



## Our Sacred Responsibilities

Union of BC Indian Chiefs submission to the House of Commons Standing Committee on Indigenous Affairs Study on Specific Claims and Comprehensive Land Claims Agreements

October 26, 2017

### INTRODUCTION

The lands known as British Columbia are unique within Canada as the majority of Indigenous Nations here have not signed historical treaties. Instead, in colonial times and after BC joined Confederation in 1871, governments established orders, laws, processes, and commissions for the creation of reserves. Indigenous Nations have never ceded their title to their traditional territories, and that title remains a powerful reality that has been affirmed by the Supreme Court of Canada. Indigenous Nations continue to hold inherent underlying title to these lands.

A clear understanding of this regional historical distinctiveness is essential to any Comprehensive Claims Policy (CCP) reform; any policy changes must strategically and systematically address BC issues to be effective in advancing claims resolution in Canada as a whole. Further, this historical context explains why most BC Nations are choosing not to participate in the comprehensive claims process: the process continues to be based on the de facto extinguishment of Indigenous title and is vastly out of step with current case law.

In this submission, we make recommendations for the transformational and transitional changes that are needed within land rights–related decision making, within two areas:

1. Recognition of Aboriginal title and rights; and
2. Reforming the Comprehensive Claims Policy and the BC Treaty Commission Process.<sup>1</sup>

We emphasize that outstanding historical and present-day land rights issues must be addressed directly with Indigenous Nations and governments co-existing respectfully with one another, with a final aim of co-governance and ongoing shared decision-making—rather than of closure or extinguishment of Aboriginal title and rights and treaty rights. We reject outright the idea that Nations must accept extinguishment of title as a prerequisite for any form of recognition. A summary of all recommendations appears at the end of the document.

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<sup>1</sup> We do not discuss specific claims issues here, as these are addressed in the BC Specific Claims Working Group submission to your committee.

The restructuring of Crown-Indigenous relations is a much larger process than reforming claims policies or creating one-time agreements. What is needed are new decision-making processes and recognition-based systems of government (including title-based fiscal relations).

Federal claims policies must be understood as part of a larger shift toward the full enactment of true Nation-to-Nation systems of government, in which Indigenous Nations can exercise their full territorial authority. Canada must recognize that the proper title holder relationships are between the Crown and Indigenous Nations. All changes within claims policies must align with this larger shift and support—and never impede—Nations’ rights to self-determination and ongoing connectedness with our traditional lands.

### About the Union of BC Indian Chiefs

The Union of BC Indian Chiefs (UBCIC) is a not-for-profit organization that supports Indigenous Nations in asserting and implementing their Aboriginal title, rights, treaty rights, and right of self-determination as peoples. Since inception in 1969, the UBCIC has worked with many Indigenous Nations in BC to ensure that they are supported in their efforts to have their title and rights recognized and respected, and addressed by governments and industry so that our connection to our lands can be sustained. We are directed by the resolutions from our Chiefs Council Meetings and Annual General Assemblies, at which representatives of our over 100 member Nations gather.

## RECOGNITION OF ABORIGINAL TITLE AND RIGHTS

### RECOMMENDATIONS

1. Fully implement the UNDRIP in full partnership with Indigenous Nations:
  - a. Work with Indigenous Nations to develop a legislative framework for the unqualified implementation of the UNDRIP
  - b. Jointly develop UNDRIP implementation protocols
  - c. Create an independent or joint oversight body for implementation of the UNDRIP
2. With Indigenous Nations, develop principles for a range of negotiation and dispute resolution models that integrate Indigenous laws and legal systems.
3. Adopt the “Four Principles” as the framework for recognition and reconciliation
4. Design and enact new models of title-based fiscal relations

Our traditional, unceded territories are the source of our cultures, languages, and laws, and our survival as Indigenous peoples depends on our ability to maintain our lived connections to our lands. We have a sacred responsibility to protect and manage our lands and resources for generations to come.

Meanwhile, governments continue to deny the existence of our Aboriginal title and rights and issue interests in our lands and resources as if they have complete authority to do so. For settler governments to presume their underlying title and issue new proprietary interests is to perpetuate the colonial “Doctrine of Discovery,” wherein the British Crown could unilaterally declare its sovereignty over our territories. As the Truth and Reconciliation Commission states in its “Calls

to Action,” this justification of European sovereignty must be repudiated.<sup>2</sup> In *Delgamuukw v. British Columbia*, the Supreme Court affirmed that “title is a proprietary interest in land,” including both surface and subsurface resources.<sup>3</sup>

Yet the Province continues to alienate the lands and resources on our ancestral homelands, without having addressed Aboriginal title in any meaningful way, in contravention of both domestic and international law. Particularly troubling is the continued development and extraction of resources within the unceded territories of Indigenous Peoples in BC without our free, prior, informed consent. Meaningful and active involvement in land and resource use decisions, as well as the ability to benefit from those uses, continues to be denied to us. Impacts to lands and resources are deeply felt within our communities.

Clearly, deep transformations are needed in land and resource-related decision-making in this province. But our member Nations are concerned that remedies for land losses and breaches of fiduciary duty not replicate the bias, discrimination, and inequality that these reforms are meant to address. For this reason, we repeatedly call for reform processes to be in line with laws and frameworks to protect our Indigenous rights.

At our 2016 Chiefs Council meeting, our member Nations passed a resolution calling for the unqualified implementation of the *UN Declaration on the Rights of Indigenous Peoples*—the “minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”<sup>4</sup> As well, our member Nations have endorsed the “Four Principles,” developed at an All Chiefs Meeting in September 2014 (and explained below), as the basis of recognition and reconciliation. These frameworks must form the foundation for any reform of land-related decision-making, such that our rights will be respected and implemented in any outcome or effects.

### RECOMMENDATION 1: Fully implement the UNDRIP in full partnership with Indigenous Nations

The UNDRIP is a critical instrument to guide claims reform, which must move forward on a human rights foundation. Our rights to the “the lands, territories and resources which [we] have traditionally owned, occupied, or otherwise used or acquired” are articulated in this Declaration.<sup>5</sup> This minimum standard of rights recognition has serious implications for ongoing land use decision-making. There is a clear need to develop new political arrangements in which Indigenous Nations’ rights and authority are realized. Canada must recognize the independent standing of Indigenous peoples in international law, their right to self-determination: “By virtue of that right,” states article 3 of the UNDRIP, “they freely determine their political status and freely pursue their economic, social and cultural development.”

In May 2016, Canada announced its unqualified adoption of the UNDRIP; Canada must now, in full partnership with Indigenous Nation as proper rights holders, develop a legislative framework

<sup>2</sup> See article 45(i), Truth And Reconciliation Commission “Calls to Action,” page 5.

<sup>3</sup> See Kent McNeil, 2002, *Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion*. Available at [http://fngovernance.org/ncfng\\_research/extinguish.pdf](http://fngovernance.org/ncfng_research/extinguish.pdf).

<sup>4</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, article 43. The UBCIC Chiefs Council Resolution (2016-14) is available online at <http://www.ubcic.bc.ca/resolutions>.

<sup>5</sup> See articles 26(1) and 32(2).

for complete and unqualified implementation. Canada must provide funding for the full engagement of Indigenous regional organizations, as well as Indigenous Nations to be partners in the development of this legislative framework.

The UNDRIP is a guiding framework for the Nation-to-Nation relationship and consent-based decision-making. In June 2016, the UBCIC passed a resolution calling on Canada to fulfill legal obligations and engage with Indigenous peoples through a meaningful and substantive process to implement the Declaration.<sup>6</sup> We specified that Canada must reform federal laws, regulations, and policies to ensure that the free, prior, and informed consent of Indigenous Peoples is required for any decisions that could have an impact on Indigenous title and rights and treaty rights. The resolution reminds Canada that “free, prior, informed consent is more than a process of consultation, and that recognition of this right will lead to greater peace and security for all.”

The Chiefs Council resolution of 2016 also calls for the creation of an independent oversight body to review and report on implementation progress. We continue to advance this call for oversight, such that accountability and transparency are structured into the implementation process.

### RECOMMENDATION 2: Adopt the “Four Principles” as the basis of recognition and reconciliation in BC

All governments working in BC must recognize and adopt the “Four Principles” as the basis of recognition and reconciliation. These principles are the region-specific points for Crown-Indigenous relations that the Indigenous leaders in BC clearly articulated at an All Chiefs Meeting in September 2014. They laid out the following four points as the basis of recognition and reconciliation:

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

In a resolution passed in February 2015, the UBCIC Chiefs Council directs that any engagement between the Province and Indigenous Nations be fully informed and directly influenced by these four principles.<sup>7</sup> However, given the principles’ focus on the necessary implementation of our rights and title, they are foundational for engagement and decision-making among all levels of government.

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<sup>6</sup> Union of BC Indian Chiefs, 2016, “RE: Support for the Unqualified Implementation of UNDRIP in Legislative Framework,” Resolution 2016-14. Available online at <http://www.ubcic.bc.ca/resolutions>.

<sup>7</sup> UBCIC, 2015, “Support for the Four Principles” (Resolution 2015-04), UBCIC Chiefs Council, February 2015.

### RECOMMENDATION 3: With Indigenous Nations, develop principles for a range of negotiation and dispute resolution models that integrate Indigenous laws and legal systems

Canada has committed to the creation of a new reconciliation framework, one that is based on the principles of Aboriginal title and rights. To realize this framework for reconciliation, however, new approaches to negotiation and associated dispute resolution options must to be designed and implemented. Such models must incorporate both Western and Indigenous models of interaction and resolution, and recognize multiple legal authorities. The first step in the development of these new models is to develop a joint set of innovative, creative principles for how negotiation and conflict resolution can be conducted. Much research already exists on this topic, and many Indigenous Nations have already clearly articulated laws and protocols for conflict resolution, including for disputes over land. Creation of these new and more flexible, integrative models is an important step in resolving disputes and restructuring Crown–Indigenous relations within a reconciliatory framework.

International and national frameworks for rights and reconciliation clearly state that this integration of Indigenous and Crown legal orders is essential to redress and conflict resolution. Article 40 of the UNDRIP states that conflict resolution processes “shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned.” Similarly, the Truth and Reconciliation Calls to Action recommend “recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.”

### RECOMMENDATION 4: Design and enact new models of title-based fiscal relations

Canada must fairly and adequately fund Indigenous Nations to practice and enact their rights to self-government; what is needed is a review of Crown-Indigenous fiscal relations, with the aim of creating new models of shared decision-making and equitable distributions of revenue. Indigenous Nations’ rights and roles need to be more fully integrated into economic decision-making, particularly around resource extraction and use. This review will involve creation of new models of resource taxation and revenue sharing that allow Indigenous nations to be adequately funded to fulfill the “informed” part of “free, prior, and informed consent.”

## REFORMING THE COMPREHENSIVE CLAIMS POLICY AND ADDRESSING OVERLAP AND SHARED TERRITORY ISSUES

### RECOMMENDATIONS

1. Redevelop the Comprehensive Claims Policy to reflect current case law
2. Create an Indigenous Commission to address shared territory and overlap issues

The process for negotiating comprehensive claims is different in BC than in the rest of Canada. The BCTC describes its treaty-making as a “made in BC process” and says that it is largely separate from the Comprehensive Claims Policy. In BC, a Claims Task Force, created in 1990,

recommended creation of an independent body to oversee treaty negotiations. The BCTC was the result of that process.

But the vast majority of BC Nations are not involved in negotiations at the BCTC, and are instead pursuing other legal and political routes to advance their territorial authority and rights.<sup>8</sup> The UBCIC is an organization that has always supported and advocated for Indigenous Nations who have chosen not to pursue modern treaties through the BCTC. In the past, we have commented on the flaws within the process, such as burdens associated with loan funding and the BCTC's approach to shared territory and overlap issues.<sup>9</sup> (We describe the latter below.)

But foremost among our concerns with the BC treaty process is its denial of Aboriginal title; the process is based on a surrender and grant-back process, wherein Nations agree to relinquish a vast proportion of their rights and title such that the Crown can “grant” them a small proportion of their lands and rights. The land that is surrendered constitutes 95 percent of a Nation's traditional territory, or more. For these reasons, we support Nations in advancing their title, rights, and treaty rights through the kinds of rights-based processes we describe above. Here we make two recommendations related to comprehensive claims processes, emphasizing throughout that these claims should not impede the full enactment of the title and rights of Indigenous Nations outside the BC Treaty process.

### Recommendation 1: Redevelop the Comprehensive Claims Policy and to reflect current case law

Most BC Indigenous Nations are not participating in the BCTC process. Further, the Comprehensive Claims Policy (CCP) is so out of date with respect to current case law that we have repeatedly challenged its role in land-related decision-making. However, the treaty process continues to have effects on non-participating Indigenous Nations. Further, we recognize that a much reformed CCP could be one mechanism by which some Nations might choose to advance their rights and territorial authority.

As such, the UBCIC has been involved in extensive advocacy around the CCP, repeatedly calling on Canada to engage with Indigenous Nations and to update the CCP to reflect current legal realities, particularly the *Tsilhqot'in Nation* decision.<sup>10</sup> In 2014, UBCIC Chiefs Council fully rejected an interim CCP put forward by Canada and demanded that a new mechanism be jointly

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<sup>8</sup> According to the BCTC 2017 annual report, there are currently 38 First Nations and Tribal Societies actively participating in the BCTC process.<sup>8</sup> (These are groups “implementing treaties,” “in final agreement negotiations,” “in advanced agreement in principle negotiations,” and “active negotiations.”) Meanwhile, however, a large majority of BC Nations are not actively participating in the BCTC process—and many Nations that are counted as part of the total “participating” Nations are currently not actively engaged in any negotiations. Specifically, while the BCTC regularly reports that “65 First Nations, representing over half of all Indian Act bands in BC, are participating in, or have completed treaties through, the BC treaty negotiations process,”<sup>8</sup> this number includes the 27 Nations who are currently not actively negotiating treaties. Further, many tables that are currently listed as active are stalled. The total percentage of “Indian Act bands” actively participating in BCTC processes is significantly less than the “over half” that the BCTC repeatedly cites.

<sup>9</sup> See, for example, the letter from the UBCIC Executive to Prime Minister Trudeau and Ministers Bennett and Wilson-Raybould, April 25, 2017, “Re: BCTC Action Plan: Moving Beyond the BCTC Process,” which is included as an attachment to this report.

<sup>10</sup> The Supreme Court of Canada decision in *Tsilhqot'in Nation* (and other preceding jurisprudence reaffirming continuity of Indigenous title, from *Delgamuukw* onward) helped to address uncertainty regarding ownership and jurisdiction of lands in BC. The court found that the Tsilhqot'in are “the owners of their traditional lands, with the right to choose how the lands will be used”; it issued a declaration of Tsilhqot'in title to over 2,000 square kilometres of the Nation's territory. See Union of BC Indian Chiefs and Tsilhqot'in National Government, *Tsilhqot'in Nation v. British Columbia: Plain Language Version*.

drafted with Indigenous Nations. This policy must recognize and affirm our Aboriginal title and rights in accordance with the *Tsilhqot'in* decision.

### Recommendation 2: Create an Indigenous Commission that enacts Indigenous laws and legal principles to resolve shared territory and overlap issues

We recommend creation of an Indigenous commission—designed, established, and driven by Indigenous Nations—to provide certain supports to Indigenous Nations while being respectful and reflective of and consistent with Indigenous Nations’ rights of self-government and self-determination. Upon request, the commission would support Nations with respect to boundary resolution (in accordance with Indigenous Nations’ respective laws, customs, and traditions) and other issues related to governance building (e.g. constitution development, law making, and policy development). The commission would provide a range of processes and options that Nations could opt into, with binding and non-binding outcomes possible. Once established, this commission would require ongoing sustainable funding to be provided by both federal and provincial governments.

This new approach to shared territory is clearly necessary: federal and provincial governments’ approaches to shared territories and overlap issues have resulted only in increasing conflict. While the Comprehensive Claims Policy (of 1986) and the recommendations of the BC Claims Task Force (which established the BC Treaty Commission) both clearly state that shared territory issues must be resolved before any claim can be settled, “in BC, these policies have been ignored repeatedly.”<sup>11</sup> Indigenous Nations outside the BC treaty process have been largely sidelined and are expressly excluded from any consultation about the impact of agreements being negotiated within the BC treaty process on their title and rights. The result has been several court cases.<sup>12</sup> Further, the current approach to overlaps is based on problematic assumptions about title: if two Nations claim exclusivity on an area of land, title is assumed to default to the Crown.

The BCTC seeks money for a fund to support Indigenous Nations’ efforts to resolve shared territory and overlap issues,<sup>13</sup> but the BCTC is not the appropriate body to resolve these challenges. It is not an impartial arbiter, but an active proponent of treaty making and is perceived as such. Also, shared territory issues also exist among Nations outside the Treaty process. An independent Indigenous Commission is the best way to address these kinds of territorial issues in ways that strengthen—rather than weaken—our title and rights, capacity for self-determination, and ability to foster cooperation among Nations.

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<sup>11</sup> Christopher Turner and Gail Fondahl, 2015. “‘Overlapping claims’ to territory confronting treaty-making in British Columbia: Causes and Implications.” *Canadian Geographer* 59(4): 476. Further, even the basic reporting of overlap issues has been flawed: as the BCTC itself notes, its “policies and procedures for reporting on overlapping and shared territory disputes ha[d] not been widely utilized” because of “lack of resources” and “lack of incentive.”

<sup>12</sup> Turner and Fondahl report that “four of six modern treaties in BC have been contested in the BC Supreme Court because of overlapping claims” (pp. 482–83).

<sup>13</sup> “BC Treaty Commission Submission: House of Commons Standing Committee on Indigenous and Northern Affairs, Specific Claims and Comprehensive Land Claims Agreements,” 25 September 2017, <http://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR9127779/br-external/BritishColumbiaTreatyCommission-e.pdf>.

## **SUMMARY: UPHOLDING OUR SACRED RESPONSIBILITIES**

Indigenous title is real and fully territorial in nature, and the full beneficial interest in title land is that of the title-holding group. Such was the conclusion of the Supreme Court in the *Tsilhqot'in* case. Over many generations, Indigenous Nations have supported each other to build frameworks of governance in relation to settler governments, to help each other achieve their shared and respective goals. Underlying this work has been a commitment across Nations that future generations of Indigenous people should have the full opportunity to be connected to our territories, cultures, communities, and way of life.

In all governance and decision-making, Indigenous Nations in BC seek to uphold this commitment. Our title has never been extinguished; our territories have never been ceded. The Supreme Court finding in *Tsilhqot'in* only reaffirmed what our Nations have been saying all along. Here, for example, is an excerpt of the Declaration of the Lillooet Tribe, which was signed by eighteen chiefs at Spences Bridge, BC, on May 10, 1911: “We are aware the BC government claims our country, like all other Indian territories in BC; but we deny their right to it. We never gave it nor sold it to them. They certainly never got the title to the country from us, neither by agreement nor conquest, and none other than us could have any right to give them title.”

The UBCIC repeatedly calls for comprehensive recognition and implementation of Indigenous governance, jurisdiction, and laws. We continue to seek to build and advance frameworks of governance in relation to settler governments. The recommendations described in this proposal are examples of clear, direct steps toward building these kinds of frameworks (see summary box, below).

Throughout our submission, we highlight the uniqueness of the BC context and the specific challenges that Nations here face in having their rights recognized and their claims resolved. The history of colonization and ongoing denial of our title and rights has created profound inequity and degradation of our traditional territories, but also a clear sense among our hundred-plus member Nations of what will—and will not—work for our communities. We have sacred responsibilities to our lands and peoples, and in all processes, we must all consider what is sustainable and just for our future generations.



## **SUMMARY OF RECOMMENDATIONS**

### **Recognition of Aboriginal Title and Rights**

1. Fully implement the UNDRIP in full partnership with Indigenous Nations:
  - a. Work with Indigenous Nations to develop a legislative framework for the unqualified implementation of the UNDRIP
  - b. Jointly develop UNDRIP implementation protocols
  - c. Create an independent or joint oversight body for implementation of the UNDRIP
2. Adopt the “Four Principles” as the framework for recognition and reconciliation in BC
3. With Indigenous Nations, develop principles for a range of negotiation and dispute resolution models that integrate Indigenous laws and legal systems.
4. Design and enact new models of title-based fiscal relations

### **Reforming the Comprehensive Claims Policy and addressing overlap and shared territory issues**

1. Redevelop the CCP to reflect current case law
2. Create an Indigenous Commission to address shared territory and overlap issues

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