

Distinctions-Based Approach Primer

December 2023



Introduction

This document is intended to assist the Government of British Columbia (the Province) in building an understanding of the legal basis for, and core elements of, a distinctions-based approach in all of the Province's relations with First Nations, Métis, and Inuit in what is now British Columbia. A companion document will provide guidance to public servants on the practical application of a distinctions-based approach.

A proper understanding and application of a distinctions-based approach is necessary for the provincial government, and is of particular importance for those public servants who are involved in decisions regarding the Province's relations with First Nations, Métis, and Inuit in British Columbia.

This document is not, nor is it intended to be, a complete or comprehensive description of the relationships the Province has with First Nations, Métis, and Inuit, which take many different forms and arrangements.

Requirement for a Distinctions-Based Approach

The Province is required to take a distinctions-based approach in all of its relations with First Nations, Métis, and Inuit. This requirement has a legal foundation in the Constitution Act, 1982; the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration); the Declaration on the Rights of Indigenous Peoples Act (Declaration Act); treaties; as well as the respective and distinct laws, legal systems, and systems of governance of First Nations, Métis, and Inuit. This document helps meet this requirement by affirming the Provincial position and ensuring it is applied consistently in legislation, policy, and practice.

➤ **Constitution Act, 1982:** Section 35(2) of the Constitution Act, 1982 identifies three distinct Peoples – Indian, Métis, and Inuit – as the “aboriginal peoples” of Canada.

The Supreme Court of Canada has confirmed that section 35(1) of the Constitution Act, 1982 includes a recognition of the “distinctive societies” of Indigenous Peoples, with “their own practices, traditions, and cultures.”¹

- » First Nations and Inuit are “distinctive societies” that pre-existed the arrival of Europeans, as sovereigns over their territories; and,
- » Métis are “distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their [First Nations] or Inuit and European forebears.”²

The term “Indian” was drawn from the federal Indian Act and is now used primarily in that statutory context. The term “First Nation” is now commonly used to describe the pre-existing Indigenous Peoples who are distinct from Inuit and Métis. The term “aboriginal peoples” is used in the Constitution Act, 1982 to collectively refer to First Nations, Inuit, and Métis Peoples and, therefore, has been used in common law (court decisions) to date. The term “Indigenous” has now replaced the term “aboriginal” as the generally accepted term to collectively refer to First Nations, Inuit, and Métis Peoples. This term should be used intentionally and should not be confused with the term “First Nation,” pursuant to the distinctions expressed in this document.

1 R. v. Van der Peet, [1996] 2 S.C.R. 507 at para. 31.

2 R. v. Powley, [2003] 2 S.C.R. 207 at para. 10 (“Powley”).

- **UN Declaration and the Declaration Act:** The UN Declaration affirms the diversity and distinctions of Indigenous Peoples, including in the preamble and articles 8, 15, and 34. The UN Declaration refers to Indigenous Peoples as “distinct peoples” that have their own “distinct political, legal, economic, social, and cultural institutions” and the “diversity of their cultures, histories, traditions, and aspirations.” Section 1(2) of the Declaration Act states: “For the purposes of implementing this Act, the government must consider the diversity of the Indigenous peoples in British Columbia, particularly the distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems of the Indigenous peoples in British Columbia.” The Declaration Act affirms the application of the UN Declaration to the laws of British Columbia.
- **Treaties:** Treaties are constitutionally protected, government-to-government agreements that identify, define, and implement a range of rights and obligations, creating long-term, mutually binding commitments. Treaties set out the fundamental and unique legal relationship between the treaty Nation, the Province, and Canada. Article 37 of the UN Declaration emphasizes the right of Indigenous Peoples to the recognition, observance, and enforcement of treaties, as well as agreements and other constructive arrangements. British Columbia is unique in that it has both modern treaties (including Nisga’a, Maa-nulth, Tla’amin, and Tsawwassen) and historic treaties (Douglas Treaties and Treaty 8). Each of these treaties varies depending on the particular obligations, interests, rights, jurisdictions, and authorities that are recognized, and represent a critical element within the distinctions-based approach.
- **The Respective and Distinct Laws, Legal Systems, and Systems of Governance of First Nations, Métis, and Inuit:** The UN Declaration affirms Indigenous Peoples’ right to self-determination and, in exercising this right, the right to autonomy or self-government.³ Flowing from the inherent and human right to self-determination, Indigenous Peoples have the [collective] right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions.⁴ In British Columbia, First Nations also have rights 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.⁵
- **Provincial Policy and Practice:** The Province must take a distinctions-based approach in all of its relations with Indigenous Peoples. Principle 10 of the Draft Principles that Guide the Government of British Columbia’s Relationship with Indigenous Peoples states:

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.⁶

3 UN Declaration, Articles 3-4.

4 UN Declaration, Article 5.

5 UN Declaration, Article 26.

6 Draft Principles that Guide the Government of British Columbia’s Relationship with Indigenous Peoples, p7. 2018

The Declaration Act Action Plan states:

The Province is committed to a distinctions-based approach. This requires that the Province's dealings with First Nations, Métis, and Inuit Peoples be conducted in a manner that acknowledges the specific rights, interests, priorities, and concerns of each, while respecting and acknowledging these distinct Peoples with unique cultures, histories, rights, laws, and governments. Section 35 of the Constitution Act, 1982, recognizes and affirms the rights of Aboriginal Peoples of Canada, while all Indigenous Peoples have human rights that are expressed in the UN Declaration. However, not all rights are uniform or the same among or between all Indigenous Peoples. In many cases, a distinctions-based approach may require that the Province's relationship and engagement with First Nations, Métis and Inuit Peoples include different approaches or actions and result in different outcomes.⁷

Meaning of a Distinctions-Based Approach

A distinctions-based approach, and appropriate respect for Indigenous laws and jurisdictions, means that the scope of rights enjoyed by an Indigenous People is contextual and that the Province's relations and dealings with First Nations, Métis, and Inuit will be conducted in a manner that is appropriate for the specific context, recognizing and respecting the distinct and different rights, laws, legal systems, and systems of governance of each.

The following elements of a distinctions-based approach reflect guidance from international law; the laws, legal systems, and systems of governance of First Nations, Métis, and Inuit; domestic Canadian courts; and the continually evolving laws, policies, and practices of British Columbia.

- **Indigenous Rights are Not Uniform:** Not all rights are uniform or the same among or between all Indigenous Peoples. These rights are diverse, distinct, and contextual under both domestic Canadian law and international law, arising from and in relation to their unique histories, circumstances, laws, legal systems, and systems of governance. As such, the Province's relationship and engagement with First Nations, Métis, and Inuit will require different approaches and result in different outcomes. For example, in the British Columbia context, a distinctions-based approach will result in circumstances where First Nations are engaged but Métis and Inuit are not engaged as rights holders, particularly with respect to the Province's processes, projects, or initiatives that relate to or have implications for the land, water, or air in British Columbia, or associated jurisdiction related to land, water, or air in British Columbia.
- **The Laws, Legal Systems, and Systems of Governance of First Nations in Respect of Land, Resources, and Territories in British Columbia:** First Nations, as territorial title and rights-holders, and the pre-existing sovereign societies that used and occupied lands and resources in British Columbia prior to contact, have their own laws, legal systems, and systems of governance that apply to those lands, resources, and territories. Those laws, legal systems, and systems of governance have not and cannot be unilaterally displaced.

⁷ Declaration on the Rights of Indigenous Peoples Act Action Plan 2022-2027, p3. 2022.

- **Pre-Existing Sovereignty and Aboriginal Title of First Nations:** A core purpose of section 35 of the Constitution Act, 1982 is to effect reconciliation of “pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”⁸ There is a significant body of jurisprudence (common law) confirming the existence of Aboriginal rights of First Nations in British Columbia arising from this prior occupation. This includes a wide range of rights related to land and resources, including Aboriginal title and governance rights.⁹ The courts have also confirmed a range of corresponding Crown obligations to First Nations arising out of section 35 of the Constitution Act, 1982. No such findings have been made for Métis or Inuit in British Columbia.
- **Diversity of First Nations and Government-to-Government Relationships:** First Nations have diverse cultures, languages, histories, customs, and practices. In section 35 case law, Canadian courts have emphasized in multiple cases that First Nations’ rights are pre-existing and inherent, and an expression of their distinctive societies that existed prior to the arrival of Europeans. A purpose of section 35(1) of the Constitution Act, 1982 is to protect this distinctiveness, and ensure just reconciliation with the Crown. This diversity must be respected in approaches to respecting and upholding inherent, constitutional, and human rights, and the relationships formed between the Province and First Nations.

Reflecting this, the Province has been developing relationships with First Nations in British Columbia over many years through political protocols and accords,¹⁰ treaties, agreements, and other constructive arrangements, as part of reconciliation of pre-existing First Nations’ sovereignty with the assertion of Crown sovereignty, as required under section 35 of the Constitution Act, 1982.

The Province also has treaty obligations in the pre-Confederation treaties on Vancouver Island, Treaty 8 in the Northeast, as well as the Nisga’a Final Agreement and Modern Treaties concluded under the British Columbia treaty negotiation process.

As well, consistent with the standards of the UN Declaration, the Province recognizes and supports the inherent right of self-determination, including self-government.

As reflected in the Province’s guidance regarding Indigenous Governing Bodies (IGBs), the Province is continuing to realign and adjust its work with First Nations to support and reflect their priorities in Nation and governance re-building.¹¹ While the Province also regularly engages with the First Nations Leadership Council (FNLC),¹² on issues and matters of concern to First Nations throughout British Columbia, neither the FNLC nor any of the FNLC organizations is a Nation or a People and they do not hold rights and title. Accordingly, engagement with FNLC cannot satisfy any of the Province’s obligations owed to First Nations who are the proper holders of inherent, constitutional, and human rights and title in British Columbia. Any government-to-government relationship is between each individual First Nation and the Province.

8 *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 at para. 20.

9 *Tsilhqot’in Nation v. British Columbia*, [2014] 2 SCR 257 at para. 44.

10 See bilateral Commitment Document (2015) between the Province and FNLC, including the: a) *Joint Agenda: implementing the Commitment Document – Shared Vision, Guiding Principles, Goals and Objectives* (2018); and b) *Joint Agenda: Implementing the Commitment Document – Concrete Actions: Transforming Laws, Policies, Processes and Structures* (2018).

11 [Indigenous Governing Bodies in the Declaration on the Rights of Indigenous Peoples Act](#)

12 The First Nations Leadership Council or FNLC is a collaborative working partnership among the political executives of the BC Assembly of First Nations, First Nations Summit, and the Union of BC Indian Chiefs, formalized by a *Leadership Accord* signed in 2005. They work on topics of mutual interest established through resolution.

- **Métis Rights are Distinct from First Nations or Inuit Rights:** The term “Métis” in section 35 of the Constitution Act, 1982 does not encompass all individuals with mixed First Nation and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs and recognizable group identity separate from their First Nation or Inuit and European forebears. As such, “the inclusion of the Métis in s. 35 [of the Constitution Act, 1982] is not traceable to their pre-contact occupation of Canadian territory.”¹³ Rather, “the purpose of s. 35 as it relates to the Métis is therefore different from that which relates to [First Nations] or the Inuit... The inclusion of the Métis in s. 35 represents Canada’s commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the Constitution Act, 1982 recognized can only survive if the Métis are protected along with other aboriginal communities.”¹⁴

To account for the unique post-contact emergence of Métis communities and post-contact foundation of their Aboriginal rights, the Supreme Court of Canada set out a distinct common law test regarding Métis rights under section 35 of the Constitution Act, 1982 to recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control and persist today. This requires claimants to self-identify as Métis,¹⁵ establish an ancestral connection to an identifiable historic Métis community (which is a “a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life”¹⁶), and demonstrate they are accepted by a modern community, whose continuity with the historic community provides the legal foundation for the right being claimed.¹⁷

- **No Confirmed Identifiable Historic Métis Community in British Columbia:** While Métis individuals have settled and live in British Columbia, there has been no court decision applicable to British Columbia that has confirmed the existence of any identifiable historic Métis community or Métis homeland in British Columbia. Further, the Métis Homeland, as defined by the Métis National Council¹⁸ does not extend into British Columbia west of the Rocky Mountains.¹⁹

As such, there are no existing land, water, or air-based Métis rights or associated inherent jurisdiction in British Columbia that trigger the same Crown obligations that are owed to First Nations under section 35(1) of the Constitution Act, 1982 or international law, including the duty to consult and accommodate and the need to obtain free, prior, and informed consent. Accordingly, it is not appropriate to include Métis

13 *Powley*, supra note 2 at para. 17

14 *Powley*, supra note 2 at para. 17

15 “This self-identification should not be of recent vintage: While an individual’s self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.”: *Powley*, supra note 2 at para. 31

16 *Powley*, supra note 2 at para. 12

17 *Powley*, supra note 2 at para 30-33.

18 The Métis National Council asserts it is the representative body of the Métis people of northwestern Canada and represents the Métis Nation both nationally and internationally. It receives direction from the elected leadership of the Métis Nation’s provincial-level representative organizations being the Métis Nation British Columbia, Métis Nation of Alberta, Métis Nation Saskatchewan, and the Métis Nation of Ontario. The Manitoba Métis Federation was a founding member of the Métis National Council but left the Métis National Council in 2021.

19 Online: <https://www.cbc.ca/news/indigenous/map-showing-m%C3%A9tis-homeland-boundaries-sparks-online-conversation-1.4928401>.

as rights-holders in any of the Province's processes, matters, projects, or initiatives that relate to the land, water, or air in British Columbia, or associated jurisdiction related to land, water, or air.

As part of the political and social work of addressing the legacy of colonialism and systemic racism in British Columbia, the Province works with Métis Nation British Columbia²⁰ in respect of Métis who have settled and are living in British Columbia and to recognize and value Métis culture. This work is distinct in scope, nature, and purpose from government-to-government relations the Province has with First Nations. It is important that this work occurs in a manner which recognizes the inherent, human, and constitutional rights of First Nations and upholds the laws, legal systems, and systems of government of First Nations.

- **No Formal Relationship with Inuit Living in British Columbia:** The Inuit do not have a historical homeland in British Columbia, so there are no existing land, water, or air-based Inuit rights or associated jurisdiction in British Columbia that trigger the same Crown obligations that are owed to First Nations under section 35(1) of the Constitution Act, 1982 or international law.

Applying a Distinctions-Based Approach

Each ministry and agency across the Province must apply a distinctions-based approach in the development and implementation of its policies, legislation, programs, operations, and funding initiatives, and in its engagement and relationships with First Nations, Métis, and Inuit. This work must be done in a manner that reflects a distinctions-based approach and correctly identifies and engages the appropriate rights-holders.

The Ministry of Indigenous Relations and Reconciliation, with support from other ministries and working with First Nations and Indigenous organizations, will continue to provide guidance regarding a distinctions-based approach, and strategic advice for implementation of a distinctions-based approach across government.

FOR ADDITIONAL SUPPORT:

For questions specific to the Province's distinctions-based approach and information contained within this document, please contact the Ministry of Indigenous Relations and Reconciliation by emailing declaration@gov.bc.ca.

KEY SUPPORTING DOCUMENTATION:

Constitution Act, 1982 –

[https://laws-lois.justice.gc.ca/eng/const/page-13.html#:~:text=35%20\(1\)%20The%20existing%20aboriginal,are%20hereby%20recognized%20and%20affirmed.&text=\(2\)%20In%20this%20Act%2C,and%20M%C3%A9tis%20peoples%20of%20Canada](https://laws-lois.justice.gc.ca/eng/const/page-13.html#:~:text=35%20(1)%20The%20existing%20aboriginal,are%20hereby%20recognized%20and%20affirmed.&text=(2)%20In%20this%20Act%2C,and%20M%C3%A9tis%20peoples%20of%20Canada)

United Nations Declaration on the Rights of Indigenous Peoples –

https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

20 The Métis Nation British Columbia is a society under the *Societies Act* (BC) and is recognized by the Métis National Council as the Métis Nation's only provincial-level representative organization in British Columbia.

Declaration on the Rights of Indigenous Peoples Act –

<https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044>

Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples –

https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf

