

Draft #6 – September 6, 2018
Note: this draft is under consideration

DRAFTING INSTRUCTIONS: Scope and content of a federal *Recognition of Indigenous Rights Act*

1. Preamble

A detailed preamble to the *Recognition of Indigenous Rights Act* (“Act”) could be in the form of a narrative setting out the historical and legal narrative of Crown recognition under the Act, or modelled after the preamble in the UN Declaration. The preamble, remaining consistent with Section 35, with the minimum standards set out in the UN Declaration, with Canada’s commitments in the Outcome Document from the September 2014 UN World Conference on Indigenous Peoples, and with the commitments made in the House of Commons by the Prime Minister on February 14, 2018, would:

- recognize that Crown-Indigenous relations have been politically, culturally, socially and legally flawed, marked by Crown assimilationist laws, policies and practices, and that trust by Indigenous people in government is crucial;
- recognize the impacts of colonization, and reject colonial doctrines, including the doctrines of discovery and *terra nullius* and extinguishment of Indigenous rights in form or result;
- recognize that Indigenous Peoples pre-existed Canada, and continue to exist today and have their own laws, governments, political structures, social orders, territories and rights inherited from their ancestors;
- recognize Indigenous systems of laws and governance throughout Indigenous territories across Canada, without proof of laws and legal orders existing, or strength of claim;
- affirm that the nature of Indigenous relations reflected in the Royal Proclamation of 1763 (ratified by the 1764 Treaty of Niagara), peace and friendship treaties, agreements, and other constructive arrangements, requires the Crown to exercise Section 91(24) jurisdiction expansively, in a matter consistent with the Prime Minister’s commitment to nation-to-nation relationships;
- affirm nation-to-nation and government-to-government relationships between the Crown and Indigenous Peoples, with Indigenous governments constituting a distinct order of government;
- affirm that the standards in the UN Declaration constitute the minimum standards for the survival, dignity and well-being of Indigenous Peoples and the recognition, protection and promotion of Indigenous human rights, serving as the framework for meaningful reconciliation in Canada;
- affirm that the UN Declaration is a key part of the evolving customary international law relating to Indigenous Peoples and applies within Canada;

- recognize Indigenous Peoples' right of self-determination entitles them to freely determine their political status and pursue their economic, social and cultural development;
- affirm that the Crown embraces the standard of free prior and informed consent (fpic);
- recognize the inherent right of self-government is an Aboriginal right within the meaning of Section 35;
- recognize inherent unextinguished Aboriginal title and rights to lands, resources and waters exist without proof or strength of claim or having to be negotiated with Canada, making clear that Aboriginal title and rights are implemented as legal rights, not policy issues to be exercised at the discretion of Crown officials;
- affirm historic and modern-day treaties, agreements, and other constructive arrangements, and commit to their full implementation consistent with their spirit and intent and the UN Declaration;
- affirm Canada's commitment to implement the TRC's Calls to Action;
- affirm Canada's commitment to align all Crown laws, policies practices and relevant mandates with recognition and implementation of Indigenous rights;
- affirm that the path to self-determination must be driven by Indigenous Peoples defining what consent looks like for each, and then engaging in consent-based, collaborative decision-making process when strategic-level and statutory/regulatory decisions are to be made;
- affirm Canada's support for and implementation of the *2030 Agenda for Sustainable Development*.

2. Definitions

The following definitions are proposed for consideration. Additional terms may be defined in the Act through the course of drafting:

Recognition is affirming the historical and legal narrative set out in the preamble, and includes:

- (a) Crown recognition of inherent Aboriginal title and rights, including laws and legal orders , and rights negotiated in treaties, agreements and other constructive arrangements as Indigenous human rights and constitutionally recognized and affirmed legal rights, protected under Section 35, which is a "full box of rights," elaborated upon in the *UN Declaration*;
- (b) The Crown fulfilling constitutional and international obligations in full partnership with Indigenous Peoples;

- (c) Crown recognition that unextinguished Aboriginal title and rights are implemented without proof or strength of claim or having to be negotiated with Canada, and an unqualified acknowledgement that Aboriginal title has a jurisdictional and inescapable economic component;
- (d) Crown recognition of Indigenous self-determining governing bodies (i.e., of their own political choosing, design and structure) as legal entities;
- (e) The Crown adhering to international human rights standards, including the UN Declaration and the American Declaration on the Rights of Indigenous Peoples; and
- (f) Supporting the implementation of the TRC's Calls to Action.

Consent: Means fpic, as a standard by which Indigenous Peoples exercise and express their right of self-determination and inherent right of self-government in accordance with their respective Indigenous laws and legal orders, and which is communicated through a range of instruments or mechanisms. The denial of consent is a part of fpic and other consent mechanisms.

Indigenous Peoples: this term is not defined. Should a definition be necessary for the purposes of this Act, the definition will be provided by Indigenous Peoples and not the Crown. While a few definitions exist, there is no single definition of "Indigenous Peoples" in international law. During the negotiations of the *UN Declaration* in Geneva, representatives of Indigenous Peoples refused to include a definition in this human rights instrument. A major concern was that any definition of "Indigenous Peoples" would either be over-inclusive or under-inclusive. Ultimately, States agreed not to include a definition. There is also no definition of "Indigenous Peoples" in the *American Declaration on the Rights of Indigenous Peoples*.

Crown: Means the Crown in right of Canada and includes Crown corporations, agencies, and other emanations, including all officials.

3. Purpose

The purpose section sets out the legislative purpose:

- (a) to articulate principles for recognition under the *Act* (including fiduciary, honour of the Crown, good faith, no sharp dealings) and standards binding the Crown in all dealings with Indigenous Peoples including in legislation, policy, negotiations and litigation mandates and practice standards;
- (b) to confirm the application of the UN Declaration in Canadian law;
- (c) to create over-arching interpretation provisions, that align the development, and administration of federal legislation, including discretion within federal legislation, with these binding principles and standards;

- (d) to commit Canada to work collaboratively and in partnership with Indigenous Peoples, to implement a reconciliation framework based on recognition;
- (e) to commit to new mechanisms and institutions including new dispute resolution mechanisms to support implementation of these principles and binding standards.

4. Recognition affirmation and implementation principles and standards

The *Act* would set out principles and standards for implementation of recognition. Implementation is premised on the Crown funding support and new institutions and tools, including dispute resolution mechanisms, discussed below.

4.1 Affirming across Canada:

- (a) the standards in the UN Declaration, read together with the American Declaration on the Rights of Indigenous Peoples, constitutes the minimum standards for the survival, dignity and well-being of Indigenous Peoples, and the recognition, protection and promotion of Indigenous human rights in Canada;
- (b) the UN Declaration serves as the framework for reconciliation in Canada;
- (c) the standard of consent is the applicable standard when the Crown contemplates legislative and administrative decisions affecting Indigenous Peoples, including decisions relating to the use of lands and resources in Indigenous Peoples' territories;
- (d) the inherent right of Indigenous Peoples to implement their laws and legal orders throughout their territories without proof of laws and legal orders existing, or strength of claim and without having to negotiate this with Canada;
- (e) a commitment to jointly develop a plan and process(es) to implement this *Act* and the TRC Calls to Action.

The *Act* would make clear, in principle, that the work Indigenous Peoples have to do around implementing self-determination is internal to their jurisdictions, and is to be done under their laws, including around the proper title and rights holder, shared and overlapping territory issues aided by the new mechanisms discussed below.

4.2 For those Indigenous Peoples with Treaties, agreements and other constructive arrangements:

- (a) affirming inherent Aboriginal title and rights including laws and legal orders, confirmed by Treaties, agreements and other constructive arrangements;
- (b) celebrating historic and modern-day treaties, agreements and other constructive agreements, and their honorable implementation, consistent with their spirit and intent, and the minimum standards in the UN Declaration.

4.3 **For those Indigenous Peoples on unceded lands:** Affirming inherent Aboriginal title and rights associated with title, throughout Indigenous territories, without proof or strength of claim or the necessity of negotiating this with Canada.

Notes:

- The *Act* would make clear that the Crown is required to recognize Aboriginal title belonging to a particular Indigenous People, in respect of a particular territory, and when there are no disputes regarding proper title and rights holder or overlapping issues with neighbours, (noting that shared territory or shared access to resources is not such a dispute) there would be a mechanism, such as a consent Court Order for formal registration of the geography of the territory belonging to that Indigenous Peoples.
- Where an Indigenous group may assert rights, without holding title to an area or resource, the Crown will achieve consent with the Indigenous Peoples holding title, to accommodate the asserted rights and interests or refer the matter to a dispute resolution mechanism, discussed below.
- Where the *Act* states that inherent title, rights and jurisdictions exist without proof or strength of claim or having to be negotiated with the Crown, negotiation is necessary as to how these rights and jurisdictions interface with Canada.

5. An Interpretation Section

This section will:

- harmonize non-derogation clauses and amend the *Interpretation Act* to ensure that Crown legislation and policy, including the exercise of discretion, is consistent with the principles and standards;
- create paramountcy provision(s) binding the Crown, making clear where there is a conflict between this *Act* and other Crown enactments, this *Act* will prevail;
- make clear that this *Act* moves beyond the consultation and accommodation framework in the *Haida* case, which was always intended as interim, pending recognition.

6. A Process for Engagement

Consistent with Articles 18 and 19 of the UN Declaration, the *Act* would commit Canada, in collaboration and partnership with Indigenous Peoples acting through their representatives, duly mandated, to design and implement a framework and an engagement process to develop the mechanisms, tools, and processes to implement the binding principles and standards.

Unfinished business of Confederation requires new constitutional structures and arrangements within which Indigenous laws may operate as an order of government within federalism in keeping with the jurisprudence that:

- Indigenous laws and legal orders pre-existed and survived the assertion of Crown sovereignty, have not been extinguished and find expression in Section 35;
- the *Campbell* case, where the Court held that jurisdiction is not exhaustively divided between Crown governments; and
- the *Tsilhqot'in* case where the SCC recognized that Indigenous rights are a limit on both federal and provincial/territorial jurisdictions.

The section would recognize the need for jurisdictional arrangements including:

- creating space for the operation of Indigenous laws and legal orders as an order of government within Canadian federalism;
- new treaty, agreements and other constructive arrangements about revenue and benefit sharing;
- establishing mechanisms for redress, including restitution and compensation;
- pathways and supports for transitions out of the current *Indian Act* system;
- new dispute resolution mechanisms, including supports for Indigenous Peoples to move to self-determination;
- the *Act* would clarify the required processes for developing the jurisdictional list and managing overlapping Crown/Indigenous jurisdictions, stipulating the situations when paramountcy of Indigenous jurisdiction would apply, in a conflict between overlapping jurisdictions. (An example can be found in the *Campbell* case where the Court held that determining citizenship falls exclusively within Indigenous jurisdiction.)

7. Mechanisms

Consistent with Articles 27 and 40 of the UN Declaration, recognizing that implementing this *Act*, and meeting the standards of consent and self-determination, requires the development of institutions and tools, including dispute resolution mechanisms, the following are recommended for inclusion in this *Act*. The *Act* would commit to the mechanism noting that the details may follow in regulations.

- 7.1 An oversight body, possibly through a Commission, whose members would be equally comprised of Indigenous and Crown appointments to determine if the Crown is in compliance with this *Act*, including consideration whether Crown legislation, policies, negotiation and litigation mandates, and practice standards comply with the *Act*. This Commission could be combined with the TRC recommendation for an oversight body for the implementation of the Calls to Action and mandated accordingly. This body could also be mandated to address disputes arising from the assertion of rights by non–title Indigenous rights holders. Indigenous Peoples would determine their own process to make Indigenous appointments, and would also be central in the decision-making for Crown appointments.

This institution might be financed by federal government, Provinces and territories with the federal government assuming a greater cost share.

- 7.2 A Treaty/ Agreement Implementation Commission, whose members would be equally comprised of Indigenous and Crown appointments to monitor interpretation and honourable implementation of historic and modern treaties, agreements and other constructive arrangements, consistent with this *Act* and the minimum standards provided for in the UN Declaration. Indigenous Peoples would determine their own process to make Indigenous appointments, and be central in the decision-making for Crown appointments. This institution might be financed by the federal government, the Provinces and territories.
- 7.3 An Indigenous institution to deal with proper title and rights holder issues, shared and overlapping territories, as a new dispute resolution mechanism. The institution would be designed, developed and under the control of Indigenous Peoples, including the rules, procedures and principles for decision-making and appointments. This institution should be financed by the federal government, the Provinces and territories.
- 7.4 Decolonizing institution to support Indigenous Peoples and governance re-building, law-making and Indigenous jurisdictions, including transitions out of the *Indian Act* regimes, and the attainment of self-determination. These supports could be non-prescriptive and voluntary. This would include obligations on Canada of support, including fiduciary and honour of the Crown obligations in transition. Indigenous Peoples would determine their own process to make Indigenous appointments, and be central in the decision-making for Crown appointments. This institution could be financed by the federal government, the Province and territories.

8. Regulations

The regulations will be co-developed in partnership to further implement the *Act*.

9. Timeframe

The Recognition Legislation will be drafted for presentation to the principals within 14 days of the date of instructions to the drafters.