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Memorandum

TO:	Union of B.C. Indian Chiefs
FROM:	Bruce McIvor
SUBJECT:	Legal Review of Canada's Interim Comprehensive Land Claims Policy
DATE:	November 4, 2014

This memorandum provides a legal review of Canada's interim policy *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (the "Interim Policy") for the Union of B.C. Indian Chiefs ("UBCIC").

Summary

For decades, Indigenous peoples have called on Canada to approach the process of reconciliation between Indigenous peoples and the Crown based on recognition and respect for the prior and continued existence of Indigenous laws and Aboriginal title and rights.

The Supreme Court of Canada's recent decision in *Tsilhqot'in*[1] confirms the need for a foundational shift in comprehensive claims towards negotiation processes based on recognition rather than denial of Aboriginal title. The Interim Policy fails to make this shift. In particular, the Interim Policy:

- disregards the need for high-level discussions between Canada and First Nations leadership to reframe the approach to achieving reconciliation on Aboriginal title and rights claims;
- fails to acknowledge that recognition of Aboriginal title must be the starting point for all negotiations and agreements between Indigenous peoples and the Crown;
- fails to address the need for the Crown to seek and obtain the consent of Indigenous peoples before making decisions that will affect Aboriginal title lands;
- fails to consider and adhere to the underlying principles of Aboriginal title; and
- imposes a unilateral approach which is inconsistent with Canada's fiduciary relationship to Indigenous peoples and its obligations to act in good faith in negotiations concerning Aboriginal title and rights.

[1] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*]

Background to the Interim Policy

The Interim Policy, released by Canada on August 29, 2014, sets out Canada's current approach to settling comprehensive land claims with Indigenous peoples. Once finalized, the Interim Policy will replace the existing version of Canada's *Comprehensive Land Claims Policy*.

Canada intends the Interim Policy to serve as a starting point for discussions with Indigenous peoples and other interested parties on updating and revising the current comprehensive claims policy ("CCP"). Douglas Eyford, the Ministerial Special Representative, is leading engagement with Indigenous peoples and stakeholders on renewing the existing policy. This engagement is currently underway, and we are aware that a number of First Nations have already, or are planning to, provide comment and input to the Special Representative.

The Interim Policy represents the latest iteration of Canada's approach to comprehensive claims over a number of decades. Key points in the evolution of Canada's approach are as follows:

Calder & the Original Policy

- The first CCP arose in response to the Supreme Court's 1973 *Calder* decision.[2] Prior to *Calder,* official federal policy in relation to Aboriginal title and rights was articulated in the Trudeau/ Chretien White Paper policy of 1969, which characterized those rights as historical relics incompatible with Canada's current constitutional, political and cultural values.

- The *Calder* decision raised the possibility of the existence of Aboriginal title and resulted in a significant shift in Canada's approach to outstanding title claims. It was also the starting point for a four-decade long pattern of judicial "non-decision-making" regarding Aboriginal title. While courts developed the doctrine of Aboriginal title, they avoided issuing declarations of title as sought by the Indigenous peoples or otherwise providing remedies premised on the existence of Aboriginal title.[3]

- The original CCP was fraught with limitations. In particular, Canada would consider only a limited number of negotiations at a given time. In addition, the provincial government maintained its position that the issues were purely federal and as such initially refused to participate in negotiations.

The *Constitution Act, 1982*

- The next major event affecting the CCP was the entrenchment of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. As part of that entrenchment, Canada committed to hold a series of constitutional conferences with First Nations leadership from across the country to discuss and arrive at common understandings about the content and substance of section 35. These conferences failed to provide direction on section 35. As a result, the issue was left to be addressed in the courts or through negotiations.

B.C. Treaty Commission Process

- The B.C. Treaty Commission was established in 1992 to facilitate treaty negotiations between Canada, B.C. and First Nations. The expectation at the time was that there would be a 5-6 year

[2] *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313, 1973 CanLII 4 (SCC [*Calder*]
[3] For example, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC);
Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700

timeline for the negotiation and implementation of treaties. However, problems and limitations associated with the CCP mandate have become key obstacles to the timely and successful negotiation of treaties in B.C.

Recent Events

- 2006-2007: First Nations from across B.C. gathered at Snuneymuxw to issue a Unity Protocol demanding that Canada and B.C. adjust their approaches to negotiations. This was an expression of years of frustration with the Crown's limited mandates and negotiation approaches, and the lack of progress generally.

- 2008: A tripartite Common Table discussion between First Nations, Canada and B.C. took place in an attempt to move negotiations forward. The process was not productive and did not yield meaningful or transformative results.

- 2010: John Duncan, Federal Minister of Indian Affairs, appointed James Lornie as a Special Representative to investigate the B.C. treaty process and report on how outcomes could be improved. The report was effectively shelved by Minister Duncan.

- 2011: The Inter-American Commission on Human Rights issued a decision in the Hul'qumi'num Treaty Group's petition which held that there are no effective domestic remedies in Canada for Aboriginal people in relation to claims for Aboriginal title. The decision is a condemnation of both the failure of Canadian courts to provide remedies on outstanding title issues and the existing negotiations processes in Canada and B.C. that in practice required Indigenous peoples to agree to the extinguishment of their title.

- 2013: Prime Minister Stephen Harper met with First Nation leaders on January 11, 2013 in response to ongoing protest in relation to Canada's failure to honour its commitments to Indigenous peoples. The Prime Minister committed to engage in high-level dialogue with First Nation leadership, including with respect to the replacement of the existing CCP with the advice and input of the AFN-supported Senior Oversight Committee on Comprehensive Claims. The resulting process has been criticized as being heavily driven by Canada and a further perpetuation of the problematic dynamics at the root of the existing CCP.

- 2014: The Supreme Court issued a declaration of Aboriginal title to the Tsilhqot'in Nation. *Tslihqot'in* marks the need for renewed engagement between the Prime Minister's Office and First Nations leadership to establish a negotiation framework based on recognition rather than extinguishment of Aboriginal title.

- 2014: Canada announced it will develop a renewed CCP and appointed Ministerial Special Representative Douglas Eyford to lead engagement with Indigenous groups and stakeholders. The announcement and the subsequent release of the Interim Policy occurred post-*Tsilhqot'in* but makes no reference to the decision or the resulting need for fundamental changes to the approach to resolving comprehensive claims.

Overview of the Interim Policy

Overview: Objectives of Negotiations

The Foreword and Section 1 of the Interim Policy set out Canada's objectives and guiding principles when negotiating agreements on comprehensive land claims with Indigenous peoples.

Canada's objectives are to promote certainty with respect to the development of lands and resources and to achieve "fair and equitable agreements and an enduring reconciliation of rights and interests."[4] Canada describes the process of reconciliation between Indigenous peoples and the Crown as promoting a "secure climate for economic and resource development" which benefits all Canadians and which "balances Aboriginal rights with broader societal interests."[5]

The Interim Policy's guiding principles are based on the *Guiding Principles Respecting the Recognition and Reconciliation of Section 35 Rights* developed by the Crown and First Nations through the Senior Oversight Committee. The principles constitute high-level statements on the current approach to comprehensive claims which were prepared prior to *Tsilhqot'in*.

The principles are not legally inaccurate, and indicate some shift in language from previous statements and approaches of Canada. However, the principles fail to refer to the recognition of Aboriginal title as a prerequisite to reconciliation, the recognition of Indigenous laws, protocols and jurisdiction outside of treaty settlement lands, the requirement that the Crown seek the consent of Indigenous peoples before undertaking activities that would affect Aboriginal rights, or the possibility of compensation for past infringements of title and rights. More generally, given that the principles were developed prior to *Tsilhqot'in*, they would need to be reviewed and revised in light of *Tsilhqot'in* if they were to form an appropriate basis and starting point for a new CCP.

Scope of Negotiations: Lands & Resources Treaty Negotiations

Section 2 outlines the issues that Canada will consider when negotiating comprehensive agreements on lands and resources. Some of the key issues of concern are:

- Canada seeks to negotiate modern treaties with Indigenous peoples in order to achieve "certainty" over lands and resources so that economic development can take place.[6] There is no reference to Indigenous peoples' objectives in entering into negotiations with the Crown with respect to lands and resources.

- The Interim Policy focuses on using treaties to achieve certainty with respect to "treaty settlement lands."[7] Canada's reduction of Indigenous ownership of lands to those covered by treaty is inconsistent with the broad, territorial nature of Aboriginal title as affirmed in *Tsilhqot'in*.

- The Interim Policy acknowledges the possibility of resource revenue-sharing but places non-negotiable limits on such arrangements. For example, Canada will not enter into revenue-sharing

[4] Interim Policy, pg. 6, 10
[5] Interim Policy, p. 6
[6] Interim Policy, p. 11
[7] Interim Policy, p. 13

arrangements that provide resource ownership rights and will not establish joint management boards for the management of subsurface and subsea resources.[8]

- The Interim Policy states that Canada may enter into negotiations with Indigenous peoples on the issue of self-government but will only consider self-government within a prescribed list of categories.[9] According to the Interim Policy, Indigenous peoples' inherent right to self-government may only be recognized within the context of Canada's existing federal structure.[10]

- Compensation for existing and past infringements of Aboriginal title and rights is not included as one of the matters which may be negotiated as part of the comprehensive land claims process.

Treaty Negotiation Processes & Procedures

Section 3 outlines processes for negotiating treaties within and outside of B.C. As with the rest of the Interim Policy, Section 3 focuses heavily on achieving agreements through Canada's prescribed process of treaty negotiations rather than through other types of agreements premised on the recognition of Aboriginal title.

Critique of the Interim Policy

Legal principles related to the recognition of Aboriginal title and rights have evolved considerably since Canada's CCP was last updated. Importantly, for the first time the Supreme Court in *Tsilhqot'in* affirmed the existence of Aboriginal title and laid out the requirements for the Crown when negotiating with Indigenous peoples in respect of lands and resources.

The Interim Policy fails to adhere to the principles necessary for achieving reconciliation between Indigenous peoples and the Crown as described by the Supreme Court and the UNDRIP on the following bases.

Presumption of Title

The Supreme Court in *Tsilhqot'in* rejected the Crown's "dots on a map" approach and confirmed that Aboriginal title applies to the regular use of land on a territorial basis for hunting, fishing and otherwise exploiting resources.[11] As such, all negotiations between Indigenous peoples and the Crown should be based on the presumption of Aboriginal title.[12]

Courts have further recognized that the Crown's assertion of sovereignty in B.C exists on a *de facto* basis.[13] As a result, it can be argued that rather than requiring that Indigenous peoples establish proof of Aboriginal

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[8] Interim Policy, p. 14
[9] Interim Policy, p. 17
[10] Interim Policy, p. 8
[11] *Tsilhqot'in* at para. 42
[12] *Tsilhqot'in* at para. 42, 69
[13] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 at para. 32; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74 at para. 42

title, there should instead be a reverse onus on the Crown to prove that lands are *not* subject to Aboriginal title.[14]

The Interim Policy disregards the principle that all lands should be presumed to be subject to Aboriginal title.

Consent

Tsilhqot'in and the UNDRIP confirm the importance of Indigenous consent when the Crown undertakes activities that could infringe Aboriginal title and rights both before and after a declaration of title.[15]

The Interim Policy fails to recognize the need to move to a consent-based model of decision-making on issues affecting Aboriginal title and rights.

Right to Self-Determination

The UNDRIP affirms Indigenous peoples' right to self-determination, including the right to self-government and to the lands, territories and resources which Indigenous peoples have traditionally owned, occupied or otherwise used or acquired.[16] Recognition of Aboriginal title is fundamental to the exercise of these rights.

The Interim Policy is inconsistent with the principle that the recognition of title is a prerequisite to the realization of Indigenous peoples' right to self-determination.

Indigenous Decision-Making Authority

Indigenous societies and their legal systems pre-existed and survived the assertion of Crown sovereignty. The Supreme Court has acknowledged the prior and continued existence of Indigenous decision-making authority and has implied that such decision-making authority is a part of Aboriginal title.[17] The B.C. Supreme Court has further affirmed that Indigenous self-government is a protected right pursuant to section 35(1) of the *Constitution Act, 1982* which exists outside of the constitutional division of powers.[18]

Contrary to Canadian law, the Interim Policy recognizes the ongoing existence of Indigenous decision-making authority only on a limited basis within the existing federal structure.

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[14] See for example McNeil, Kent. "The Onus of Proof of Aboriginal Title." Osgoode Hall Law Journal 37.4 (1999): 775-803
[15] *Tsilhqot'in* at para. 97; UNDRIP Article 32.1
[16] UNDRIP Articles 4 and 26.1; see also UBCIC Resolution 2011-12
[17] See for example *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at para. 115; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 at para. 129, 165
[18] *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 112

Good Faith Negotiations

The Supreme Court in *Tsilhqot'in* emphasized the importance of good faith negotiations for agreements between Indigenous peoples and the Crown. The Crown has both a moral and legal duty to negotiate in good faith to resolve land claims.[19] Similarly, all negotiations must reflect the Crown's fiduciary relationship with First Nations.[20]

The Interim Policy's unilateral approach to the negotiation of treaties and other agreements with the Crown does not demonstrate good faith on the part of the Crown and is not consistent with the Crown's fiduciary relationship with Indigenous peoples.

Inherent Limit on Treaty Negotiations

Tsilhqoti'in affirmed that Aboriginal title is a collective title to be held for the benefit of present and future generations.[21] It can only be alienated to the Crown and cannot be encumbered so as to deprive future generations of the use and enjoyment of the land.[22] Similarly, government infringement of Aboriginal title cannot be justified if it would substantially deprive future generations of the benefit of their Aboriginal title lands.[23]

The Interim Policy fails to acknowledge this underlying principle of Aboriginal title that calls into question the Crown's current approach to certainty.

Compensation for Past and Ongoing Infringements

The inherent limit on the use and infringement of Aboriginal title brings into question the Crown's policy of seeking certainty without considering compensation for past and ongoing infringements. The Supreme Court confirmed in *Tsilhqot'in* that the Crown may be liable in damages for infringements of Aboriginal title.[24]

The Interim Policy prescribes a set of categories which Canada will consider for negotiation but is silent on the issue of compensation for past and ongoing infringements. A principled approach to the settlement of comprehensive claims would allow space for the possible negotiation of compensation for past and ongoing infringements of Aboriginal title.

[19] *Tsilhqot'in* at para. 17, 18, 89, 91
[20] *Tsilhqot'in* at para. 80
[21] *Tsilhqot'in* at para. 74
[22] *Tsilhqot'in* at para. 74
[23] *Tsilhqot'in* at para. 86
[24] *Tsilhqot'in* at para. 89

Agreements

The Supreme Court emphasized that reconciliation between Indigenous peoples and the Crown may be realized through agreements which recognize the elements of Aboriginal title.[25] Such agreements need not be restricted to treaties.

The Interim Policy makes reference to the possibility of agreements that are interim in nature and agreements that could be negotiated outside the treaty process. However, the Interim Policy is still focused on a treaty negotiation process which is inconsistent with the principles of Aboriginal title and which does not take into account the perspectives and objectives of Indigenous participants.

Key Principles for a Revised Joint Comprehensive Land Claims Policy

The Interim Policy is inconsistent with key principles for achieving reconciliation between Indigenous peoples and the Crown under Canadian law.

We recommend that the following principles be considered as a basis for a renewed framework for advancing a process of reconciliation based on recognition and respect for Aboriginal title and rights consistent with the current legal landscape:

1. The policy should affirm that recognition of Aboriginal title is essential to the process of reconciliation between Indigenous peoples and the Crown. Negotiation processes and agreements must be based on recognition, not denial.

2. Indigenous laws, protocols and jurisdiction should be incorporated into the policy, negotiation processes and resulting agreements.

3. The policy should affirm the recognition of Indigenous decision-making authority as a critical component of Aboriginal title.

4. The policy's guiding principles should include the four principles established by First Nation leaders on September 11, 2014 as reflected in UBCIC Resolution 2014-29:

    a. acknowledgement that relationships must be based on the recognition and implementation of the existence of Indigenous peoples' inherent title and rights and pre-confederation, historic and modern treaties throughout B.C.;

    b. acknowledgement that Indigenous systems of governance and laws are essential to the regulation of lands and resources throughout B.C.;

    c. acknowledgement of the mutual responsibility for government systems to shift to relationships, negotiations and agreements based on recognition; and

[25] *Tsilhqot'in* at para 89, 90

d. acknowledgement of the need to move to consent-based decision-making and title-based fiscal relations, including revenue-sharing, in relationships, negotiations and agreement.

5. The policy should affirm and be consistent with Indigenous peoples' right to self-determination as setout in the UNDRIP.

6. The policy should be consistent with and adhere to the underlying principles of Aboriginal title as affirmed in *Tsilhqot'in,* including the principle that government infringement of Aboriginal title cannot be justified if it would substantially deprive future generations of the benefit of their Aboriginal title lands.

7. The policy should expressly include the option of negotiating compensation for past and ongoing infringements of Aboriginal title and rights as part of achieving reconciliation between Indigenous peoples and the Crown.

8. Consistent with *Tsilhqot'in* and the UNDRIP*,* the policy should recognize that the Crown must seek the consent of Indigenous groups before making decisions that will affect lands subject to Aboriginal title.

9. The policy should avoid the Crown's imposition of unilateral definitions, processes and non-negotiable positions.

10. The policy should be the joint result of an iterative process between Indigenous peoples and the Crown, and must accordingly recognize and incorporate the views and priorities of Indigenous participants.

11. The policy should be clear that there will be no pre-determined limits on negotiations and any resulting agreements, including with respect to the exercise of Aboriginal rights, the scope of possible economic benefits from resource development, or the exercise of Indigenous self-government.

Conclusion

Thank you for the opportunity to assist you with this most important of issues. We would be pleased to discuss with you further the current Interim Policy and our suggested principles for revising the approach to comprehensive claims and to assist UBCIC in working to achieve a framework for the recognition and affirmation of Aboriginal title and rights of Indigenous peoples.