Department of Justice Canada
Ministère de la Justice Canada

The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples

Canada

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Foreword by the Attorney General of Canada

In my mandate letter from the Prime Minister, I was tasked as Attorney General of Canada to review the Government of Canada's litigation strategy. I was mandated to make decisions to end appeals or positions inconsistent with the Government's commitments, the *Charter of Rights and Freedoms*, and Canadian values. With the Government of Canada's publication of the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (the *Principles*),[1] we have stated our commitment to a significant move away from the status quo and a fundamental change in Canada's relationship with Indigenous peoples. That includes the Crown's conduct in litigation. On February 14, 2018, the Prime Minister of Canada further confirmed the Government's shift to the recognition of rights as the basis for relations with Indigenous peoples, and that a new recognition and implementation of rights framework would now be developed to operationalize recognition.

These *Principles* are rooted in section 35 of the *Constitution Act, 1982*, guided by the UN Declaration on the Rights of Indigenous Peoples (the UN Declaration), and informed by the Report of the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission (TRC)'s Calls to Action. At their core, the *Principles* seek to further the full promise of section 35 of the *Constitution Act, 1982* through the recognition and implementation of Indigenous rights.

The work of shifting to, and implementing, recognition-based relationships through a new recognition and implementation of rights framework is a process that will take dynamic and innovative action by the Government of Canada and Indigenous peoples. We are now in a significant period of transition in Crown-Indigenous relations.

[1] http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html

In order to advance this transition, and demonstrate how the *Principles* shape the work of the Attorney General of Canada as a broader recognition and implementation of rights framework is developed and implemented, I have sought to outline in this Directive the approach that should guide the Attorney General of Canada in the discharge of her litigation duties as the Chief Law Officer of the Crown. This Directive promotes our Government's commitment to reconciliation by establishing guidelines that every litigator must follow in the approaches, positions, and decisions taken on behalf of the Attorney General of Canada in the context of civil litigation regarding section 35 of the *Constitution Act, 1982* and Crown obligations towards Indigenous peoples.

The nature of section 35 litigation has always been unique. When section 35 was included in the *Constitution Act, 1982*, it was agreed further political work needed to be done regarding its implementation. Attempts to advance understandings and implementation of section 35 occurred over the course of four constitutional conferences in the 1980s, and through two attempts at constitutional amendment. The lack of success in this work contributed to the courts assuming a leading role in defining section 35. In this way, litigation became a central forum to resolve major issues in the Crown-Indigenous relationship as opposed to a forum of last resort focused on specific areas or issues in dispute.

Litigation is by its nature an adversarial process, and it cannot be the primary forum for achieving reconciliation and the renewal of the Crown-Indigenous relationship. This is why a core theme of this Directive is to advance an approach to litigation that promotes resolution and settlement, and seeks opportunities to narrow or avoid potential litigation. Our Government is committed to pursuing dialogue, co-operation, partnership and negotiation based on the recognition of rights.

We recognize, however, that Indigenous peoples are entitled to choose their preferred forum to resolve legal issues, that some matters will require legal clarification, and that at times litigation will be unavoidable. When matters do result in litigation, this Directive instructs that the Government of Canada's approach to litigation should be to assist the court constructively, expeditiously, and effectively so that it may provide direction on the matters in issue.

I hope that, in time, this litigation Directive will be recognized to have brought about a significant shift in the Government of Canada's positions and strategies. I hope, too, that litigation will be recognized as a dispute settlement forum of last resort, as trust and good faith allow collaborative processes, including facilitation, mediation and negotiations, to be the primary means of resolution.

The Honourable Jody Wilson-Raybould, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada

Application

This Directive applies to the Attorney General's role in civil litigation regarding section 35 of the *Constitution Act, 1982* and other Crown obligations towards Indigenous peoples.[2] It is a concrete manifestation of how the *Principles* are effecting transformative change.

The Directive promotes an approach to conflict resolution that will be consistent with the goal of achieving reconciliation with Indigenous peoples. It provides counsel[3] with objectives and litigation guidelines to apply the *Principles* in litigation while respecting the role of client departments and Cabinet in providing counsel with instructions on particular cases.

In the context of civil litigation, departments – and, in appropriate cases, Cabinet – generally act as instructing clients. This means that on a day-to-day basis Justice litigation counsel on behalf of the Attorney General consult with their clients, give them legal advice and receive instructions from those clients on the approaches and positions to be taken in the litigation, including in relation to this Directive.

As was explained by the Prime Minister in *Open and Accountable Government,*

> "In the civil litigation context, departments generally act as instructing clients, although in having carriage of all litigation the Attorney General must keep in mind his or her duty to ensure that public affairs are administered in accordance with law. Depending on the complexity or sensitivity of a case, it may be appropriate for the Attorney General to consult with the Prime Minister as well as Cabinet colleagues whose mandates could be affected by particular litigation."[4]

The legal and policy implications beyond a particular case before the court are essential considerations in developing an approach to litigation. In considering options and applying this Directive, counsel must take into account the potential impacts on existing and future claims, as well as Canada's ongoing efforts to advance reconciliation with Indigenous peoples more broadly.

[2] While this Directive primarily applies to section 35 litigation, the general themes will find broader application to all civil litigation and other forms of conflict resolution that relate to the distinct obligations that exist at law on the Crown as a result of the historic and ongoing relationship between the Crown and Indigenous peoples. Similarly, much of the Directive's content includes best practices that apply to the conduct of all litigation.

[3] "Counsel" in this Directive is intended to include not only litigation counsel, but all departmental counsel involved in litigation. Where there is reference to specific counsel, such as litigation counsel or legal services counsel, it is used as emphasis.

[4] *Open and Accountable Government*, Annex F.5 Ministers and the Law, Role of Minister of Justice and Attorney General (https://pm.gc.ca/eng/news/2015/11/27/open-and-accountable-government).

Core objectives

A core theme of this Directive is to advance an approach to litigation that promotes resolution and settlement, and seeks opportunities to narrow or avoid potential litigation. Indigenous peoples are entitled to choose their preferred forum to resolve legal issues, and some matters will require legal clarification. Indeed, litigation may be necessary and important in order to obtain guidance from the courts. This may involve, in appropriate cases, the pursuit of appeals or other judicial remedies by Indigenous parties or by the Crown. However, litigation cannot be the primary forum for achieving reconciliation. Where litigation is unavoidable, this Directive instructs that Canada's approach to litigation should be constructive, expeditious, and effective in assisting the court to provide direction.

This Directive pursues the following objectives: (1) advancing reconciliation, (2) recognizing rights, (3) upholding the honour of the Crown, and (4) respecting and advancing Indigenous self-determination and self-governance. These objectives, and the guidelines for litigation counsel they promote, are interrelated.

Advancing reconciliation

Reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*. Reconciliation is an ongoing process through which Indigenous peoples and the Crown work cooperatively to establish and maintain a mutually respectful framework for living together, with a view to fostering strong, healthy, and sustainable Indigenous nations within a strong Canada. Reconciliation requires hard work, changes in perspectives and actions, and compromise and good faith by all.

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 working together. Adversarial litigation between the Crown and Indigenous peoples presents challenges for achieving reconciliation.

Recognition of rights

The Government of Canada recognizes the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada. The promise of section 35 mandates that reconciliation be based on the recognition and implementation of Aboriginal rights.

Aboriginal rights do not require a court declaration or an agreement in order to be recognized. Despite this, the Government of Canada has often insisted on a court declaration or an agreement before recognizing rights. Transitioning out of this practice is part of the work of forming new nation-to-nation, government-to-government, and Crown-Indigenous relations.

In many instances where matters do proceed to court, the dispute may involve a conflict between an Indigenous group or people and the Government of Canada about how to effect the recognition of rights. When this arises, it may be extremely difficult to give full effect to recognition through a court proceeding. Aspects of the precise scope of the right may engage complex evidentiary matters. For this reason, recognition speaks to the need for the Government of Canada to prioritize resolution and settlement through collaboration and co-operation.

Upholding the honour of the Crown

The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples. The Attorney General and her 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 recognized 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.

Respecting and advancing Indigenous self-determination and self-governance

Indigenous self-determination and self-government are affirmed in the UN Declaration and are central to addressing the history of colonization and forming new relationships based on recognition, respect, partnership, and co-operation. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.
Recognition of the inherent jurisdiction and legal orders of Indigenous nations is a starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous governments.

Litigation Guidelines

The following 20 litigation guidelines instruct counsel as to how the *Principles* must be applied in civil litigation involving Indigenous peoples. The work of operationalizing these Guidelines is already taking place and will be on-going.

Litigation Guideline #1: Counsel must understand the *Principles* and apply them throughout a file's lifespan.

The Department of Justice is committed to fostering an internal culture that encourages its counsel to pursue reconciliation. Counsel must understand and apply the 10 principles in their work. This means, for example, that counsel must seek to understand Indigenous perspectives, recognizing that there will be diversity among those perspectives, and that Indigenous-Crown relationships are to be guided by the recognition and implementation of rights. The Department of Justice will provide its counsel with the training and resources needed to achieve these objectives.[5]

Where litigation was started before the *Principles* or this Directive, counsel must review their pleadings, legal positions, and litigation strategy to ensure that they are consistent with the *Principles* and this Directive. Working with the client and other departmental counsel, litigation counsel should take steps to resolve any inconsistencies, including amending pleadings.[6] In those circumstances where it appears impossible to resolve an inconsistency, counsel must seek direction from the Assistant Deputy Attorney General.[7]

[5] Training may include, for example, training in intercultural competency, as suggested by the TRC's Call to Action #57.

[6] This requirement applies to active litigation only.

[7] Throughout this document, where a matter is referred to the Assistant Deputy Attorney General, further consultation with other senior governmental officials may be sought, and approvals obtained. In many instances, the Attorney General personally will give direction.

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

Principle 3 requires the Government of Canada and its departments, agencies, and employees to act with honour, integrity, good faith and fairness in all dealings with Indigenous peoples. As suggested by Litigation Guideline #3 below, at the beginning of each file, counsel and the client department or agency must have a discussion about the possible effects of litigation on the relationship between Indigenous peoples and those departments or agencies. These possible effects should inform the litigation strategy, which must include ways of resolving all or part of the litigation as expeditiously as possible.

Effective advocacy starts with developing a litigation strategy rooted firmly in the government's policy objectives and the applicable law, supported by good legal advice. Litigation and legal services counsel have key roles to play in working with client departments and agencies to underscore the importance of adopting a strategy that demonstrates respect for the broader objectives of reconciliation.

While departments generally act as instructing clients, counsel for the Attorney General act for the government as a whole, not for any particular department or agency.[8] Counsel must always be conscious of government-wide concerns that may arise in litigation, and the government-wide implications of judicial decisions or settlements.

Broad consultation is frequently necessary to ensure that legal positions reflect a whole-of-government approach. Counsel in legal services, centres of expertise, and specialized sections in the Aboriginal Affairs Portfolio and Public Law and Legislative Services Sector play an important role in supporting litigation files. This includes counsel for Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services Canada; the Aboriginal Law Centre; the Human Rights Law Section; and the Constitutional, Administrative, and International Law Section. In addition to bringing specialized knowledge, these counsel can assist with identifying broader issues, including alternative methods of dispute resolution, and bringing a whole of government perspective to litigation files. Instructing clients should be encouraged to support counsel in this work by consulting with other departments as appropriate.

[8] Under Paragraph 4(a) of the *Department of Justice Act*, the Minister of Justice, who is *ex officio* the Attorney General, has the responsibility of seeing that the administration of public affairs is in accordance with law. As a result, he or she "[…] is not subject to the same client direction as private clients," *R. v. Campbell*, [1999] 1 S.C.R. 565, at 603. See also *Open and Accountable Government*, Annex F.5 Ministers and the Law, Role of Minister of Justice and Attorney General (https://pm.gc.ca/eng/news/2015/11/27/open-and-accountable-government).

Litigation Guideline #3: Early and continuous engagement with legal services counsel and client departments is necessary to seek to avoid litigation.

Litigation is by its nature an adversarial process, and cannot be the primary forum for broad reconciliation and the renewal of the Crown-Indigenous relationship. One of the goals of reconciliation in legal matters is to make conflict and litigation the exception, by promoting respectful and meaningful dialogue outside of the courts. To achieve this, counsel must engage with client departments and agencies as soon as they become aware of a conflict that may result in litigation. Working with the client and other departmental counsel, counsel must develop a coordinated approach with the aim of achieving a resolution that avoids litigation.

Indigenous groups are entitled to choose their preferred forum to resolve their legal issues; sometimes litigation will be unavoidable. But the relationship between Indigenous peoples and the Crown can be adversely affected by how we conduct this litigation. The conduct of litigation must respect this relationship by pursuing reconciliation and focusing the litigation on those specific issues that cannot be resolved through other forums.

Litigation Guideline #4: Counsel should vigorously pursue all appropriate 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 way possible. This is consistent with a 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 reasonable avenues for narrowing the issues and settling the dispute are explored. A focus on effective resolution does not require abandoning valid legal positions. Rather, 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 Canada's relationship with Indigenous peoples.

Counsel must work with client departments and agencies to develop problem-solving approaches that promote reconciliation.[9] These approaches should include alternative dispute resolution processes such as negotiations and mediations.[10] Where appropriate, counsel must consider whether the issues can be resolved through Indigenous legal traditions or other traditional Indigenous approaches.

Other problem-solving approaches may include a range of measures not strictly required by law. For example, further consultation with the Indigenous party may be undertaken even though there is no legal requirement to do so.[11] Where such a recommendation is made, counsel must advise the client department or agency that this measure is being proposed as a matter of policy.

Where there are obstacles to resolving all or part of the litigation, counsel must consider creative solutions with other departmental counsel and other government departments or agencies. 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. Other approaches 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.

Counsel must bear in mind that the Government of Canada may be engaged with Indigenous groups in other processes, such as 'comprehensive claims' negotiations, 'specific claims' negotiations, exploratory tables, or consultations regarding resource development projects. Counsel, in consultation with client departments and agencies, must 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 as a means of narrowing or resolving the litigation, counsel should 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 should consider whether postponing or staying the litigation to pursue a potential settlement may actually frustrate the objectives of reconciliation if settlement efforts are unsuccessful.

[9] For example, see the Minister of Crown-Indigenous Relations and Northern Affairs Mandate letter that requires the Minister to "work with the Minister of Justice to ensure that both in our dispute resolution mechanisms and litigation we advance positions that are consistent with the resolution of past wrongs toward Indigenous Peoples, promote co-operation over adversarial processes, and move towards a recognition of rights approach."

[10] Where a proceeding is brought in the Federal Court, counsel should consult that court's *Practice Guidelines for Aboriginal Law Proceedings*. (http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf)

[11] Principles 5 and 9 signal Canada's willingness to enter into innovative and flexible arrangements with Indigenous peoples that will ensure that the relationship accords with the aspirations, needs, and circumstances of the Indigenous-Crown relationship.

Litigation Guideline #5: Recognizing Aboriginal rights advances reconciliation.

The *Principles* require a decisive break with the status quo. Specifically, principle 1 calls on the Government of Canada 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. Principle 2 recognizes that reconciliation requires "hard work, changes in perspectives and actions, and compromise and good faith, by all."

The *Principles* require the Government of Canada and its officials to change the way they do business. In litigation, this means, above all, approaching issues in a way that does not begin and end with a denial of Aboriginal rights.[12]

As specified in Litigation Guideline #12 (below), this Guideline requires counsel to recognize Aboriginal rights, including Aboriginal title. In this period of transition – as a new recognition and implementation of rights framework is being developed and implemented – rights must be recognized where they can be recognized.

In some circumstances recognition may be complicated by the fact that other Indigenous groups have an overlapping or competing interest. It is preferable for Indigenous groups and Nations to resolve disputes amongst themselves. Litigation counsel should generally avoid seeking to add other Indigenous parties to the litigation and should also avoid taking positions that could undermine the ability of Indigenous groups to resolve disputes amongst themselves. Where possible and appropriate, litigation counsel should explore with clients 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 Canada may assist in facilitating such discussions.

The effect of recognition will often be avoiding or substantially narrowing litigation. Where Aboriginal title and rights are proposed to be denied, counsel must seek direction on the proposed position from the Assistant Deputy Attorney General.

In addition to recognizing rights, counsel must ensure that their submissions and positions do not have the direct or collateral effect of undermining or restraining those rights, including Indigenous peoples' right to self-determination.

[12] Throughout this document, references to Aboriginal rights include Treaty rights.

Litigation Guideline #6: Positions must be thoroughly vetted and counsel should not advise client departments and agencies to pursue weak legal positions.

Counsel must make an early assessment of the likelihood of success of the Crown's substantive legal positions. Given Canada's commitment to recognize Aboriginal rights and the obligation to act honourably in all of its dealings with Indigenous peoples, counsel should advise against taking weak legal positions. In exceptional circumstances where there is a principled basis for pursuing a position that may seem likely to fail, counsel must seek direction from the Assistant Deputy Attorney General.

Counsel should make every effort to resolve differences of opinion on available arguments and the strength of legal positions through discussion. Where resolution is not possible, counsel must ensure not only that consultation is full, but that approvals are obtained from the relevant decision-making authority. This will include, in appropriate circumstances, approvals from the Assistant Deputy Attorney General or by the Regional Litigation Committees and the National Litigation Committee, as well as approvals from other government departments. The goal is always to reach a consensus on a position that best serves the government as a whole, and that is in accordance with the *Principles.*

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

Counsel must ensure that litigation is dealt with promptly. Litigation counsel should avoid unnecessary procedural motions and seek agreements on non-contentious matters. All those involved in litigation should seek to avoid delays due to internal bureaucracy. Avoiding delay can be a contributing factor to advancing justice and reconciliation.

Counsel must also consider resource imbalances that may exist between the parties. Counsel should be willing to extend deadlines on costly litigation steps, like document production.

Litigation Guideline #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. Canada's submissions and pleadings must seek to advance reconciliation by applying the *Principles.*

Litigation Guideline #9: Counsel must use respectful and clear language in their written work.

The Attorney General of Canada is expected to be a model litigant. All communications with the courts, Indigenous peoples or their counsel, the media, the public and other parties must uphold this expectation, maintaining high standards of civility and advocacy.

Similarly, all communications, pleadings, and submissions must reflect the special relationship between the Crown and Indigenous peoples. The honour of the Crown is reflected not just in the substance of the positions taken, but in how those positions are expressed.[13]

Respectful advocacy is persuasive advocacy. Counsel must ensure that language and tone are not unnecessarily pointed or dismissive.

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. However, counsel must 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.

[13] See Principle 3, *The Government of Canada recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.* The overarching goal of this principle is to ensure that Indigenous peoples are treated with respect and as full partners in Confederation.

Litigation Guideline #10: Legal terminology must be consistent with constitutional and statutory language.

In English, the term "Indigenous" is largely synonymous with the term "Aboriginal", and both refer to the First Nations (Indian[14]), Inuit, and Métis peoples of Canada. Generally, the term "Indigenous" should be used instead of "Aboriginal" or "Indian". This distinction in terminology does not exist in French, so the term "autochtone" should continue to be used.[15]

However, counsel should continue using the specific terms used in the Constitution, by Parliament, and by the legislatures relating to Indigenous peoples. The 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.

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 party 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 Aboriginal Law Centre where they require advice about terminology.

[14] Section 35 of the *Constitution Act, 1982* refers to the "Indian, Inuit, and Métis peoples of Canada".

[15] 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.

Litigation Guideline #11: Overviews must be used to concisely state Canada's position and narrow the issues.

An overview of Canada's position, whether in pleadings or in factums, is an important communicative tool. The overview must be used to plainly explain Canada's position, what is in issue and what is not in issue. As prescribed by the supporting commentary for principle 2, acknowledging wrongs where appropriate and focusing on what is common between the parties may help facilitate reconciliation and narrow the issues.

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

Statements of fact must reflect a careful approach to admissions. Where historical harms were done, in the appropriate case, the narrative should acknowledge those harms and reflect an awareness that things would be done differently today. Where such acknowledgements are made, counsel must seek approval from the client and, where appropriate, the Assistant Deputy Attorney General.[16]

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, instead of only 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.**

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

Counsel should make admissions of fact and identify areas of agreement on the law relevant to establishing Aboriginal rights and title or other issues in the litigation wherever possible. Such admissions narrow the issues in dispute, and signal Canada's respect for and recognition of Aboriginal rights, as required by principle 2.[17]

For example, where the scope, but not the existence, of Aboriginal title or rights is at issue, Canada will not simply deny the title or rights. This may include litigation 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 make meaningful admissions relevant to the establishment of title and recognition of rights, while requiring the Indigenous party to prove the scope of title and rights.

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

Canada's pleadings must not consist simply of a broad denial of the Indigenous party's statements in its pleadings, demanding proof of each and every statement. As indicated in Litigation Guideline #12, this is particularly so for statements of Aboriginal title or Aboriginal rights, where the existence of the title or rights may not be in doubt, and only the scope of the title or rights is in issue.[18]

Denials made at early stages of litigation, when the facts may be unknown and when it would be imprudent to admit too much, must be withdrawn if and when it becomes clear that such denials are inconsistent with the available 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.

[17] See Principle 2, *The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982*. This principle explains that reconciliation requires recognition of rights and that Indigenous peoples and the Crown work together to implement Aboriginal rights.

[18] See Principle 2, *The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982.*

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

Extinguishment, surrender, abandonment

The *Principles* discourage certain long-standing federal positions, including relying on defences such as extinguishment, surrender, and abandonment.[19]

Generally, these defences should be pleaded only where there is a principled basis and evidence to support the defence.[20] Such defences must not be pleaded simply in the hope that through discoveries or investigation some basis for the defence may be found.

When determining whether such circumstances exist, counsel must consider whether the defence would be consistent with the honour of the Crown. Reconciliation is generally inhibited by pleading these defences.

When considering pleading these defences, counsel must seek approval from the Assistant Deputy Attorney General.

[19] Principles 1, 2, 4, and 5 recognize the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada.

[20] The Assistant Deputy Attorney General shall track the situations in which these defences are pleaded and report to the Attorney General on their use.

Limitations and laches

In cases where litigation is long delayed, equitable defences such as laches and acquiescence are preferable to limitation defences. However, these defences should also be pleaded only where there is a principled basis and evidence to support the defence,[21] and where the Assistant Deputy Attorney General's approval has been obtained.[22]

> Litigation Guideline #15: A large and liberal approach should be taken to the question of who is the proper rights holder.

Canada respects the right of Indigenous peoples and nations to define themselves and counsel's pleadings and other submissions must respect the proper rights-bearing collective. Where rights and title have been asserted on behalf of larger Indigenous entities – nations or linguistic groups, for example – and there are no conflicting interests, Canada in the proper case, or where supported by the available evidence, will not object to the entitlement of those groups to bring the litigation. This approach is consistent with principle 1, which affirms the Government of Canada's renewed nation-to-nation approach.[23] In Aboriginal rights and title cases, Canada will not usually plead that smaller Indigenous entities – clans or extended family groups, for example – are the proper holders of Aboriginal rights and title.[24]

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

[21] There are certain limitation periods that cannot be waived, such as where a statute precludes waiver.

[22] This Guideline goes beyond the TRC's Call to Action #26, which discourages reliance on limitation defences specifically in legal actions regarding historical abuse brought by Indigenous peoples. Counsel should also be aware of the research and perspectives underpinning this Call to Action.

[23] See also principles 4 and 6. These two principles affirm Indigenous peoples' right to participate in decision-making matters that affect their rights through their own representative institutions.

[24] 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.

Litigation Guideline #16: Where litigation involves Federal and Provincial jurisdiction, counsel should seek to ensure that the litigation focuses as much as possible on the substance of the complaint.

In assessing litigation, counsel should carefully consider the respective responsibilities of each order of government. While seeking to add another government as a party or addressing that government or party's responsibility may be appropriate, counsel should not add other parties to a litigation proceeding unless there is a principled and evidentiary basis for doing so.

Counsel should remain cognizant of the fact that too often positions taken by government have left Indigenous peoples in "a jurisdictional wasteland with significant and obvious disadvantaging consequences."[25]

Litigation Guideline #17: Oral history evidence should be a matter of weight, not admissibility.

Counsel should treat oral history evidence as a matter of weight, not admissibility. Similarly, counsel must take a respectful and cautious approach when testing oral history evidence through cross-examination. To ensure appropriate treatment of this evidence, counsel should consider developing an oral history protocol with opposing counsel.[26]

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

[26] For additional guidance, counsel should consult the Federal Court's *Practice Guidelines for Aboriginal Proceedings.* (http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf)

Litigation Guideline #18: Decisions on judicial reviews and appeals should be subject to full consultation within government and be limited to important questions.

The Government of Canada will not judicially review or appeal every decision with which it disagrees. Decisions to challenge a judgment by judicial review or appeal should be limited to only important questions. All recommendations to judicially review, appeal or seek leave to appeal must be the subject of full consultation within Government and approved by the Attorney General where appropriate.

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

The *Principles* guide Canada's approach to interventions. 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.

Litigation Guideline #20: All files must be reviewed to determine what lessons can be learned about how the *Principles* can best be applied in litigation.

At the conclusion of any litigation file involving Indigenous parties or issues, the litigation team and client department or agency must debrief on lessons learned and ways of preventing similar litigation from re-occurring. This must include a discussion of the *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 departments and agencies should discuss the impact of the litigation on the relationship with the Indigenous groups involved in the litigation. Where a litigation file is ongoing, a similar discussion should occur, at reasonable intervals. The Directive itself should also be re-considered at regular intervals, to accord with evolving practice and other government initiatives towards reconciliation.

Please visit the justice.gc.ca to read the Principles Respecting the Government of Canada's Relationship with Indigenous peoples.