

Proposed Federal Recognition and Implementation of Rights Framework

Yukon Discussion Paper



YUKON REGION

**Prepared for the Assembly of First Nations – Yukon Region &
the Council of Yukon First Nations**

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1. Introduction

Earlier this year, the Prime Minister committed the federal government to work in partnership with First Nations, Inuit and Métis peoples for the development of a Recognition and Implementation of Indigenous Rights Framework (the “**Framework**”).

The Framework is intended to include a collection of legislative and policy instruments that will ensure that the recognition and implementation of Indigenous rights is the basis for all relations between the Government of Canada and Indigenous peoples. It could also include new measures, including federal legislation, to support the rebuilding of Indigenous nations and advancing Indigenous self-determination while respecting territorial and provincial jurisdictions.

The federal officials advise that the Framework is meant to accelerate the work already begun to renew the nation-to-nation, government-to-government relationship between the Government of Canada and Indigenous peoples based on the recognition of rights, respect, cooperation and partnership.

Since the Prime Minister’s announcement on February 14, 2018, the Minister of Crown-Indigenous Relations and Northern Affairs has held numerous engagement sessions across Canada with First Nations, Inuit and Métis peoples.

2. How to promote reconciliation in the Yukon?

The Yukon First Nations have been trailblazers with respect to the negotiation and implementation of modern treaties and self-governance in Canada. Their land claim and self-government arrangements broke new constitutional trails that other First Nation groups have followed for the benefit of their citizens and communities. When the Yukon First Nations submitted *Together Today For Our Children Tomorrow* to the Prime Minister in 1973, they proposed that a land claim settlement would protect their Aboriginal rights and address their deplorable socio-economic conditions. At that time, they committed to reconciliation with Canada by way of treaty implementation.

In every respect, the Yukon First Nations and their land claim and self-government agreements are unique. Therefore, the Framework must acknowledge that uniqueness and set out specific legislative and policy instruments that serve to promote and facilitate the implementation of the Yukon First Nation final and self-government agreements.

2.1 Self-governing Yukon First Nations

The self-governing Yukon First Nations invested more than four decades into the negotiation and implementation of their land claim and self-government agreements. As proposed in *Together Today For Our Children Tomorrow*, these agreements set out a comprehensive framework to protect their Aboriginal rights and address the socio-economic gaps with respect to their citizens and communities. Based on their experience, the self-governing Yukon First Nations have reiterated that the implementation of their land claim and self-government agreements have proven to promote substantive political, legal and socio-economic changes that ultimately bring meaningful reconciliation.

In *Beckman v. Little Salmon/Carmacks First Nation*, the Supreme Court of Canada recognized that the overarching purpose of modern treaty implementation is to achieve reconciliation.

The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful



administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.¹

Therefore, the self-governing Yukon First Nations maintain that the Framework must focus on treaty implementation in order to promote reconciliation in the Yukon. In particular, the Framework must incorporate specific measures and policies to realize the full implementation of the Yukon First Nation final and self-government agreements consistent with their spirit and intent. The Framework must commit the Government of Canada to develop mandates and policies with the Yukon First Nations to address the following implementation matters.

- 2.1.1 Need full and broad implementation of the land claim and self-government agreements.** The modern treaties must be implemented to achieve their broad socio-economic objectives. The approach of federal civil servants to narrowly interpret the terms of modern treaties, including the objectives therein, is unacceptable. To that end, the Government of Canada must commit in the Framework to work with the self-governing Yukon First Nations and other self-governing Indigenous governments to develop a policy to provide direction and guidance to the federal system with respect to implementation of the modern treaties in Canada.
- 2.1.2 Need to resolve implementation impasses.** The long-standing impasses relating to the implementation of certain provisions of the Yukon First Nation self-government agreements must be resolved. In some cases, these impasses have been outstanding and frustrated the implementation of key provisions of the self-government agreements for more than two decades.

Specific federal mandates and policies are required to facilitate the implementation of the unique provisions of the Yukon First Nation land claim and self-government agreements. Often national federal mandates and policies fail to address the specific implementation obligations of the Yukon First Nation land claim and self-government agreements.

If the federal and territorial governments fail to develop the mandates and policies necessary to implement key provisions of the Yukon First Nation final and self-government agreements, the Yukon First Nations' limited capacity is expended wastefully in fruitless negotiations and discussions with federal officials and the ability of the Yukon First Nation to function effectively and efficiently is adversely impacted. These impasses include the following.

- 2.1.2.1 Tax.** The Yukon First Nation self-government agreements provide the self-governing Yukon First Nations with the power to enact various taxation laws relating to settlement land. While this power does not limit the power of the federal or territorial governments to levy tax or make taxation laws, it creates the need for the parties to coordinate their taxation systems.

The self-government agreements require the Yukon First Nations and the Government of Canada to make reasonable attempts to negotiate agreements to coordinate the Yukon First Nations' power to enact laws concerning direct taxation. It also provides that they will negotiate whether the Yukon First Nations' taxation power will be extended to apply to other persons and entities located on settlement land.

Over the past twenty years, the Yukon First Nations and the federal and territorial governments have entered into tax sharing agreements with respect to personal income tax and GST. However, no further progress has been made with respect to other forms of direct taxation relating to settlement land, including corporate and commodity taxes.

¹ [2010] 3 S.C.R. 103 at para. 10.

Therefore, the Framework must include federal commitments to adopt new policies in order to negotiate such tax collection and sharing agreements with the Yukon First Nations in accordance with the self-government agreements.

- 2.1.2.2 Program and service transfer agreement** (the “PSTA”). The self-governing Yukon First Nations have the ability to negotiate the assumption of responsibility for the management, administration and delivery of certain programs and services. Such an agreement is referred to as a PSTA.

To date, the Yukon First Nations have only been able to negotiate PSTAs that provide funding based on the number of their citizens who are status Indians within the meaning of the *Indian Act* since the federal and territorial governments have not been able to reach agreement with respect to the Yukon’s contributions to PSTAs.

This means that the Yukon First Nations are grossly underfunded for most programs and services that they assume under PSTAs since their non-status citizens may comprise up to 50 percent of their citizenship.

The Framework must commit the federal government to work with the territorial government to confirm and clarify the Yukon Government’s contribution to the PSTAs with respect to non-status citizens in accordance with the self-government agreements.

- 2.1.2.3 Administration of justice agreement** (the “AJA”). The Yukon First Nation self-government agreements require the self-governing Yukon First Nations and the federal and territorial governments to enter into negotiations with respect to AJAs.

These negotiations will deal with such matters as adjudication, civil remedies, punitive sanctions including fine, penalty and imprisonment for enforcing any Yukon First Nation law, prosecution, corrections, law enforcement, the relation of any Yukon First Nation courts to other courts and any other matter related to aboriginal justice to which the parties agree. In particular, the AJAs would set out the process for the adjudication and enforcement of laws made by the self-governing Yukon First Nations.

Due to limited federal and territorial mandates, the pace of progress with respect to the negotiation and implementation of the AJAs has been glacial. To date, only one AJA has been negotiated and other Yukon First Nations have been engaged in protracted discussions with the federal and territorial governments for years.

The Government of Canada must commit in the Framework to work with the Yukon First Nations to develop mandates and policies so that the Yukon First Nations are able to implement and operationalize their judicial branches.

- 2.1.2.4 Yukon First Nation paramountcy over federal laws.** The Yukon First Nation self-government agreements direct the self-governing Yukon First Nations and the Government of Canada to enter into negotiations in order to conclude, as soon as practicable, a separate agreement or an amendment of the self-government agreements that identifies the areas in which the Yukon First Nation laws will prevail over federal laws to the extent of any inconsistency or conflict.

Despite the commitment set out in the self-government agreement, no discussions have been held with respect to this issue for more than 20 years. The initial discussions held 20 years ago were suspended since the federal mandates and policies were unacceptable.

The Framework must include federal commitments to development new mandates and policies with the Yukon First Nations with respect to this matter.



2.1.3 Must incorporate the collaborative fiscal policy process. For years, the self-governing Yukon First Nations have raised concerns about the inadequacy of the funding provided under self-government financial transfer agreements (the “FTAs”) negotiated pursuant to the Yukon First Nation self-government agreements. It is intended that the FTAs would provide funding for the self-governing Yukon First Nations to operate their governance institutions and provide public services to its citizens at levels comparable to other Yukoners.

While the federal mandates relating to FTA negotiations have evolved over the years, the Yukon First Nations’ concerns have not been completely addressed.

The self-governing Indigenous governments, including the self-governing Yukon First Nations, and the Government of Canada have been working together over the past two years to develop a new fiscal policy for self-government. They reached agreement with respect to the draft *Self-Government Fiscal Policy Proposal for Federal Review Collaborative Fiscal Policy Development Process* dated December 13, 2017 – referred to as the “Green Book” – and the federal Cabinet approved it on June 20, 2018. The Green Book intends to provide a principled approach to fiscal relations with the self-governing Indigenous governments consistent with the commitments made in the applicable self-government agreements and modern treaties. In particular, it is significant that the Green Book states that self-governing Indigenous governments “should have access to sufficient fiscal resources to fulfill their responsibilities and address associated expenditure needs.”

The self-governing Indigenous governments and the Government of Canada are now developing annexes that establish the methodology for determining expenditure need in each of the components of the self-governing Indigenous governments’ expenditure base. While significant progress has been made with respect to the annexes for governance and lands and resources, it is assumed that the other annexes will not be completed before the upcoming federal election.

It is hoped that Green Book will promote the development of federal mandates and policies so that the negotiation of the FTAs will be based, on among other matters, the Yukon First Nations’ expenditure needs. It is also hoped that the Green Book will bring federal mandates and policies so that equitable tax sharing agreements are negotiated with Yukon First Nations with respect to various tax revenues.

The Framework must include the principles of the Green Book and its annexes. Treaty implementation will only be successful if the Yukon First Nations and the Government of Canada change how they will address fiscal matters. As recognized in the Green Book, the fiscal relationship between each self-governing Indigenous government and the Government of Canada is “fundamental to the success of self-government.”

2.1.4 Must commit to land claim negotiation loan reimbursement. Following positive discussions with federal officials, the self-governing Yukon First Nations have worked with other self-governing Indigenous governments to provide a proposal to the federal officials with respect to the reimbursement of their land claim negotiation loans that have been repaid to the Government of Canada in accordance with their modern treaties. This proposal provides that the federal government would reimburse the self-governing Indigenous government’s land claim negotiation loans and interest charges and re-indexation amounts over a period of several years.

The federal government should make a commitment to reimburse the Yukon First Nations prior to the upcoming federal election and that commitment must be part of the Framework. The Yukon First Nation land claim and self-government agreements must benefit if the federal mandates evolve with respect to the land claim negotiation loans. Fair and equitable treatment is fundamental to reconciliation.

2.1.5 Provide constitutional protection for the Yukon First Nation self-government agreements. The self-governing Yukon First Nations have negotiated self-government agreements pursuant to Chapter 24 of the Yukon First Nation final agreements. The Yukon First Nation final agreements provide that the



agreements negotiated pursuant to Chapter 24 “shall not be construed to be treaty rights within the meaning of section 35 of the Constitution Act, 1982.”

While the provisions of the Yukon First Nation self-government agreements are contractually-binding on the parties, they are not protected under section 35 of the *Constitution Act, 1982*. These provisions were made at the negotiation table almost 30 years ago when the federal mandates did not contemplate broad and progressive self-governance.

More than 20 years ago, the Yukon First Nations and the federal and territorial governments had discussions to “constitutionalize” the Yukon First Nation self-government agreements.

Unfortunately, these discussions to entrench the self-government agreements in section 35 failed since the federal negotiation mandates were based on the federal inherent rights policy. The federal officials insisted that key provisions of the self-government agreements would have to be renegotiated to as part of the process to provide constitutional protection to the self-government agreements.

The Framework must address this issue. The Government of Canada must commit to develop new mandates and policies and reconvene discussions to provide constitutional protection to the Yukon First Nation self-government agreements without requiring the Yukon First Nations to agree to amendments to key provisions.

- 2.1.6 Need senior federal officials to focus on modern treaty implementation.** The Framework must provide that senior federal officials with authority and clout, and the ear of politicians, be appointed to take on implementation of modern treaties as a core mission of the federal government. Putting implementation into the hands of risk-adverse lower level officials who require constant approval of senior officials is not achieving satisfactory results.
- 2.1.7 Need an independent office to report annually to Parliament.** The Framework must provide that an independent implementation office be established to monitor, investigate and report to Parliament on the progress of treaty implementation in Canada. Such an office should be effective to remove roadblocks and bottlenecks. It would provide transparency and accountability with respect to modern treaty implementation. All Canadians have an interest to ensure that the federal investment in modern treaties are achieving their objectives.
Perhaps this office could also provide a dispute resolution mechanism. The dispute resolution process set out in the Yukon First Nation final agreement has a limited and narrow application.
- 2.1.8 Must establish a collaborative process for legislative development.** Despite the objections of the self-governing Yukon First Nations, the Government of Canada enacted Bill S-6 in 2015 which amended certain provisions of federal environmental and socio-economic assessment legislation made pursuant to the Yukon First Nation final agreements. Ultimately, the contentious amendments made by Bill S-6 were repealed. However, this emphasized the need for federal and territorial legislation to be co-developed with Yukon First Nations. The Framework must commit the federal government to work collaboratively with respect to the development of federal legislation that may affect the Yukon First Nation final or self-government agreements or their citizens’ exercise of their Aboriginal or treaty rights.

2.2 Yukon First Nation that have not ratified land claim or self-government agreements

While this paper focuses on the self-governing Yukon First Nations, it must be noted that three Yukon First Nations have not reached any agreement with the Crown with respect to their Aboriginal rights in the Yukon. The Crown must engage with these Yukon First Nations to ensure that the Framework addresses their specific issues.

It is noted that representatives of the Yukon First Nations that have not ratified a final or self-government agreement have stated that those Yukon First Nations have concerns with certain provisions of the Umbrella Final Agreement, but they want to negotiate some sort of agreement with the Crown in relation to their Aboriginal rights in the Yukon. Upon the request of the federal government, Gavin Finch undertook an assessment in 2008 about the situation in the Yukon with respect to the outstanding land claims and highlighted the need for some resolution with respect to the outstanding land claims of the White River First Nation, Liard First Nation and Ross River Dena Council.

These unsettled areas bring uncertainty to the Yukon and often serve to impede the implementation of the Yukon First Nation final and self-government agreements.

2.3 Transboundary First Nations

A number of First Nations whose communities are now located outside the Yukon's boundaries have Aboriginal rights in the Yukon, including the Taku River Tlingit First Nation, Acho Dene Koe First Nation and Kaska Dena Council (which represents the Daylu Dena Council, Dease River First Nation and Kwadacha First Nation). Their claims in the Yukon are referred to as transboundary claims. The Framework must address the reconciliation of these transboundary claims. There is a need for the Crown to adopt appropriate mandates and policies to engage with the transboundary First Nation with respect to their Aboriginal rights in the Yukon.

It also noted that the Gwich'in Tribal Council (the “GTC”) has a transboundary agreement that applies to a specific area in the northern area of the Yukon. We recommend that the Government of Canada engage with the GTC to ensure that the Framework addresses any concerns relating to the implementation of its transboundary agreement.

3. Next steps

The following next steps are recommended.

3.1 Reconciliation in the Yukon must be based on the implementation of the Yukon First Nation final and self-government agreements.

The path of reconciliation in the Yukon must continue to be land claim and self-government implementation.

It is recommended that the self-governing Yukon First Nations ensure that the Framework sets out measures and policies specific to the implementation of the Yukon First Nation final and self-government agreements. In particular, the Framework must address the challenges that have risen over the past 20 years to obstruct or delay the implementation of the Yukon First Nation final and self-government agreements. Some of these challenges are summarized in section 2 above.

3.2 The Framework represents an opportunity for Yukon First Nations to push their issues at the national level.

It is recognized that the development and implementation of the Framework cannot be a distraction to the implementation of the Yukon First Nation final and self-government agreements. Nevertheless, the Yukon First Nations must be involved to ensure that the Yukon First Nations' issues are addressed.

Therefore, it is recommended that the self-governing Yukon First Nations develop a common strategy to ensure that their views and positions are communicated effectively to the federal system and other parties involved in the development of the Framework. Perhaps the self-governing Yukon First Nations should prepare a written submission to inform the federal system with respect to their views and positions. It may be appropriate for the Yukon First Nations to have a representative involved in the development of any federal legislative or policy instruments relating to the Framework.

3.3 The Framework must incorporate new progressive mandates and policies.

It is recommended that the Framework repeal or amend out-of-date federal mandates and policies, such as the 1995 inherent right



policy, and incorporate new progressive mandates and policies, developed jointly with the self-governing Indigenous governments, such as the collaborative fiscal policy process and land claim negotiation loan reimbursement.

3.4 The Framework must address the concerns of the Yukon First Nations that have not ratified a land claim or self-government agreement + the transboundary First Nation that have Aboriginal rights in the Yukon.

3.5 Need to confirm how the Yukon Government will be involved in reconciliation measures in the Yukon.

The role of the Yukon Government with respect to the Framework and, more generally, with the development and implementation of new legislative and policy instruments to promote reconciliation in the Yukon must be confirmed and clarified.

Of course, the Yukon Government must be involved in this work since it is a party to the Yukon First Nation final and self-government agreements and, in particular, involved in the negotiations relating to tax agreements, PSTAs and AJAs in accordance with the self-government agreements.

While federal officials state that territorial jurisdictions will be respected in the development and implementation of the Framework, it is pointed out that the Yukon is not a province and the Yukon Government has no constitutional jurisdiction. The Yukon and its law-making jurisdictions are established pursuant to federal legislation, not section 92 of the *Constitution Act, 1867*.

In light of the admonishments from courts, including the Supreme Court of Canada², to the Yukon Government over the past ten years with respect to implementation of the Yukon First Nation final agreements, there are concerns that the Yukon Government has had the ability to undermine and frustrate reconciliation in the Yukon.

Given the Yukon Government's unique law-making powers, the Government of Canada must be prepared to intervene and ensure that the Yukon Government is carrying out its obligations under the final and self-government agreements and devolution agreements in a manner consistent with the honour of the Crown. In fact, the *Yukon Act* authorizes the federal government to intervene in certain circumstances. The Government of Canada must be proactive in order to promote reconciliation in the Yukon. For instance, it cannot simply act upon the request of the Yukon Government, in the absence of support from the Yukon Government, to change federal legislation or policies that would affect their Aboriginal and treaty rights, such as the Yukon Government's request for the contentious amendments made pursuant to Bill S-6 that were ultimately repealed.

Over the past several years, the self-governing Yukon First Nations and the Yukon Government have been working to re-establish a respectful government-to-government relationship and it is hoped that they can continue to work constructively. However, the Yukon Government cannot be permitted to frustrate reconciliation in the Yukon. The Framework must deal with these issues.

In closing, it must be emphasized that the Framework cannot be considered as a replacement of the Crown's constitutional obligations to engage on a nation-to-nation level with the self-governing Yukon First Nations in accordance with their respective final and self-government agreements.

² *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 + *First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 S.C.R. 576.