The Attorney General, having responsibility for the regulation and conduct of all litigation for or against Her Majesty the Queen in right of the Province of British Columbia, has issued the Directives reproduced below to be followed by legal counsel representing the Province in civil litigation involving Indigenous Peoples. The Directives do not have the status of law and are not justiciable. The Directives do not in any way override legislation and are not intended to provide legal advice.

Directives on Civil Litigation involving Indigenous Peoples[1]

Forward

The Province of British Columbia is transforming its relationship with Indigenous Peoples and is implementing new legislative and policy tools in support of sophisticated government-to-government relationships based on respect, recognition, and upholding Aboriginal rights and Indigenous human rights. In November of 2019, the Province became the first jurisdiction in Canada to pass legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) through the *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act).[2]

The Declaration Act requires that the Province, in consultation and collaboration with Indigenous Peoples, take all measures necessary to align provincial laws with the UN Declaration and undertake an action plan to meet the objectives of the UN Declaration. This provides the provincial government with tools and mechanisms to collaboratively transform structures and processes so they are inclusive and respectful of Indigenous human rights. These tools can support innovative new approaches to strong and effective relationships, while also helping to avoid costly, lengthy, and adversarial litigation.

The Province recognizes its ongoing legal and constitutional obligations concerning its relations with Indigenous Peoples and to the constitutional imperative of reconciliation of Aboriginal and Crown titles and jurisdictions. Further, in all its dealings with Indigenous Peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Indigenous Peoples in question.[3] This applies as a legal and constitutional standard for Crown conduct.

To support its capacity in this regard, the Province introduced Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples (Draft Principles) in early 2018, which are designed to support institutional change and guide the daily work of provincial government employees.[4]

The Declaration Act and UN Declaration, complemented by the Draft Principles, provide a framework for necessary dialogue and engagement with Indigenous Peoples and their respective governing bodies. The resolution of conflict and disputes between the Crown and Indigenous Peoples is best addressed through government-to-government negotiations. A negotiated outcome is always the preferred path forward for the Crown. Meaningful reconciliation is rarely, if ever, achieved in courtrooms.[5]

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[1] These are policy directives and are not an "enactment" or "regulation" within the meaning of the *Interpretation Act,* RSBC 1979, c.206. The Directives are evergreen and will be revised consistent with processes established under the *Declaration on the Rights of Indigenous Peoples Act*. [SBC 2019], c. 44

[2] Declaration Act.

[3] *Yahey v. British Columbia,* 2021 BCSC 1287 at paras. 81 to 88; *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at paras. 68 to 72

[4] See Draft Principles: https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf

[5] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 24.

The Attorney General of British Columbia is the chief law officer for the provincial government and has responsibility for the regulation and conduct of all litigation for or against the provincial Crown. This includes: the responsibility to see that the administration of public affairs is in accordance with law; to represent the provincial government in appearances before the courts and administrative tribunals; and to ensure that government lawyers maintain the honour of the Crown in the conduct of litigation involving Indigenous Peoples.

In support of these responsibilities, the Attorney General of British Columbia has developed these Directives on Civil Litigation involving Indigenous Peoples (Directives), to ensure government lawyers take an approach to litigation that upholds the honour of the Crown and Crown obligations to Indigenous Peoples and seek negotiated resolutions that uphold Indigenous human rights and Aboriginal rights.

A strong and sophisticated government-to-government relationship between the Province and Indigenous Peoples is not achieved through prolonged litigation, but through hard work, changes in perspectives and actions, and compromise and good faith by all.[6] The Government of British Columbia and Indigenous Peoples are collaborating on the implementation of Article 27 and 28 of the UN Declaration[7], so that there are alternatives to adversarial litigation. Effective relationships require a full understanding of Indigenous human rights, the UN Declaration, constitutionally protected Aboriginal and treaty rights, and corresponding state/Crown obligations. The approach to litigation established by these Directives supports respect for the rights of Indigenous Peoples and is in the public interest, as costly protracted litigation in British Columbia is not the preferred mechanism to advance meaningful reconciliation.

[6] See Principle 2, The Province of British Columbia recognizes that reconciliation is a fundamental purposeof section 35 of the *Constitution Act*, 1982.

[7] Article 27: “States shall establish and implement, in conjunction with indigenous Peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous Peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous Peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous Peoples shall have the right to participate in this process.” Article 28: “1. Indigenous Peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the Peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”

Introduction

As expressed by the Supreme Court of Canada, over the years the rights of Indigenous Peoples were often honoured in the breach by the Crown, and Indigenous Peoples' rights to their lands were virtually ignored.[8]

Section 35 of the *Constitution Act (1982)* was enacted after lengthy constitutional talks and political debates, informed by legal jurisprudence, when the Government of Canada patriated the Canadian Constitution. It recognizes and affirms – and constitutionally protects – existing Aboriginal and treaty rights. The Courts have clarified that section 35 requires the Crown and Indigenous Peoples to negotiate the reconciliation of the assertion of Crown sovereignty with pre-existing Aboriginal sovereignty.[9] While the Courts have consistently encouraged negotiated reconciliation and settlements, there has been a significant body of jurisprudence developed since 1982 whereby the Courts have defined the nature and scope of rights and corresponding Crown obligations under section 35, instead of being a "forum of last resort" focused on resolving specific issues in dispute.[10]

It is important to recognize that courts are guardians of the Constitution and of rights under it, and they have consistently reminded parties that to fulfill this role they need a full and proper evidentiary record to be gathered and adduced so they may consider and determine whether the requirements under the legal tests have been met.[11] Counsel should endeavour in good faith to support all parties in presenting a complete record to the Court whenever possible.

The Chief Justice of British Columbia, Hon. Robert J. Bauman, commented on the urgency of the task of addressing Indigenous rights and reconciliation and the importance of leadership within the legal profession in his 2021 address to the Canadian Institute for the Administration of Justice:[12]

> Adding to that urgency is the development and acceptance of the United Nations Declaration on the Rights of Indigenous Peoples—an Indigenous instrument built by decades of bold work by Indigenous advocates and their allies. The affirmation of the applicability of UNDRIP to British Columbia and Canadian law and the government's commitment to its implementation requires all elements of the state to engage with and implement its principles. Thus, in a concrete way through this new legislation, a duty to act has been layered on top of our duty to learn.
>
> At the forefront of this effort is self-determination of Indigenous Peoples. And in this reference to self-determination I note that the Supreme Court of Canada has recognized self-determination

[8] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103.

[9] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 20 states that, "Treaties serveto reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*." In 2019, The Government of Canada, the Province of British Columbia, and the First Nations Summit collaboratively developed a *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia*. This BC-specific policy supports a recognition of a rights-based approach to treaty negotiations, and provides guidance for how treaties, agreements and other constructive arrangements are to be negotiated in a manner consistent with the Constitution and commitments to implement the UN Declaration as well as customary international law and Indigenous laws and legal orders.

[10] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam),* 2020 SCC 4 at para. 24.

[11] *R. v. Desautel*, 2021 SCC 17 at paras. 2 & 84; *Mitchell v. M.N.R.*, 2001 SCC 33 at para.51; Lax Kw'alaams *Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at paras. 11 and 12.

[12] The Hon. Robert J. Bauman, Chief Justice of BC, "A Duty to Act", November 17, 2021, https://www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/A_Duty_to_Act_CIAJ_%20Indigenous_Peoples_and_the_Law.pdf.

> as a right of a people to pursue its "political, economic, social and cultural development" albeit within the framework of an existing state. It may mean more than that to you, and in the context of UNDRIP, the UN Special Rapporteur on the Rights of Indigenous Peoples has emphasized the importance of not assimilating Indigenous self-government within the existing state. Preservation of distinctive Indigenous culture and government is crucial, not only for the survival, dignity, and well-being of Indigenous Peoples, but also as a valuable part of state identity.
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> As we find space for Indigenous legal orders, we must look to Indigenous Peoples to determine what that space will look like. Senator Murray Sinclair has said that a process of reconciliation, including legal reconciliation, that does not include an Aboriginal perspective and approach will be doomed to fail. I couldn't agree more. And, if I may, I would add that beyond inclusion, the Indigenous perspective should be prioritized and centred.

Litigation is an inherently adversarial process and, so, the Supreme Court of Canada has strongly encouraged negotiations over litigation as the primary forum for achieving reconciliation and renewed Crown-Indigenous relationships. In the past, opportunities to negotiate have been mired in denial of rights and colonial doctrines, such as seeking extinguishment of title and rights. Courts provide dispute resolution and Indigenous Peoples have a right to pursue litigation as they determine is appropriate. However, the role of the courts can shift to assist in strategically addressing narrow specific issues, while more robust, good faith negotiations occur involving all parties. There should not be a need to use the courtroom as an alternative to the negotiating table.[13]

A core objective of the Directives is to confirm an approach to litigation that prioritizes and promotes resolution, innovation and negotiated settlement, and that seeks to narrow or avoid potential litigation. The Province of British Columbia is committed to pursuing dialogue, co-operation, partnership, and negotiation based on the Indigenous human rights affirmed in the UN Declaration, and Aboriginal and treaty rights recognized and affirmed in the Canadian Constitution. The Province is also committed to reviewing pleadings, legal positions, and litigation strategies for consistency and alignment with these Directives.

The Province respects the right of Indigenous Peoples to choose their preferred forum to resolve legal issues, including the courts. In some instances, matters may require legal clarification or definition, and litigation may be unavoidable. In other instances, the parties may desire judicial clarity on one or more issues. When matters do result in litigation, whatever the reason, these Directives instruct counsel to engage honourably and to assist the court constructively, expeditiously, and effectively.

The Province acknowledges its commitments in the Commitment Document to support Indigenous groups in their nation-building and governance work, including the design and development of their own institutions and processes to address a range of issues, including inter-nation boundary issues or disputes. Greater understanding and reliance on Indigenous legal approaches and inter-nation protocols and practices, and a principled approach to resolution of such disputes, is a matter of ongoing development and response by the Province of British Columbia.

All counsel must follow these Directives in the approaches, positions, and decisions taken on behalf of the Attorney General of British Columbia in civil litigation, including quasi-judicial proceedings involving Indigenous Peoples and their section 35 rights.

[13] *R. v. Desautel*, 2021 SCC 17 at paras. 87-92.

Objectives

The purpose of the Directives is to improve the conduct of litigation involving Indigenous Peoples in a manner that considers Indigenous human rights, constitutionally protected Aboriginal and treaty rights, and upholds the honour of the Crown in all matters involving the Indigenous Peoples of British Columbia.

How the Crown conducts its approach in such proceedings: (1) supports the ongoing work of reconciliation; (2) fundamentally contributes to transformed and respectful government-to-government relations; (3) contributes to meeting the Province's legal and constitutional obligations; and (4) minimizes costs, complexity, and length of proceedings. This can also lead to strategic and constructive guidance from the courts that support negotiated arrangements.

In the application of the Directives, counsel must ensure that these objectives are being met.

Reconciliation

Reconciliation is a fundamental purpose of section 35 of the *Constitution Act (1982)*, based on the respect and full enjoyment of Aboriginal and treaty rights, and upholding the honour of the Crown. Reconciliation is an ongoing process through which Indigenous Peoples and the Crown work to reconcile the assertion of Crown sovereignty with pre-existing Aboriginal sovereignty. Through this constitutional work, we may cooperatively establish and maintain a mutually respectful framework for living together, with strong, healthy, and self-determining Indigenous nations as key government-to-government partners in a strong British Columbia. Reconciliation requires hard work, enlightened perspectives, bold actions, innovation, compromise, and good faith by all.

Government-to-Government

Indigenous self-determination and self-government are affirmed in the UN Declaration and are key to decolonization and forming new governmental relationships based on recognition, respect, partnership, and cooperation. Indigenous governments are part of Canada's evolving system of cooperative federalism and distinct orders of government.

The Province is committed to working with Indigenous nations toward strong, sophisticated, and valued government-to-government relationships, with clear principles, mutual and respective responsibilities, and accountabilities. This renewed and modernized relationship will clarify and include space for the exercise of our respective jurisdictions, governance, laws, and responsibilities (see the *Commitment Document Joint Agenda: Shared Vision, Guiding Principles, Goals and Objectives*).[14] The Province has committed to jointly design, construct and implement a principled, pragmatic, and organized approach to implement: the section 35 *Constitution Act (1982)* framework in British Columbia, the *Tsilhqot'in* decision, the UN Declaration and the Truth and Reconciliation Commission's Calls to Action, with tangible milestones to demonstrate progress. The application of these Directives contributes to that work.

[14] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shared_vision_and_guiding_principles_final_26nov2018.pdf

The Province prioritizes and prefers resolution and settlement through collaboration, cooperation, and negotiation, over litigation. Where matters do proceed to court, counsel must understand that a court-imposed solution (including conflicts as between Indigenous groups) is likely to be of less assistance in reconciling the interests of the parties than a negotiated resolution.

Crown Obligations

The Province has legal, fiduciary, and constitutional obligations in relation to Indigenous Peoples and their rights, depending on the circumstances. These obligations arise pursuant to section 35 of the *Constitution Act* in relation to Aboriginal and treaty rights, and pursuant to the Declaration Act in relation to Indigenous human rights affirmed in the UN Declaration. The Province also has obligations to Indigenous Peoples captured in treaties and agreements.

The honour of the Crown is engaged in all the Province's dealings with Indigenous Peoples. The Attorney General and counsel must act with honour, integrity, good faith, and fairness in all work that relates to Indigenous Peoples. The overarching aim is to ensure that Indigenous Peoples are treated with respect and as full partners in Confederation, with their rights, treaties, and agreements upheld and implemented. The honour of the Crown is reflected not just in the substance of the positions taken, but in how those positions are expressed. This gives rise to an obvious tension where there is a dispute between the Province and one or more Indigenous Peoples or nations. These Directives set out how counsel is to exercise discretion in developing legal positions, pleadings and arguments in a manner that helps fulfil the obligations the Province is obliged to meet.

Minimizing Costs and Complexity

Adversarial litigation cannot and should not be a central forum for achieving reconciliation. This is a message the Supreme Court of Canada has sent time and time again, strongly encouraging that the work of reconciliation take place through political, economic, and social processes that involve negotiating, building understanding, and finding new ways of existing and working together.

Adversarial litigation between the Crown and Indigenous Peoples presents challenges for achieving reconciliation. When litigation is advanced, the honour of the Crown requires increased attention to minimizing costs and complexity, and for the courts to approach proceedings involving the Crown practically and pragmatically in order to effectively resolve these disputes.[15] The Attorney General and counsel representing the Attorney General must act with honour, integrity, good faith, and fairness in all work that relates to Indigenous Peoples.

[15] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para. 51.

Litigation Directives

The following 20 litigation Directives establish policy directions that all legal counsel must apply in their conduct of civil litigation (including judicial review petitions, civil appeals, and reference questions) involving Indigenous Peoples and section 35 claims:

Litigation Directive #1: Counsel must understand and apply the Declaration Act and Draft Principles.

The Ministry of Attorney General is committed to ensuring all staff understand the Indigenous human rights and standards affirmed in the UN Declaration, Aboriginal and treaty rights, Crown obligations, and the constitutional imperative of reconciliation. All counsel, whether barristers or solicitors, must also understand and apply the Draft Principles – which are informed by the above noted rights, obligations, and documents.

Counsel must understand the Crown (state) obligations in order to uphold those rights. Counsel must also strive understand Indigenous perspectives, recognizing that there will be diversity among those perspectives. The Ministry of Attorney General will provide its counsel with training and resources to achieve these objectives.[16]

Where litigation was started before the passage of the Declaration Act or the issuance of the Draft Principles or the Directives (i.e. active litigation), counsel must review their pleadings, legal positions, and litigation strategy to ensure that they are consistent with the Declaration Act, Draft Principles and Directives.[17] Working with the client(s), other departmental counsel, and the Ministry of Indigenous Relations and Reconciliation (MIRR), litigation counsel need to take steps to resolve any inconsistencies, including amending pleadings. In those circumstances where it appears impossible to resolve an inconsistency, counsel must seek direction from the Attorney General.[18] Counsel with suggestions or concerns respecting the application of the Declaration Act or Draft Principles should bring them to the attention of their supervisor, or the Assistant Deputy Attorney General of the Legal Services Branch.

Litigation Directive #2: Litigation strategy must reflect a whole-of-government approach.

Counsel for the Attorney General represent the B.C. government as a whole, not any particular department or agency.[19] The B.C. government is obligated to uphold and fulfill Crown obligations, including those involving Indigenous Peoples. As such, litigation strategies must be grounded in Crown constitutional and legal obligations. In this regard, litigation and legal services counsel have

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[16] Training may include, for example, training in intercultural competency, conflict resolution, human rights, the UN Declaration and the Calls to Action from the Truth and Reconciliation Commission. Indigenous LegalRelations is working to deliver training to other LSB counsel, as well as clients.

[17] This requirement applies to active litigation only.

[18] Reference to the Attorney General includes the Deputy Attorney General, Assistant Deputy AttorneyGeneral, or other delegate.

[19] The duties and powers of the Attorney General of British Columbia are stated in the *Attorney General Act*, RSBC 1996, c. 22, s. 2. Please see Ombudsperson Recommendation 31 Legal Advice protocols – and special consideration in regard to Statutory Decision Makers and whether legal advice is being followed https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/public-service/legal_advice_protocols_march_2018_final.pdf

key roles to play in working with clients, and MIRR, to underscore the importance of development and implementing a strategy that demonstrates respect for, and consistency with, the broader requirements and objectives of reconciliation and fulfilling Crown obligations.

At the beginning of each file, counsel, the client(s) and MIRR must have a discussion about the possible effects of litigation on the current and future relationships between the parties to the litigation, on relationships between the Province and Indigenous Peoples generally, and on the work of reconciliation. These possible effects should inform and shape the litigation strategy, which must include ways of resolving all or part of the litigation as expeditiously as possible. The focus should be on collaborative solutions that enhance relationships.

Additional consultation with other ministries may be necessary to ensure that legal positions reflect a whole-of-government approach.

Actions launched, and responses to actions, involving Indigenous Peoples and their rights must be approved by the Attorney General and reviewed on an ongoing basis to comply with this Directive.

Litigation Directive #3: Early and continuous engagement with legal services counsel, clients and MIRR is necessary as a priority to avoid litigation.

Litigation is an inherently adversarial process and cannot be the primary forum for reconciliation in the Crown-Indigenous relationship. Rather, it is the Province's interest to make conflict and litigation the exception, by promoting respectful and meaningful dialogue and dispute resolution outside of the courts.

To achieve this, legal services counsel must engage with client(s) and MIRR as soon as they become aware of a conflict that may result in litigation. Working with the client(s), other departmental counsel and MIRR, counsel must develop a coordinated approach with the aim of achieving a resolution that avoids litigation.

Indigenous groups are entitled to choose a preferred forum to resolve their legal issues and sometimes litigation will be unavoidable. The relationship between Indigenous Peoples and the Crown should not be adversely affected by how the Crown conducts this litigation. The conduct of litigation must respect this relationship by upholding Indigenous rights and Crown obligations and focusing the litigation on those specific issues that cannot be resolved through other forums.

Counsel must be open to alternative resolution processes inclusive of or based on Indigenous approaches, values, and principles, including engaging Indigenous specialists and Indigenous legal orders.[20] Government's participation in such processes will be guided by the Negotiations and Regional Operations Division of the Ministry of Indigenous Relations and Reconciliation.

[20] See: The Hon. Robert J. Bauman, Chief Justice of BC, "A Duty to Act", November 17, 2021, https://www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/A_Duty_to_Act_CIAJ_%20Indigenous_Peoples_and_the_Law.pdf. The Hon. Lance Finch Chief Justice of BC, "The Duty to Learn: Taking Account of Indigenous LegalOrders in Practice" (Paper delivered at the Continuing Legal Education Society of British Columbia Indigenous Legal Orders and the Common Law Conference November 15, 2012).

Litigation Directive #4: Counsel should vigorously pursue all alternative forms of resolution throughout the litigation process.

Counsel's primary goal must be to resolve the issues, using the court process as a last resort and in the narrowest and most constructive way possible. This is consistent with counsel's ongoing obligation to consider means of avoiding or resolving litigation throughout a file's lifespan. Counsel must engage in these efforts early and often, ensuring that all opportunities and avenues for narrowing the issues and settling the dispute are explored. A focus on effective resolution requires innovation, and principled and legally sound advice. It involves advancing legal positions in a way that ensures the issues are addressed in a principled way that equally considers the implications for the law, government operations, and the Province of British Columbia's relationship with Indigenous Peoples.

Counsel must work with client(s) and MIRR to develop problem-solving approaches that promote reconciliation. These approaches should include alternative dispute resolution processes such as negotiations and mediation, informed by and inclusive of Indigenous perspectives and approaches. Counsel must engage with the Indigenous party to identify any issue(s) that can be resolved through Indigenous legal traditions or other appropriate traditional Indigenous approaches.

Where there are obstacles to resolving all or part of the litigation, counsel should consider creative solutions with other Legal Services Branch counsel and other government ministries, including MIRR. For example, counsel should ask about existing programming and funding authorities that may provide a means of resolving the litigation and/or addressing ongoing harms.

The partial resolution and settlement of litigation must be considered and sought wherever possible, with the aim of narrowing the issues and facilitating an expeditious resolution. This can include developing agreed statements of fact; limiting the scope of discovery; using written interrogatories; using alternative dispute resolution; and, where appropriate, using processes such as summary judgment, summary trial, and the trial of an issue. It should be remembered that there is a power imbalance and resourcing disparity between Indigenous groups and the B.C. government.

The Province of British Columbia may be engaged with Indigenous groups in other processes, such as treaty negotiations, exploratory tables, or consultations regarding resource development projects. Counsel, in consultation with the client(s) and MIRR, should consider both the impact of the litigation, and of any proposed negotiations to settle the litigation, on these other processes.

Conversely, where problem-solving approaches are employed to narrow or resolve the litigation, counsel must consider whether these approaches can reasonably occur alongside the litigation. Given how long it can take to bring some of these matters to trial, counsel must consider whether postponing or staying the litigation to pursue a potential settlement may frustrate the objectives of reconciliation if settlement efforts are unsuccessful.

Litigation Directive #5: Legal obligation to uphold Aboriginal rights, treaty rights and Indigenous human rights.

Section 35 of the *Constitution Act (1982),* the Declaration Act and Draft Principles upended the *status quo* colonial relationship with Indigenous Peoples. Specifically, the Declaration Act establishes a human rights framework for Crown-Indigenous relations, requiring the Province, in consultation and cooperation with Indigenous Peoples, to take all measures necessary to ensure the laws of British Columbia are consistent with the UN Declaration. Further, Draft Principle 1 calls on the Province of British Columbia to ensure its relationships with Indigenous Peoples are based on the recognition and implementation of the right to self-determination, including the inherent right of self-government.

The Province has, through these developments, committed itself to change the way it does business and the way it engages with Indigenous Peoples, including a fundamental shift away from litigation and judicial determination of matters in dispute prior to taking meaningful action to implement inherent Aboriginal and treaty rights. This means new legal strategies and positions that may recognize and uphold – and not deny – Aboriginal and treaty rights, and Indigenous human rights.[21]

As specified in Litigation Directive #12 below, counsel must make admissions where appropriate, based on facts relevant to the existence of Aboriginal title and rights. Rights, or facts relevant to the existence of rights, must be recognized.

In some circumstances, recognition may be complicated by the fact that other Indigenous Peoples or groups have indicated an overlapping or competing interest. It is appropriate that Indigenous Peoples resolve any disputes internally. Counsel should not seek to add other Indigenous parties to litigation unless it is necessary for the court to resolve issues raised in the action.

Litigation counsel must avoid taking positions that could undermine the ability of Indigenous groups to resolve disputes amongst themselves using their own protocols and approaches. Where appropriate, litigation counsel must explore with the client(s), MIRR, and other parties to the litigation whether the overlapping or competing interests of Indigenous groups may be addressed through discussions between them outside the litigation, and whether British Columbia or Canada may assist in facilitating such discussions.

Rights recognition contributes to avoiding or substantially narrowing the scope and substance of matters in litigation. Where the nature or scope of Aboriginal title or rights, or treaty rights, are the subject of dispute, counsel must seek direction on the proposed position from the Attorney General and indicate how the position aligns with the Declaration Act and these Directives.

In addition to recognizing rights, counsel must ensure that their submissions and positions are not directed at undermining those rights, including Indigenous Peoples' right to self-determination.

[21] The change in terminology has been influenced by use of the term "Indigenous" by Indigenous Peoples themselves, and use of that term in international instruments, such as the UN Declaration.

Litigation Directive #6: Positions must be thoroughly vetted, and counsel must not advise clients to pursue weak legal positions.

Keeping in mind the constitutional requirement to act honourably in all dealings with Indigenous Peoples, and the Province of British Columbia's obligation to implement the UN Declaration, counsel must make an early assessment of the likelihood of success of the Crown's substantive legal positions. This assessment must include the implications on the Crown-Indigenous relationship going forward.

Counsel must advise against taking denial of rights legal positions or advancing weak legal positions intended to add unnecessary complexity in the litigation causing inertia, delay and increased cost.

In exceptional circumstances where there is a principled basis for pursuing a controversial position, counsel must seek approval from the Attorney General before proceeding.

Counsel should make every effort to resolve differences of opinion on available arguments and the strength of legal positions through internal discussion. Where resolution is not possible, counsel must ensure not only that internal to government consultation is full, but that approvals are obtained from the relevant decision-making authority. This will include, in appropriate circumstances, approvals from the Attorney General. The goal is always to reach a consensus on a position that best serves the Province of British Columbia as a whole, and that is consistent with the Declaration Act and accords with the Draft Principles.

Litigation Directive #7: Counsel must seek to simplify and expedite the litigation as much as possible.

Counsel must ensure that litigation is carried out expeditiously. Litigation counsel must avoid unnecessary procedural motions and seek agreement on non-contentious matters. All those representing the B.C. government involved in litigation must seek to avoid unnecessary delays. Counsel should consider how unnecessary delay may cause added expense and strain to Indigenous parties and may be seen as disrespectful and as an attempt to deny them justice. Consistent with reconciliation, counsel must take all appropriate measures to narrow the scope of, and shorten, litigation involving Indigenous Peoples, and pursue and implement ways to minimize and reduce costs and financial burdens on Indigenous parties. This includes reasonable consideration of requests to extend deadlines on costly litigation steps, such as document production and strive to provide documents early in the litigation process to allow Indigenous parties time to receive legal advice.

Litigation Directive #8: All communication and submissions must be regarded as an important tool for pursuing reconciliation.

Written and oral submissions, including pleadings, are a form of communication between the parties, between the Attorney General and Indigenous Peoples generally, between the Attorney General and the courts, and between the Attorney General and the public. The Province of British Columbia's submissions and pleadings must seek to advance reconciliation by upholding the honor of the Crown and applying the Declaration Act and Draft Principles.

Litigation Directive #9: Counsel must use respectful and clear language.

The Attorney General of British Columbia is the chief law officer of the provincial Crown. All communications with the courts, Indigenous Peoples or their counsel, the media, the public and other parties must be respectful, in good faith and in keeping with the honour of the Crown.

Counsel's communications, pleadings and submissions take on a unique importance in litigation relating to Indigenous Peoples. The honour of the Crown is reflected not just in the substance of the position taken, but in how these positions are expressed.

Respectful advocacy requires that counsel ensure that language and tone are not unnecessarily pointed or dismissive. This requires awareness, understanding and competency regarding Aboriginal rights and Indigenous human rights. Counsel must fully respect the relevant standards, principles and laws, which structure Crown discretion and decision-making.

Clear language communicates respect for Indigenous Peoples and their counsel. Counsel must bear in mind that "legalese" may be perceived as an obstacle to communication. Conversely, counsel must also be careful that plain language does not create misunderstanding by distorting a clear legal meaning and there may be times where legal language is unavoidable.

Counsel must address Indigenous parties by their Indigenous names (if known and used by the Indigenous party) and describe their territories using Indigenous names (if known) in addition to the use of English or non-Indigenous terms.

Litigation Directive #10: Legal terminology regarding Indigenous Peoples must be consistent with the *Constitution Act (1982),* the UN Declaration and be distinctions-based.

Section 35 of the *Constitution Act (1982)* recognizes and affirms "aboriginal and treaty rights of aboriginal Peoples" and defines "aboriginal Peoples" as including the "Indian, Inuit, and Métis Peoples of Canada." This gives rise to the need for a distinctions-based approach, which is captured in Principle 10 of the Draft Principles:

> The Province of British Columbia recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of Indigenous Peoples in B.C. are acknowledged, affirmed, and implemented. The Province recognizes First Nations, the Métis Nation, and Inuit as the Indigenous Peoples of Canada, consisting of distinct, rights-bearing communities with their own histories, including with the Crown. The work of forming renewed relationships based on the recognition of rights, respect, co-operation, and partnership must reflect the unique interests, priorities, and circumstances of each people.

The Declaration Act, and various federal statutes, use the term "Indigenous Peoples", as the UN Declaration affirms Indigenous human rights. These statutes confirm that "Indigenous Peoples" has the same meaning as "aboriginal Peoples" in the *Constitution Act (1982)*

Generally, there is increasing use of the term “Indigenous”, particularly with the passage of provincial and federal legislation to implement the UN Declaration. However, a general preference for using the term “Indigenous” does not require its use where the context requires a different term, as the following examples illustrate:

- “Aboriginal” is a defined term in section 35 of the *Constitution Act (1982).* When counsel refer to groups who are or may be holders of section 35 rights, or refer to section 35 rights themselves, “Aboriginal” and not “Indigenous” should be used.
- The term “Indian” appears in subsection 91(24) of the *Constitution Act, 1867* and legislation flowing from that head of power, such as the *Indian Act*, R.S.C. 1985, c I-5.
- “First Nation” is the legally accurate term when referring to the *First Nations Land Management Act*, S.C. 1999, c. 24, or other legislation.
- “Métis” is the legally accurate term when referring to the post-contact, pre-control test as defined in *R. v. Powley,* 2003 SCC 43.

This is not to say that counsel should simply use the term “Indigenous” in their dealings with particular groups. Counsel should use the specific name of the Indigenous Peoples, nation, or governing body with whom they are dealing.

In choosing the appropriate terminology, counsel must be sensitive to the fact that terminology that may be acceptable to some might be offensive to others. This is an area that continues to evolve, and counsel should consult the Assistant Deputy Attorney General where they require advice about terminology, and this advice will be rooted in proper collaboration and cooperation with the representatives of the Indigenous Peoples involved.[22]

Litigation Directive #11: Overviews should be used to concisely state the Province of British Columbia’s analysis and narrow the issues.

An overview of the Province of British Columbia’s analysis is an important communicative tool. The overview must be used to plainly explain the Province of British Columbia’s perspectives, what is in issue and what is not in issue. As prescribed by the supporting commentary for Draft Principle 2, acknowledging wrongs where appropriate and focusing on what is common between the parties may help facilitate reconciliation and narrow the issues.

Litigation Directive #12: To narrow the scope of litigation, admissions ought to be made, whenever possible.

Admissions, based on accepted facts, should be made to narrow the scope of the litigation to core issues of dispute and minimize the adversarial nature of the process. Where such admissions are to be made, counsel must seek prior approval from the client(s), MIRR, and the Attorney General.[23]

[22] See also Provincial Writing Guide for Indigenous Content: https://www2.gov.bc.ca/gov/content/governments/services-for-government/service-experience-digital-delivery/web-content-development-guides/web-style-guide/writing-guide/writing-guide-for-indigenous-content

[23] The Assistant Deputy Attorney General must keep track of the admissions made on litigation files andreport to the Attorney General on their use.

In pleadings, facts that are known to support the statements in the Indigenous party's pleading and that may advance reconciliation should be explicitly stated and not just admitted where appropriate. For example, in addition to listing those paragraphs with such facts in a generic statement of admission, counsel should affirmatively plead those facts:

> In response to paragraph x of the statement of claim, since at least the date of contact, the plaintiffs and their ancestors have lived at various sites in the vicinity of the identified area.

In consultation with the client(s) and MIRR, counsel should make admissions of fact and identify areas of agreement on the law relevant to establishing the existence of Aboriginal rights and title or other issues in the litigation wherever possible. Such admissions should be used as appropriate to narrow the issues in dispute, and signal the Province of British Columbia's respect for, and recognition of, Aboriginal rights, as required by Draft Principle 2.

For example, where the scope, but not the existence, of Aboriginal title or rights is at issue, the Province of British Columbia should set this out rather than simply denying the Aboriginal title or rights. This may include circumstances where the existence of Aboriginal title or rights is not disputed, but the area is unknown or may overlap with the territory of other Indigenous groups that are not parties to the litigation. In such cases, counsel should set out known facts relevant to the existence of Aboriginal title and of rights, while working with the Indigenous party to ensure that the Court has all relevant evidence in relation to the issue regarding the scope of their Aboriginal title and rights.

If an admission is made by the Province and supported by available documentary or other evidence which is not already in the possession of the Indigenous party, counsel must bring the evidence to the attention of the Indigenous party.

Litigation Directive #13: Denials must be reviewed throughout the litigation process.

The Province of British Columbia's pleadings must not consist simply of a broad denial of the Indigenous party's pleadings, demanding proof of each and every statement. As indicated in Litigation Directive #12, this is particularly so for statements of Aboriginal title or Aboriginal rights,[24] where the existence of the Aboriginal title or rights is not in doubt and only the scope of the title or rights is in issue.[25]

Denials made at early stages of litigation, when the facts may be unknown and it would be imprudent to admit prematurely, must be withdrawn if and when it becomes clear that such denials are inconsistent with evidence. Counsel should consider whether reconciliation and efficiency may be served by seeking additional time to file a pleading. This may allow for information to be gathered to make certain admissions that would otherwise be denied at this stage.

[24] See Draft Principle 2, The Province of British Columbia recognizes that reconciliation is a fundamentalpurpose of section 35 of the *Constitution Act, 1982.* This principle explains that reconciliation requires recognition of Aboriginal rights and that Indigenous Peoples and the Crown work together to define and implement Aboriginal rights.

[25] See Draft Principle 2, The Province of British Columbia recognizes that reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*.

Litigation Directive #14: Limitations and equitable defences should be pleaded only where there is a principled basis and evidence to support the defence.

The Province recognizes that the unfinished business of reconciliation between the Crown and Indigenous Peoples is a matter of national and constitutional import, and that the courts, as the guardians of the Constitution, cannot be barred by statutes from issuing declarations on such fundamental constitutional matters. Statutes of limitations do not apply in an Indigenous context in which declarations are sought as a way to give effect to the honour of the Crown. However, limitations legislation may apply to Indigenous claims in which consequential relief is being sought.[26] Statute of limitations defences, along with equitable defences such as laches, will only be pleaded where appropriate and after obtaining approval from the Attorney General to do so.

The Province will also only plead defences of surrender or abandonment in exceptional circumstances and only where there is a principled basis and compelling evidence to support the defence, and to do so would not be inconsistent with the honour of the Crown.[27] This includes consideration of the risk of perpetuating the disruption of the lives and communities of Indigenous Peoples. Again, instructions from the Attorney General are required to plead these defences.

Article 25 of the UN Declaration affirms "Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous Peoples have now or may acquire in the future". Further, the Province is committed to negotiating treaties, agreements and other constructive arrangements outside of the litigation process, guided by, among other things, the repudiation of concepts such as the doctrine of discovery and *terra nullius*, and a new government-to-government relationship based on the recognition of rights, reconciliation, respect, cooperation and partnership.[28]

The honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. Accordingly, unilateral extinguishment is not consistent with the honour of the Crown or with the UN Declaration (see Articles 8 and 28). The Province will not advance arguments based upon the unilateral extinguishment of Aboriginal rights. There may be circumstances in which counsel believes that Aboriginal rights have been extinguished with the lawful consent and surrender of an Indigenous group. In those circumstances, counsel will seek approval from the Attorney General for instructions to advance such a position.

Litigation Directive #15: A large and liberal approach should be taken regarding proper rights holders.

The Province of British Columbia respects the right of Indigenous Peoples and nations to define themselves and their institutions and governing bodies, and counsel's pleadings and other submissions must respect the proper rights holders. Where Aboriginal rights and title have been expressed on behalf of an Indigenous Peoples and there are no conflicting interests or credible contrary evidence, the Province of British Columbia will not object to the ability of the Indigenous Peoples to advance that litigation through their self-determined representative body after

[26] *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at paras. 134-144
[27] The Province does not rely on the doctrine of *terra nullius*, which, as noted by the SCC in *Tsilhqot'in v. B.C.* 2014 SCC 44 at para. 69 this doctrine (that no one owned the land prior to European assertion of sovereignty) never applied in Canada.
[28] See for example: Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia, 2019.

confirming the authority of that entity to represent the rights holder.[29]

Where Indigenous groups have overlapping or competing interests, it is for those groups to resolve these disputes amongst themselves as described in Litigation Directive #5.

Litigation Directive #16: Counsel should seek to ensure that the litigation focuses as much as possible on the substance of a matter rather than which order of government is responsible.

In assessing litigation, counsel should carefully consider the respective responsibilities of each order of government while remaining cognizant of the fact that positions taken by the Crown governments can leave Indigenous Peoples in "a jurisdictional wasteland with significant and obvious disadvantaging consequences."[30]

While seeking to add another government as a party or addressing that government or party's responsibility for certain actions may be appropriate, the province will attempt to address the substance of the litigation as it relates to the areas of provincial responsibility. Where possible and appropriate, the relative responsibilities of different orders of government may be addressed through discussions between the various orders of government, or through separate legal proceedings not requiring the participation of the Indigenous party.

Litigation Directive #17: Oral history evidence is a matter of weight, not admissibility.

Counsel must treat oral history evidence as a matter of weight, not admissibility. Counsel should consider whether the evidence of Indigenous law and precedent (e.g., oral histories, narratives, and societal expressions) should be treated as a source of law, and to consider such sources as law rather than requiring a court declaration of such. Similarly, counsel must take a respectful and cautious approach when testing oral history evidence through cross-examination. Counsel should also consider whether any special accommodations or mechanisms are available to the delivery of the evidence in court without causing undue fear and stress upon Elders. Elders are knowledge keepers and have information and perspectives that are relevant and necessary according to their own protocols and should be heard whenever possible in litigation and in alternative dispute resolution processes.

To ensure appropriate treatment of this evidence, counsel should consider developing an oral history protocol with opposing counsel. Models of oral history protocols are available for review.

Litigation Directive #18: Appeals should be limited to important questions of principle.

The Province of British Columbia will not challenge every decision with which it disagrees. Appeals must be limited to those issues which ought to be resolved by higher courts, and that will facilitate the orderly development of the law. All recommendations to appeal should be approved by the Attorney General or their delegate.

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[29] Counsel must also be conscious of the fact that the existence of competing claims and multiple potential rights holders can be a divisive issue among Indigenous communities. Regardless of who may be the proper rights holder in law, counsel must be conscious of the potential effect on reconciliation for all groups.The law on proper rights holder is continuing to develop, and the Province will also be informed by guidancefrom the courts.

[30] *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at para. 14.

Litigation Directive #19: Intervention should be used to pursue important questions of principle.

The Attorney General may seek to intervene in cases that raise important issues, particularly ones that may affect reconciliation. In deciding whether an intervention is warranted, counsel must consider whether the Attorney General's intervention can assist the court by providing a legal or constitutional perspective that may not be addressed by the parties to the dispute. All interventions must be approved by the Attorney General and the Attorney General should consider supporting interventions by Indigenous governing bodies in cases of significance to them.

Litigation Directive #20: Litigation files should be reviewed upon conclusion to determine what lessons can be learned about the application of these Directives and whether further changes in approach are needed.

At the conclusion of any litigation file involving Indigenous parties or issues, the litigation team, together with the client(s) and MIRR must debrief on lessons learned and ways of preventing similar litigation from occurring in the future, and whether the objectives of these Directives are being met and whether further amendments may be appropriate. If desired by the Indigenous party, they may provide a presentation or submission to the litigation team.

This debriefing may take the form of a report summarizing learnings and recommendations to improve these Directives. The debrief and review should include a discussion of the UN Declaration, Section 35 of the *Constitution Act (1982)*, the Draft Principles, both in how they were applied throughout the litigation and how they can be applied as the lessons learned are implemented. Counsel and the client(s) and MIRR should discuss the impact of the litigation on the relationship with the Indigenous groups involved in the litigation, and efforts to build trust and positive relationships will inform this debrief, review and lessons. Where a litigation file is ongoing, a similar discussion should occur, at reasonable intervals, to avoid hostility and conflict from being the primary sentiment guiding the relationship. The Directives should also be reconsidered at regular intervals, with representatives of the Indigenous governments of British Columbia, to accord with evolving practice and other government initiatives towards reconciliation.