FIRST NATIONS LANDS ADVISORY BOARD BRIEF – HOUSE OF COMMONS INDIGENOUS AND NORTHERN AFFAIRS COMMITTEE JUNE 14, 2023

“Restitution” or “Lands Back” is increasingly important as Canadians become more aware of past injustices and current challenges facing First Nations. There is no single answer but we will offer our suggestions for moving forward.

There are now more than 100 First Nations across Canada governing reserve lands under the *Framework Agreement on First Nation Land Management* and we expect this to rise to over 150 First Nations in the next five years. This started just twenty-five years ago with a few First Nations breaking away from the failures of the Indian Act.

Colonial policies deprived First Nations of their lands, and often left them with small economically unsustainable reserves. After Confederation, the situation worsened. Canada failed to live up to treaty promises to provide reserve lands. Many reserves were taken away from First Nations to support settlement, railways, natural resource and infrastructure development, the economic goals of non-Indigenous Canada, and to satisfy veterans’ entitlements after the two world wars (see e.g. *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),*1995 CanLII 50 (SCC), [1995] 4 SCR 344, <https://canlii.ca/t/1frdf>). Throughout, federal and provincial governments did not consider First Nation’s Aboriginal title and rights, as well as treaty rights to be legally enforceable, though a split decision in the Supreme Court of Canada gave cause for reconsideration (*Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] SCR 313, <https://canlii.ca/t/1nfn4>). That decision led to formal withdrawal of the notorious 1969 White Paper on Indian Policy **https://oneca.com/1969_White_Paper.pdf ,** which had proposed the abolition of Indian reserves and which was strongly opposed by First Nations.

At the same time, courts recognized that the few obligations to First Nations under the Indian Act could be compromised by the many other priorities of government (see, e.g., *Kruger v. The Queen*, 1985 CanLII 5569 (FCA), [1986] 1 FC 3, <https://canlii.ca/t/g9dl5>). Courts continue to be called upon to resolve conflicting powers, duties and constitutional obligations of non-Indigenous governments.

It is only in the past fifty years that the federal government has reversed course with policies for negotiation of modern treaties, treaty land entitlement agreements, specific claims for past takings of lands, and the Additions to Reserve ("ATR") Policy. By the 1980's, courts had begun to identify and enforce the Crown's fiduciary obligations to First Nations (*Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335, <https://canlii.ca/t/1lpfn>). And only in this century did the courts also describe the Crown's duties to consult where land decisions might affect Indigenous rights (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511, <https://canlii.ca/t/1j4tq>). Ironically, these legal developments tended to slow additions to reserves rather than enhance them as government officials pondered at length the implications of these historic and modern obligations.

Though there has been some success in restitution of First Nation lands, particularly with urban reserves which benefit First Nations and their neighbours, there remain many failures and our recommendations follow.

RECONCILIATION RATHER THAN CONFRONTATION

Too often over the past fifty years, there has been a win-lose approach. First Nations have turned to the courts and Canada's policies trigger lengthy and difficult negotiations. Despite this, claim settlements and additions to reserve often lead to reconciliation and benefits for First Nations and their neighbours. The old confrontational policy of taking reserve lands without consent is gone,

as a matter of policy. The *Framework Agreement* made it legally impossible for an operational First Nation's reserve land base to be diminished in area or quality.

We recommend that emerging reconciliation policies must be less confrontational, recognize the lead of First Nations in proposing solutions, the importance of First Nation governance and relations with other governments, and economic reconciliation for all.

FIRST NATIONS GOVERNANCE IS KEY TO THE LANDS QUESTION

The Indian Act and federal programs have led to failures on reserve. Federally designed programs will not solve the housing, infrastructure, and social issues on First Nation lands. Indigenous Services Canada must consider First Nation designed and led approaches rather than try to transfer failed systems and programs. **The Framework Agreement shows that reserves can be successful.** Effective First Nation land governance, land use planning and the power to realize economic opportunities in business time rather than federal time can overcome past failures, and Framework Agreement First Nations are proof of that. All First Nations who wish to join the over 100 First Nations across Canada governing their lands under the Framework Agreement should have the option of doing so without delay. Canada should continue to support improvements to the Framework Agreement, such as the development of a new First Nations led land registry, to strengthen First Nations governance on our lands.

ADDITIONS TO RESERVE (ATR) REFORMS

Starting roughly fifty years ago, Canada established a short policy to guide ATRs. Canada's policy is now 59 pages long (including schedules) and is accompanied by legislation. The policy includes a 13 page application form, which when completed is typically at least 20 pages long. Some ATRs have taken more than twenty-five years to complete.

We agree with the Minister of Crown Indigenous Relations when he says that Canada's ATR policy is broken. We recommend a new policy approach for Framework Agreement First Nations governing under land codes and examples include: 1) eliminate narrow policy categories for ATRs as First Nations may have any number of good reasons for ATRs; 2) eliminate policy barriers to ATRs, such as requirements that First Nations solve municipal service or environmental issues in advance of ATRs; 3) streamline ATRs which involve minor boundary adjustments or return of former reserve lands to a First Nation; 4) reduce or eliminate the role of federal officials in ATR submissions to the Minister. Ottawa should get out of the way so that First Nations have the clear lead in submissions to Canada; 4) Explore broader reforms in partnership with the Lands Advisory Board which might include amendments to the Framework Agreement. For example, explore how to end delays posed by Canada's procedures for land acquisitions which has been built by and for federal departments and agencies.

Expanding reserves and rebuilding the presence of First Nations on ancestral lands should be embraced, instead of barely tolerated under narrow and failed policies. Reserve lands should not be seen as a burden on administrators and taxpayers but instead as essential to the vitality and success of First Nations and First Nation governments. Many of the applications lingering in the ATR system are for lands First Nations have acquired and paid for themselves.

END POLICIES TERMINATING RESERVES & THE FRAMEWORK AGREEMENT

Canada's comprehensive claims policy and the BC Treaty process include requirements to terminate existing reserves. This complicates negotiations and many First Nations reject these policy conditions imposed by Canada and have therefore refused to pursue comprehensive claims or treaty negotiations in British Columbia. This policy failure seems to be based on the assumption that reserves are a failure. **We have proven over the past twenty-five years that**

the Indian Act is the main culprit, not reserve lands. Many First Nations governing their reserve lands under the Framework Agreement are now thriving communities with enviable economic opportunities, significantly improved housing and infrastructure, members returning to live on reserve, and even attracting non-Indigenous businesses and residents. First Nations should have the option of retaining Framework Agreement lands governance when negotiating modern treaties or other self-government agreements.

CONCLUSION

Our recommendations are consistent with Article 26 of UNDRIP:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.