *Constitution Act*, including the *Canadian Charter of Rights and Freedoms*, as well as the United Nations Declaration on the Rights of Indigenous Peoples.

Further, the preamble could acknowledge that through section 35 of the *Constitution Act*, 1982, Canada

'Federal Overview' continued from page 20

recognized and affirmed the Aboriginal and treaty rights of Indigenous peoples. Reference can be made to the fact that Canadian courts have repeatedly upheld Indigenous rights, setting a strong legal precedent for the recognition and implementation of Indigenous rights.

The fact that Indigenous peoples lived on and governed lands that now form part of Canada could also be recognized. Consequently, the preamble could also recognize the rights of Indigenous peoples, which in many instances include title, in their traditional lands and territories. In addressing lands and title on federal Crown lands, the preamble could make further reference to constructive arrangements such as co-management and shared decision-making as mechanisms for giving life to recognition.

The preamble could acknowledge, further to consultation with provinces and territories, that co-operative federalism and legal pluralism will guide relationships. The preamble could also acknowledge that the legislation is creating new opportunities for how the parties come together and how they explore ways to co-operate and co-exist.

The preamble could conclude by reaffirming the Government of Canada's commitment to reconciliation with First Nation, Inuit and Métis peoples through renewed nation-to-nation, Inuit-Crown, and government-to-government relationships based on the recognition of rights, respect, co-operation and partnership.

Following the preamble, the legislation could set out the purpose of the legislation, which could be:

- to contribute to meaningful reconciliation with Indigenous peoples
- to ensure that the recognition and implementation of the rights of Indigenous peoples is the foundation for all relations between the Government of Canada and Indigenous peoples
- to ensure that the Government of Canada fulfills its obligations with respect to the rights of Indigenous peoples, including by:
  - supporting Indigenous peoples in determining their own Nations and Collectives
  - encouraging a range of options for the federal recognition of self-determined Indigenous Nations and Collectives and their authority to govern themselves

Obligations binding on the Crown

What we have learned

Through the national engagement, and at the over 70 Recognition of Indigenous Rights and Self-Determination discussion tables across the country, Canada has consistently heard that legislation must include clear federal commitments to ensure that the recognition and implementation of Indigenous rights are truly the foundation of all relations between the Government of Canada and Indigenous peoples. We have heard that these commitments should derive from section 35-related jurisprudence, the United Nations Declaration on the Rights of Indigenous Peoples and the Truth and Reconciliation Commission Calls to Action. We have also heard that a commitment to consent-based decision-making on Indigenous rights-related matters based on the principle of free, prior and informed consent is critical.

We have heard from Indigenous peoples that recognition of rights and title, and their inherent nature, will be critical to meeting the government's commitments with respect to Crown conduct in relationships with Indigenous peoples. Others have expressed the view that issues concerning title may have impacts beyond federal jurisdiction, and emphasized that a recognition framework must respect provincial and territorial jurisdiction. Many Indigenous peoples expect federal recognition of their Nations and Collectives as well as the inherent right of these entities to self-determination. We have heard that existing processes for achieving self-determination impose undue burdens on Indigenous communities, and new approaches must be more timely and financially fair. We have also heard that there is a need to bring great-

'Federal Overview' continued from page 21

er clarity to the relationship between Canada and Indigenous peoples to support collaboration and advance Indigenous participation in the Canadian economy.

Indigenous Nations and Collectives, their systems of governance, and their circumstances and priorities are diverse; accordingly, we heard that any new approach to advancing self-determination must be flexible so as to respond to varying contexts and reflect their customs and traditional legal practices. Indigenous governments should be able to exercise jurisdictions incrementally and in response to the priorities of their communities and at the time and pace of their own choosing.

Indigenous peoples have expressed a range of perspectives regarding their degree of autonomy within the recognition process and in determining and governing themselves. For instance, some have been clear that Canada should recognize inherent rights and title, including Indigenous governance and systems of law, without requiring proof of rights.

We have also heard calls for a new approach to the paramountcy of laws, with recognition legislation prevailing over all legislation to the extent of a conflict, and with the governments of recognized Nations or other Collectives forming a new order of government within Canadian federalism. Others have conveyed that a recognition of rights framework must respect the existing constitutional framework and division of powers, and operate in areas of federal responsibility without unilaterally encroaching on provincial and territorial jurisdiction in a manner that is unconstitutional. Some parties have noted that a recognition framework could facilitate cooperation and partnership arrangements with provinces or territories in the implementation of Indigenous self-determination.

Indigenous peoples expressed that Nations and Collectives require sustainable fiscal arrangements and economic opportunities.

Ultimately, we heard that Indigenous peoples expect to be able to fully exercise the inherent right to self-determination and that any tools or mechanisms established through the Recognition and Implementation of Indigenous Rights legislation are premised on enabling choice or alternative options for Indigenous peoples to pursue their self-determination. The proposed legislation would not displace existing Indigenous governance agreements or arrangements, but rather would provide greater flexibility in how Indigenous Nations and Collectives exercise self-determination. New arrangements could enable the continuation of rights within and outside of agreements, with periodic reviews to provide an orderly process for the evolution of agreements.

Potential approaches

Legislation could require that the Government of Canada conduct itself based on binding principles of recognition and respect for Indigenous rights, and could include binding obligations to ensure this conduct.

The legislation would be intended to enable choices and recognize Indigenous peoples' inherent right to pursue their self-determination through the constitution or reconstitution of their self-determined Nations and Collectives. It could enable Canada to recognize a Nation or other Collective as an entity that has the authority to govern itself through a government having the legal capacity of a natural person. The legislation could ensure that upon recognition, the governing body of the Indigenous Nation or Collective in question could immediately exercise core governance powers without requiring negotiations. It could also ensure that recognized Nations and Collectives would be able to arrange for the exercise of other powers through agreements with Canada, and provinces and territories where appropriate. Where applicable, best practices related to co-management or shared decision-making could be used.

The potential approach contemplates a collaborative process for recognition supported by binding obligations on Canada. It could also include the continued pursuit of negotiated arrangements with respect to certain jurisdictions and title to land, where appropriate.

To further support the recognition process, the legislation could oblige the Minister to lead the Government of Canada in developing, in collaboration with Indigenous peoples, and with provinces and territo-

'Federal Overview' continued from page 22

ries where appropriate:

- further measures to support the process by which Canada recognizes Indigenous Nations and Collectives
- approaches to guide the development and implementation of fiscal arrangements between Canada and recognized Indigenous Nations and Collectives
- further measures to implement Indigenous rights, including title, encompassing:

o measures to affirm the co-existence of Indigenous title, with the jurisdictions and interests of other governments in the federation (i.e. Canada, provinces and territories)

o measures to coordinate the exercise and protection of jurisdictions of Indigenous peoples, the federal Crown, and, the provinces and territories where appropriate

Processes to support the co-existence of Indigenous and Crown jurisdictions and title, including all negotiations, would be co-developed with Indigenous peoples, in a manner that enables their central role in the design of solutions that respond to their distinct rights and interests.

The Governor in Council could act on the recommendation of the Minister to add recognized Nations or other Collectives and their governments to a schedule of the act. In making his or her recommendation to the Governor in Council, the Minister could be required to take into account independent advice, provided either by an ad hoc advisory committee or an institution (consult Implementation of framework: Institutions).

The legislation could deal with powers and core governance jurisdictions. Indigenous governments could choose which powers and jurisdictions they exercise, at a pace of their own choosing and consistent with the will of their members. The list of powers could also be amended over time, and Canada could be required to pursue any amendments through a collaborative process with Indigenous peoples. Processes to amend the list of powers could be further supported by transparent advice from the newly created independent institution. It is currently envisioned that the government of a Nation or Collective could exercise any of the list of powers immediately upon the occasion of federal recognition, in areas of jurisdiction such as:

- who is part of the Nation or other Collective
- the nature, structure, composition, and functions of the governing body
- rules and procedures for the selection of members of a governing body
- conflict of interest rules and procedures for a governing body
- rules and procedures for enacting laws
- system of financial management and accountability
- rules and procedures for holding meetings of the governing body
- process for amending of a constitution
- ability to delegate responsibilities, powers, duties and/or functions of the governing body to another entity

law-making authority respecting subject matters of language and culture

Canada recognizes the spectrum of interests among Indigenous groups, particularly First Nations, with

'Federal Overview' continued from page 23

respect to how and when they may wish to avail themselves of the mechanisms for federal recognition of their Nations or Collectives within the proposed legislation. The nature and timing of a given group's transition to self-determination and self-determined governance would need to be at the Nation or Collective's discretion. The intention behind the proposed legislation would be to enable these sorts of choices.

In the case where a Nation or Collective composed of one or more *Indian Act* bands may wish to be recognized by Canada, multiple desired outcomes could be possible. Some may wish to be recognized as Nations or Collectives and immediately leave behind all Indian Act structures and governance, and potentially any other provisions for governance under federal statutes (such as the *First Nations Land Management Act*). Some may wish to substitute their recognized Nation or Collective for the band within some or all provisions of the *Indian Act*, or other federal statutes, as they continue to develop their own governance and capacity. Others still may wish to retain their bands as sub-units of the Nation or Collective for certain purposes, potentially including the exercise of certain powers (core or otherwise). The legislation could ensure that all of these pathways to self-determination and self-determined governance are possible.

Where the Nation or Collective may not want to immediately make arrangements for governance outside the *Indian Act*, the legislation could provide for the possibility that governance could continue to operate under the auspices of the *Indian Act*. In this instance, the Nation or other Collective could replace the band as the unit of governance as an initial step. Legislation could also provide for the necessary consequential amendments to the Indian Act and any other Indigenous governance-related federal legislation (for example, the *First Nations Land Management Act*, the *First Nations Fiscal Management Act* and others.) to enable the government of a recognized Nation or other Collective to take on the legal role of the band for governance purposes. Should the Nation or Collective subsequently determine that it is ready to move beyond governance under the Indian Act, the legislation could enable this transition at a time and pace of the Nation or Collective's choosing.

Legislation could set out rules about the application or non-application, as the case may be, of provisions of federal statutes such as the *Indian Act*, the *First Nations Land Management Act* and the *First Nations Fiscal Management Act* to address situations where a Nation or Collective's exercise of governance powers may enter into conflict with the application of these laws. This would enable Nations and Collectives to determine and design their own systems and mechanisms for governance to suit their unique priorities and circumstances.

In essence, the legislation could ensure that Nations and Collectives could determine the ongoing roles of any pre-existing units or governing bodies at a time and pace of their choosing.

Finally, Canada could recognize that any fiscal component of Canada's government-to-government relationships with recognized Nations and other Collectives be consistent with the responsibilities, powers, duties and functions of the governing bodies of those Nations and Collectives.

To summarize, the legislation could:

- enable the Government of Canada to recognize Indigenous Nations and Collectives as legal entities with the status and capacities of a natural person
- enable the self-determined exercise of governance by federally recognized Nations and Collectives
- affirm Canada's intent to enter into government-to-government fiscal relationships with recognized Nations and Collectives
- require Canada to co-develop further measures to support these elements

Implementation of the framework: Institutions

'Federal Overview' continued from page 24

What we have learned

Indigenous peoples have consistently voiced that new institutions are required to ensure that Indigenous rights are being implemented. We have heard that new independent institutions could monitor the implementation of Indigenous rights, including the Government of Canada's implementation of treaties and agreements. Institutions could also be empowered to assist in resolving disputes between Indigenous groups and the Crown and amongst Indigenous groups without going to court. Common elements from the recommendations and other feedback are that any new institution:

- be neutral
- be national in scope
- have responsibility for ensuring that the Government of Canada is fulfilling its obligations in relation to Indigenous rights
- have authority to report to parliament

We have heard from some that Canada should create entirely new bodies, while others have called for existing bodies to take on additional functions. Some have recommended the creation of several institutions with broad mandates:

- a body to oversee implementation of the framework legislation
- a treaty oversight body to provide oversight of treaty implementation
- a co-developed dispute resolution institution
- additional institutions to support Indigenous nation and governance re-building

Alternatively, some have recommended bodies with more narrow mandates. For instance, it has been proposed that an oversight body be established as an adjunct office within the Office of the Auditor General to monitor and report to parliament on the progress of modern treaty implementation throughout Canada and to examine Canada's actions affecting the implementation of modern treaties. Under this approach, additional institutions would be required to fulfill a similar oversight function for other treaties and to serve any other proposed functions.

Through the national engagement, the need for proper oversight of Indigenous rights implementation was a recurring theme as Indigenous peoples were clear that Canada needs to do a better job of fully implementing federal obligations described in treaties and other agreements. In some instances a focus on capacity building was recommended as an option.

Through the national engagement, some Indigenous participants indicated that any new accountability measures, such as oversight and dispute resolution functions, need to consider that goals and definitions of success may be different for Indigenous peoples than they are in the Western paradigm.

Potential approaches

Legislation could expand the mandate of existing bodies or create a new institution or institutions, which could be based on co-development and shared governance. Given the variety of approaches and functions that have been suggested, coupled to the need to support the recognition of Nations and Collectives process, the key functions of any expanded or new institution could include an advisory role for the federal recognition of Indigenous Nations and Collectives, alternative dispute resolution, oversight of Indigenous rights implementation and oversight on reconciliation and public education.

Advisory role for the federal recognition of Indigenous Nations and Collectives

The legislation could equip the Minister to receive independent, expert advice to support his or her role

'Federal Overview' continued from page 25

in the process for federal recognition of Indigenous Nations and Collectives. Two potential options for this role are envisioned:

1. The advisory role could be undertaken by an ad hoc advisory committee struck by the Minister on an as-needed basis. In this option, the legislation could allow the Minister to strike such a committee on a case-by-case basis as Indigenous Nations and Collectives come forward to seek recognition. The committee could have three members: one recommended by the Indigenous party seeking recognition, one selected by the Minister and one jointly identified by the first two members. Any such committee could be mandated to provide a transparent and publically available advice, supported by research, to the Minister in order to support the federal recognition of Nations and Collectives. In carrying out its duties, any such committee could have to consider traditional Indigenous knowledge, forms of evidence, and methods of study. The Minister could be required to take the advice of any such committee into consideration in providing the ultimate recommendation to the Governor in Council on whether or not to provide federal recognition of the Nation or Collective.

The advisory role could be undertaken by the institution or by one of the institutions provided for in the legislation to fulfill alternative dispute resolution, oversight and education functions described below. In this option, the given institution could be mandated to provide transparent and publically available advice, supported by research, to the Minister in order to support the federal recognition of Nations and Collectives. In carrying out its duties to fulfill this role, the institution could have to consider traditional Indigenous knowledge, forms of evidence, and methods of study. The Minister could be required to take the advice into consideration in providing the ultimate recommendation to the Governor in Council on whether or not to provide federal recognition of the Nation or Collective. Additionally, the institution could administer funds to support governance capacity development to support Indigenous groups' self-determination.

Alternative dispute resolution

Optional and non-binding alternative dispute resolution services, including required research, could also be provided by an institution to help resolve issues related to fulfillment of the Government of Canada's obligations with respect to the rights of Indigenous peoples and matters related to the federal recognition of Nations and Collectives, including composition and membership. In addition, Nations or Collectives could access the services on matters related to shared or overlapping territory with other Nations or Collectives.

If an institution were to be created it could be required to take into account Indigenous knowledge; legal traditions; and, customary laws.

Oversight of Indigenous rights implementation

A new or existing institution could monitor and report on the fulfillment of the Government of Canada's obligations under legislation, treaties and other agreements related to rights.

The institution could also play a role in monitoring the implementation of management accountability tools and departmental results reports with respect to the framework.

Such an institution could be required to:

1) prepare an annual report detailing its observations with respect to the Government of Canada's fulfillment of its obligations, as well as a review of its dispute resolution services

2) table the report in parliament

Oversight on reconciliation and public education

Broader oversight on reconciliation in Canada and accountability on progress, as well as public education efforts to ensure that all Canadians are brought along throughout this process, could be undertaken

'Federal Overview' continued from page 26

by a separate body such as the National Council for Reconciliation which is currently being contemplated following recommendations by the Interim Board of Directors.

Amendments to the *Interpretation Act*

What we have learned

Some Indigenous groups have a longstanding interest in seeing a non-derogation clause added to the *Interpretation Act*, as well as the repeal of existing non-derogation clauses, in order to help ensure that Indigenous and treaty rights are upheld and that they are not abrogated or derogated from.

Potential approaches

Legislation could amend the federal *Interpretation Act* to add a non-derogation clause that would require that other federal legislation be interpreted so as to uphold or respect constitutionally-protected Aboriginal and treaty rights and not to abrogate or derogate from them. The legislation could also repeal existing non-derogation clauses in order to ensure a harmonized federal approach to the interpretation of legislation.

New Policy on the Recognition and Implementation of Indigenous Rights

What we have learned

We have heard that Canada's current policy framework to support the recognition and implementation of Indigenous rights is flawed, and that past insistence on "cede, release and surrender" provisions in treaties and agreements is inappropriate and outdated. We need to address issues created by the Comprehensive Land Claims and Inherent Right Policies, such as the imposition of strict federal mandates that do not take the distinctions between Indigenous groups into account, and inappropriately rigid approaches to certainty that impede the renewal of relationships. We have also heard that too often, the Government of Canada acts as though it is not bound to recognize rights and to enter into negotiations concerning the exercise of those rights in good faith, despite jurisprudence telling us otherwise.

Through decades of advocacy by Indigenous leaders and communities, the Report on the Royal Commission on Aboriginal Peoples (1996), the Penner Report (1983), the Truth and Reconciliation Commission Calls to Action (2015), the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples (2017), Recognition of Indigenous Rights and Self-Determination discussions, and the national engagement led by the Minister of Crown-Indigenous Relations, we have heard that changes are needed to ensure that policies effectively respond to the needs and interests of Indigenous communities, are grounded in recognition, and are aligned with evolving laws and the United Nations Declaration on the Rights of Indigenous Peoples, including the concept of free, prior and informed consent.

Potential approaches

Since 2015, Canada has significantly shifted its policy approach to engaging with Indigenous peoples on their rights, away from imposing pre-crafted federal mandates and limited opportunities for agreements to evolve, towards a focus on co-developed paths forward and flexible solutions.

Canada's negotiation policies need to catch up to our approaches. The fundamental purpose of replacing the Comprehensive Land Claims and Inherent Right Policies with a Policy on the Recognition and Implementation of Indigenous Rights would be to entrench co-development as the basic standard for federal engagement with Indigenous peoples to advance the implementation of their rights. The policy could be built on the principles of citizen-centered design, with Indigenous peoples at the heart of the process. It could formalize policy innovations that are already creating significant progress at negotiation tables, such as the co-development of all negotiation mandates and new approaches to certainty.

The Policy on the Recognition and Implementation of Indigenous Rights would specifically seek to provide mechanisms to uphold and implement obligations set out in the legislation. The policy would be co-developed with Indigenous peoples following a timeline that would allow for the legislation to be fully supported once it comes into effect.

First Nations Strategic Policy Counsel

Innisfil, Ontario

Phone: (613) 296-0110

E-mail: rdiabo@rogers.com

The First Nations Strategic Policy Counsel is a collection of individuals who are practitioners in either First Nations policy or law. We are not a formal organization, just a network of concerned individuals.

This publication is a volunteer non-profit effort and is part of a series. Please don't take it for granted that everyone has the information in this newsletter, see that it is as widely distributed as you can, and encourage those that receive it to also distribute it.

Feedback is welcome. Let us know what you think of the Bulletin—Russell Diabo, Publisher and Editor, First Nations Strategic Bulletin.

For More Information Check Out: http://unsettling150.ca/

'Federal Overview' conclusion from page 27

Next steps

Moving forward towards reconciliation and a renewed Crown-Indigenous relationship will require an ongoing commitment to collaborative approaches. This will mean working in partnership with Indigenous peoples, cooperating with provincial and territorial governments, and engaging industry, other stakeholders and all Canadians.

In addition to and building on the legislation, a range of policies and mechanisms will be required to realize the implementation of the Recognition and Implementation of Indigenous Rights Framework. This includes supporting the capacity of Indigenous organizations and governments to fully realize their potential.

Footnotes

Footnote 1

For the purposes of this document, references to "treaty" or "treaties" include pre-1975 treaties and modern treaties, unless otherwise stated.

Return to footnote1referrer

Footnote 2

Through the engagement process, we have heard of the need to ensure the framework is distinctions-based, and reflective of the unique cultures, experiences and desires of First Nations, Inuit and Metis.

Date modified: 2018-09-10 **[Government of Canada: https://www.aadnc-aandc.gc.ca/eng/1536350959665/1536350978933#chp3**