**January 31, 2022**

**United Nations Human Rights Council**

**Expert Mechanism on the Rights of Indigenous Peoples**

*Study on “Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition.*

**British Columbia Treaty Commission (BC Treaty Commission, BCTC) submission to EMRIP**

**Introduction**

**The BC Treaty Commission submission focuses on elements identified in the concept note**[[1]](#footnote-1) **and highlights examples of treaties, agreements, and other constructive arrangements in British Columbia (BC), Canada**, and state approaches. BCTC draws on **its 30 years’ experience** as an independent body whose responsibility is to facilitate **tripartite negotiations to recognize Indigenous rights and title. The tripartite parties are represented by the governments of Canada and British Columbia, and the First Nations in BC.**

**Types of treaties, agreements and other constructive arrangements that Indigenous peoples have made or are making with States, reconciliation initiatives, and constitutional recognition.**

Indigenous and state relations continue to evolve, as such over the past decades First Nations and Indigenous groups have developed various agreements with federal and provincial governments ranging from specific issues to more comprehensive approaches.

Some agreements address very specific matters and do not necessarily fully address relationship matters or the full extent of inherent Indigenous jurisdiction, rights, and title. As an example, some arrangements and agreements might encompass economic agreements or resource related agreements. As such, Indigenous communities often consider how to balance short term needs with long term reconciliation objectives when managing its crown relations. Some agreements focus on a process to reach a fuller recognition of rights and some agreements focus on short term. Consistent with the UN Declaration, a First Nations’ right to self-determination needs be effectively supported to determine their path which agreement to pursue.

Constitutions are regarded as the supreme law of most peoples and countries. These can be written and unwritten. However, the recognition of rights in a constitution continues to be the most comprehensive protection. Treaty and aboriginal rights are protected in the Constitution of Canada in Section 35.[[2]](#footnote-2)

Fairly negotiated and honourably implemented treaties, “represents a constitution sharing of sovereignty among the signatories to the treaty”.[[3]](#footnote-3) Currently modern treaties are the most comprehensive approach, to the entrenchment of Indigenous title and rights in Canada. However, there are many efforts are underway creating alternatives to treaties that will have incremental approaches. There are no examples of these agreements yet, although there are many pathways currently underway. It is also not clear whether other agreements, even if comprehensive, will receive the same constitutional protection and recognition as treaties, which are specifically listed in s. 35(3) of the *Constitution*. The Treaty Commission believes that all Indigenous nations have the right to determine their pathway to self-governance and should be supported to achieve the same. Not every agreement negotiated will have constitutional protection, some Indigenous nations may not want such entrenchment, but will likely refer to section 35 of the *Constitution*.

The Treaty Commission is preparing a paper that will explore these different agreements. While it will not be ready for January 31, 2022, we would be pleased to share it with EMRIP when completed. The final paper on this subject will list and reference many of these agreements. Below is an initial summary we have prepared for EMRIP. The purpose is to identify the some of the types of agreements and their characteristics which will assist in understanding the different approaches available to First Nations or Indigenous governments currently in BC and Canada. Notably, some of these agreements are in the BC Treaty Commission process or are bilateral in nature with either the BC or Canada.

*Consultation Accommodation Measures*

The duty of government to consult and possibly accommodate arises from case law in Canada stemming from Section 35 of the *Constitution*. These agreements address specific issues partially accommodating Indigenous rights and title as a result of state actions infringing on these rights. These tend to be short term agreements and transactional based. These are generally meant for a singular purpose and are bilateral – often with the government of BC. There are a range of agreements BC has reached with many First Nations, dealing with issues, such as ensuring First Nations have economic benefits related to forestry or mining activities in their territories.

*Collaborative Stewardship*

Collaborative stewardship of lands with the BC government is about sharing jurisdiction all relating to land and resource management to include First Nation stewardship practices or agreements. Federal examples with the Government of Canada include matters within its jurisdiction, and of critical importance to many First Nations in BC on matters such as fisheries and marine area management.

*Pathways to Comprehensive Reconciliation / Treaties (Process Agreements)*

Getting to a comprehensive agreement that fully expresses the recognition of all aspects of inherent Indigenous rights requires considerable planning and process.

There are a number of process agreements that show the parties commitment to a comprehensive negotiations process and organize the components of an agreement and other aspects to reach an agreement. There are older and evolving process documents through the treaty process and there are new pathways being created for comprehensive reconciliation pathways for other sorts of agreements that will address Indigenous inherent rights, title and jurisdiction. Some of these new pathways are being addressed within the BC Treaty Commission Process and some are external.

The new pathways are incorporating specific commitments to high level and broader goals, such as the implementation of the UN Declaration, consent provisions to reflect free, prior, and informed consent (FPIC), and commitments to fully recognize Indigenous title to lands and governance. Whether the comprehensive agreements down the road fulfil these promises remains to be seen.

*Partial / Incremental / Sectoral Recognition Agreements*

Some First Nations and Indigenous organizations want to address recognition of their inherent rights and title incrementally. The approach is that the components of comprehensive recognition will be addressed one at a time and the cumulative impact of these arrangements will equate to the full recognition of inherent Indigenous rights, title and jurisdiction. Some sectoral agreements already exist with some First Nations, and these are related to land management, health, education, and children and families to name a few.

*Future / emerging agreements*

This approach arranges agreements in distinct portions. These agreements will deal with components of comprehensive reconciliation. For example, land matters, fisheries, or governance matters generally have respective standalone agreements in this approach. These include the possibility of “consent agreements” on specific matter in an Indigenous nation’s territory, contemplated through BC’s *Declaration on the Rights of Indigenous Peoples Act*[[4]](#footnote-4) legislation for the implementation of the UN Declaration in BC. Consent provisions to implement FPIC are also being negotiated in the modern treaty negotiations. Some of the first modern treaties in BC also contain consent provisions in certain circumstances, although these were negotiated prior to adoption of and without reference to FPIC or the UN Declaration.

*Comprehensive Inherent Indigenous Rights, Title and Jurisdiction Recognition Agreements*

Just as the emerging agreements category is evolving, the modern treaty model is evolving as government policy evolves. These new approaches in modern treaty negotiations are finding ways to incorporate key provisions from the UN Declaration, including consent provisions and mechanisms in specific circumstances.

Some of the new approaches to negotiation and reconciliation agreements are highlighted in the 2021 BCTC annual report on pages 7-12.[[5]](#footnote-5) The highlighted agreements demonstrate new innovations and approaches to treaty and tripartite reconciliation negotiations. These milestones build upon the foundations of the treaty negotiations process established by the 1991 *Report of the British Columbia Claims Task Force[[6]](#footnote-6)* (Task Force Report), the first treaties completed in the process, and years of efforts and negotiations by First Nations, Canada, and British Columbia. The negotiations are supported by the recent *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (Rights Recognition Policy)[[7]](#footnote-7).

These innovations and new approaches continue to emphasize key principles such as:

* Negotiations are based on the recognition of Indigenous title and rights;
* Recognition and support for Indigenous self-determination and self-government.
* Treaties and agreements as flexible and living partnerships; and
* Treaties and agreements as mechanisms to the implement the UN Declaration.

For a list of completed modern treaties in BC see the BC Treaty Commission’s Annual Report 2021 and a brief summary of these treaties at pages 14-23.

**Barriers to enable conditions necessary to promote constructive dialogue**

Supporting negotiations for treaties, agreements and other constructive arrangements are complex and require new thinking by state governments beyond colonial mind sets. It requires recognizing Indigenous rights, legal orders, knowledge, governance, and most importantly the vacating of power by state governments. In order to fully and effectively implement the UN Declaration and meaningful ongoing relationships through treaties, agreements and other constructive arrangements, governments must continue to vacate power, and trust Indigenous nations to govern and make sound decisions. As well, the crown must ensure the successful transitions of power and jurisdiction, which means there must be adequate funding and resources available to support Indigenous nations in their pursuits of autonomy. States must assess old colonial-based and biased authorities and ministerial discretion, which includes examining through the lens of reconciliation and recognition of Indigenous rights.

State support for restoration of Indigenous jurisdiction, institutions, and legal orders. Failure of this impedes negotiations and collaborative processes for treaties, agreements and other constructive arrangements, ultimately impeding reconciliation and the strengthening of the relationship between State and Indigenous peoples. The failure to support erodes reconciliation processes.

**Barriers to enable conditions necessary for the implementation**

*Article 37* of the UN Declaration expands on recognition to include observance and enforcement of treaties, agreements and other constructive arrangements. Laws are only as effective as they are enforced. Where Indigenous nations are responsible for the enforcement of their laws under treaties, agreements and other constructive arrangements, states must ensure essential tools for Indigenous governments to effectively enforce and respect those laws.

Enforcement of Indigenous laws continues to face political, economic, and structural barriers which weaken the relationship between Indigenous people and the State and the implementation of treaties, agreements and other constructive arrangements. Adequate state funding, resources, regulation and state mechanism adjustments are essential to support effective enforcement of indigenous laws to enable successful implementation.

Self-government requires some essential law-making elements: the ability to make laws; the ability to adjudicate laws; and, the ability to enforce laws. State and local governments have courts, prosecutors, enforcement agencies, and the requisite funding attached to these services. These tools allow state governments to implement all aspects of enforcement, a requirement for the rule of law to be more than just a legal construct, but reality.

*Adjudication*

Treaties, agreements and other constructive arrangements should do more than recognize the right of Indigenous nations to develop their own laws and legal orders. These agreements must ensure that Indigenous laws can be adjudicated under Indigenous tribunals and courts. This will also require funding and structural and political state support for Indigenous tribunals and courts.

*Mechanics of Enforcement*

States recognition that Indigenous laws are valid state laws are necessary to enable state court enforcement mechanisms. There are numerous state and local enforcement mechanisms that are not available to Indigenous nations because Indigenous laws are not defined as “law.” A judgement of an Indigenous tribunal or court must be recognized legally as a judgement the same as that of a state court.

There are many practical mechanisms beyond the courts that assist with the enforcement of laws, and with some adjustments to regulations and mechanisms to include Indigenous nations, can enable improved implementation. These could include states mandating state prosecutors to prosecute and police to enforce; or provisions in treaties, agreements and other constructive arrangements confirming the authority of state agencies to enforce and prosecute Indigenous laws at their request.

Enforcement agreements, upon request of the Indigenous nations, to enforce Indigenous laws until capacity is developed in Indigenous nations to enforce their laws themselves are essential for implementation. Under the enforcement agreements officers are acting as agents of the Indigenous nations. Furthermore, States designation, delegation, or cross-delegation of Indigenous nations to enforce state laws on Indigenous lands and for state enforcement officers to enforce Indigenous laws on or off Indigenous lands will advance an innovative step to reduce barriers and support effective implementation.

**National mechanisms with the competence to resolve conflicts and joint problem solving approaches that facilitate constructive dialogue**

To date, there are no comprehensive mechanism with the competence and mandate to oversee the implementation of treaties, agreements and other constructive arrangements, including resolving conflicts. However, a recent announcement of an Indigenous-led Transitional Committee formed to establish a National Council for Reconciliation, will ensure the Government of Canada’s accountability for reconciling the relationship with Indigenous peoples.[[8]](#footnote-8)

Treaty implementation is complex; guidance and oversight are done by the signatories on a tripartite basis. BCTC monitors implementation. While the parties to the treaty address implementation issues amongst themselves, through implementation committees, and sometimes through alternative dispute resolution mechanisms in the treaty, over the years, treaty nations have requested BCTC assistance on specific issues. In response, BCTC is becoming involved on important issues, which both are an implementation and negotiation issue, such as S.87 taxation, and the enforcement of First Nation laws. The Treaty Commission mandate as an independent facilitator, has enabled constructive dialogue between governments and Indigenous nations on joint issues toward problem solving approaches in negotiations and as well assisting in implementation issues.

Other bodies that play a role in treaty implementation guidance is the Land Claims Agreement Coalition[[9]](#footnote-9) which represents self-governing nations in Canada and focuses on national federal issues, and there is the Alliance of BC Modern Treaty Nations[[10]](#footnote-10), which works collectively to address provincial implementation issues.

The new Rights Recognition Policy continues to enable constructive dialogue and negotiations to recognize Indigenous rights and strengthen relationships with the state. It was the first tripartite (involving both levels of government) public policy developed in conjunction with Indigenous people, critically important. It builds upon the Task Force Report and the Treaty Commission framework, which formed the Treaty Commission and made important recommendations for the negotiations process, though lacked such a public tripartite policy. This Rights Recognition Policy explicitly details how negotiations of treaties, agreements and other constructive arrangements will be grounded in the recognition of Indigenous rights and ownership of Indigenous lands and resources. Furthermore, it provides additional joint problem solving approaches such as co-development of mandates and is a recognized framework to implement the UN Declaration, including the right to FPIC.

Lastly, the new Rights Recognition Policy states that treaties, agreements and other constructive arrangements are to be capable of evolving over time and not require full and final settlement based on the co-existence of Crown and Indigenous governments and the ongoing process of reconciliation of preexisting Indigenous sovereignty with assumed Crown sovereignty. This focus on treaties and agreements as living flexible agreements is one of the more significant innovations in the negotiations process in BC.

Good practices that will be beneficial for other bodies to facilitate constructive dialogue is that the body is independent, set up in conjunction with Indigenous peoples, and underpinned with state legislation. This latter point should be emphasized, the legislative underpinning of the BC Treaty Commission assists in its longevity and continuity through inevitable challenging times in negotiations. The BC Treaty Commission continues to support progress through its roles as an independent, legislated facilitator, voice (public information/communications), and funding authority. For over 30 years this continues to be necessary to support a fair, impartial, and transparent process for recognition of Indigenous rights. Further to an independent/third-party facilitator and convener role, the following good practices are useful to note, ability to engage government and Indigenous people on issues supports co-development of new mandates on key issues; and, the involvement of the Treaty Commission when parties are at an impasse has be beneficial to assist resolving these issues collaboratively.

1. https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Treaties-Constructive-Agreements/ConceptNote-TreatiesConstructiveAgreements.docx [↑](#footnote-ref-1)
2. *Constitution Act*, 1982 [↑](#footnote-ref-2)
3. https://www.bctreaty.ca/sites/default/files/LegalOpinionHoggMillenTreatiesandShareSovereigntyCanada.pdf [↑](#footnote-ref-3)
4. <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044> [↑](#footnote-ref-4)
5. <https://www.bctreaty.ca/sites/default/files/BCTC_Annual_Report_2021.pdf> [↑](#footnote-ref-5)
6. <https://bctreaty.ca/sites/default/files/BC_Claims_Task_Force_Report_1991.pdf> [↑](#footnote-ref-6)
7. <http://www.bctreaty.ca/sites/default/files/RecognitionandReconciliationofRightsPolicyforTreatyNegotiations.pdf> [↑](#footnote-ref-7)
8. <https://www.newswire.ca/news-releases/indigenous-led-transitional-committee-formed-to-establish-a-national-council-for-reconciliation-882582932.html> [↑](#footnote-ref-8)
9. <https://landclaimscoalition.ca/> [↑](#footnote-ref-9)
10. <https://www.globenewswire.com/en/news-release/2019/11/06/1941777/0/en/Nisga-a-Nation-joins-Alliance-with-seven-other-modern-treaty-First-Nations-in-BC.html> [↑](#footnote-ref-10)