January 31, 2024

British Columbia Treaty Commission

Submission to the United Nations Expert Mechanism on the Rights of Indigenous Peoples

**Input to the study on: “Laws, legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration”**

**MODERN TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS**

The British Columbia Treaty Commission (“BC Treaty Commission”) and the BC treaty negotiations framework and process were established prior to the achievement of the UN Declaration, but reflects the goals and rights established in *United Nations Declaration on the Rights of Indigenous Peoples* (“UN Declaration”). The state governments of Canada and British Columbia in consultation and cooperation with First Nations (Indigenous Peoples) and the First Nations Summit, have progressively taken collaborative measures to recognize and promote Indigenous rights, and make changes to negotiation policies and mandates bringing them in line with the UN Declaration.

Modern treaties, agreements and other constructive agreements achieved through the BC treaty negotiations process represent comprehensive and substantive measures to implement and achieve the means of the UN Declaration. Consistent with article 38, these agreements are extensively codeveloped in good-faith by State governments (Canada and British Columbia) and Indigenous Peoples. Once concluded and ratified modern treaties are enacted into law through settlement legislation and become constitutionally protected, and establish a third order of Indigenous governments.

Treaties, agreements and constructive arrangements are living agreements. Treaties and agreements include periodic reviews and renewal provisions to provide a process for the evolution of agreements, and most importantly these reviews are done in consultation and cooperation with Indigenous peoples. Every modern treaty includes provisions for implementation, which formalizes an Implementation Committee consisting of representation from each State government and the Indigenous Nation. These measures ensure an assessment of progress towards achieving agreement provisions and commitments, identify broader gaps, including challenges in implementing the UN Declaration.

In 2019, the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (“Rights Recognition Policy”) was a significant shift “moving beyond historic legacies of Crown denial, unilateralism, and the doctrine of discovery to a new nation-to-nation relationship based on the recognition of rights, reconciliation, respect, cooperation and partnership,” *[[1]](#footnote-2)* and explicitly states that the negotiations are to be guided by the UN Declaration. This was the first public policy in Canada that was codeveloped by the State and Indigenous Peoples, with direct links to support the implementation of the UN Declaration. The Rights Recognition Policy includes a mechanism for accountability and monitoring through review provisions.

Subsequently, domestic legislation implementing the UN Declaration was enacted; the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) in British Columbia, and federally, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIPA).[[2]](#footnote-3) The latest State policy directive, *Canada’s Collaborative Modern Treaty Implementation Policy,* was also developed in consultation and cooperation with Indigenous Peoples, and directly links to the UN Declaration to guide effective treaty implementation to ensure that Indigenous Modern Treaty Partners are able to fully exercise their jurisdictional powers as set out in their agreements.[[3]](#footnote-4)

The history and the progressive evolution of the BC treaty negotiations process, and these developments and policy measures serve as good examples of State governments working jointly with Indigenous Peoples to protect and promote Indigenous rights to highest standards.

***Legal recognition and protection of Indigenous Peoples lands, territories and resources***

Articles 3, 4, and 26 of the UN Declaration center around land and autonomy rights to self-determination and self-government which require States to “give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

In recent years, building from the Rights Recognition Policy, DRIPA and UNDRIPA, the BC treaty negotiations process has supported the State governments of Canada and British Columbia working in collaboration with Indigenous Nation to develop new approaches to legal recognition of Indigenous nationhood and rights. The following provide examples of incremental steps and alternatives to litigation for States and Indigenous Peoples.

In August 2021, the Gitanyow Hereditary Chiefs (Nation/Huwilp) and the State governments of Canada and British Columbia signed the *Gitanyow Governance Accord*. The Accord provides a new path forward that will transition Gitanyow away from the colonial constructs of the *Indian Act* by revitalizing and achieving legal recognition of the Gitanyow hereditary governance system of the Huwilp/ Houses.[[4]](#footnote-5)

Through the *Gitanyow Governance Accord*, Canada and British Columbia will recognize the nature of Gitanyow hereditary governance: rights and title are held by each Wilp (the eight traditional social, political, and governing units of the Gitanyow Nation) and in that Wilp’s Lax yip (territory) each Wilp, through its Simogyet (hereditary Chief), has authorities and responsibilities for that Lax yip in accordance with Gitanyow Ayookxw (law). The State governments of Canada and British Columbia and Gitanyow have committed to key milestones to be reached within five years, including a future Gitanyow Inherent Governance Agreement, which will detail how legal effect to Gitanyow hereditary governance will be recognized and affirmed.

As well, in August 2021, the Council of the Haida Nation and the State governments Canada and British Columbia signed the *GayG̱ahlda “Changing Tide” Framework Agreement*. The Agreement sets out the process for the State governments of Canada and British Columbia and Haida to embark on negotiations that, among other things, will reconcile pre-existing Haida sovereignty with assumed Crown sovereignty. This Framework Agreement will be capable of evolving over time based on the co-existence of Crown and Haida Nation governments and the ongoing process of reconciliation. Negotiations are established on the understanding that Haida inherent title exists, rather than having to be proven, which was a longstanding tactic of both States. The State governments of Canada and British Columbia agree to legislate recognition of the inherent rights of governance and self-determination of the Council of the Haida Nation[[5]](#footnote-6)￼

Two years later in 2023, the *Haida Nation Recognition Act* was enacted by the government of British Columbia, and Canada and Haida Nation signed the *Nang K̲’uula • Nang K̲’úulaas Recognition Agreement* formalizing the States commitment to legally recognize the Council of the Haida Nation as the governing body of the Haida Nation through legislation, mirroring the BC *The Haida Nation Recognition Act. [[6]](#footnote-7)*

Currently there are three treaty negotiations that are nearing completion for comprehensive treaties with Indigenous nations that will include similar innovations for Indigenous governance, the recognition and protection of indigenous rights, and the inclusion of the UN Declaration as a governing interpretive tool.

**EVOLUTION OF LAWS AND CONSTITUTIONAL REFORM FOR THE PROTECTION AND PROMOTION OF INDIGENOUS PEOPLES RIGHTS**

The BC Treaty Commission does not intend to identify all the domestic specific legal complexities in each case, but rather will identify the substantive efforts taken to achieve the ends of the UN Declaration for the purposes of this study.

***Right to self-government protected by the Constitution and the UN Declaration***

State courts continue to be called upon to interpret Indigenous Peoples rights wherein the UN Declaration can serve as a foundational instrument and interpretive tool to assist with progressive development of domestic legislation, laws and constitutional reform.

In Canada, there are landmark cases related to Indigenous rights and the UN Declaration before the Courts. In 2022, the Quebec Court of Appeal made a groundbreaking ruling decision, which found that the inherent right of self-government of First Nations, Inuit and Métis is recognized and affirmed by section 35 of the *Constitution Act, 1982* and includes jurisdiction of child and family services. This is the first time a court has recognized that Indigenous Peoples have a constitutionally protected right of self-government. However, the Supreme Court of Canada has granted leave to hear the case, and if this aspect of the case is upheld, it will become the Delgamuukw of Indigenous self-governance, finally upholding that Indigenous Nations have a legal right to self-governance.

The Quebec Court of Appeal stated that the legal tests should be adapted:

“[486] to reflect the particular nature of the right to self-government allowing for the regulation of child and family services. By its very nature, this right pertains to Aboriginal peoples as peoples. As we have just seen, this is a right which is intimately tied to the cultural survival of Aboriginal peoples, but is not necessarily based on the practice of distinctive cultural activities in the strict sense.

[487] Like Aboriginal title, one of these necessary adaptations entails recognizing the generic nature of the right to self-government in relation to child and family services, that is, the generic right to regulate those services. This is so because this jurisdiction is essential to the cultural security and survival of each Aboriginal people …. [emphasis in the original]” [[7]](#footnote-8)

*Attorney General of Québec, et al. v. Attorney General of Canada, et al.* reference to *An Act respecting First Nations, Inuit and Métis children, youth and families* (“Bill C-92")is now before the Supreme Court of Canada. In the factum of the Attorney General of Canada there are numerous strong linkages to the UN Declaration and clear emphasis urging the Supreme Court of Canada to rely on this important legal instrument in its analysis, “[t]he UNDRIP is an important legal development that must be considered in the Court’s analysis. The Canadian government is committed to implementing the UNDRIP, which is a source for the interpretation of Canadian law. In line with Canadian jurisprudence, the UNDRIP “supports a robust interpretation of Aboriginal rights”.[[8]](#footnote-9)

Particular attention can be drawn to the Quebec Court of Appeals conclusion, which indicates a critical opportunity to use case law and the UN Declaration to advance reconciliation in a significant way, “[g]iven the history of the relationship between the Crown and Indigenous peoples, the direction taken by the legal system towards recognition of the right of self-government, and the impact of international law, particularly the UNDRIP, this Court should take the opportunity afforded by this appeal to confirm the existence of this right and to develop the jurisprudence on the Aboriginal rights of Aboriginal peoples, while helping to take a step forward in the realization of the promise of reconciliation contained in section 35”[[9]](#footnote-10)

Additionally, and consistent with the UN Declaration in accordance with articles 2, 3, 4, 5, 13, 22, 34, 40, and 43, the Attorney General of Canada argues that Indigenous laws have paramountcy over conflicting provincial (subnational) laws, on matters concerning Aboriginal children and families service, as this is jurisdiction essential to the cultural security and survival of each Aboriginal people.[[10]](#footnote-11) The Treaty Commission publicly urges that the Supreme Court of Canada in this case must find that the Constitution of Canada protects a general right to Indigenous self-government and this be upheld by the highest court of the country.

The Treaty Commission commends the Government of Canada for taking a position in an important legal case that supports the recognition of the UN Declaration in judicial decisions. This case and in other instances when existing domestic laws are at odds with the standards of the UN Declaration, States must take concrete measures, such as legal action, to establish jurisprudential clarity to ensure the protection and promotion of Indigenous rights.

***Constitutional space upholding Indigenous constitutions and self-government***

In February 2023, the Supreme Court of Canada heard submissions in *Dickson v Vuntut Gwitchin First Nation*, from State governments, Indigenous Nations, representative institutions, and the BC Treaty Commission. In short, this case relates to Indigenous collective rights and treaty rights protected under Section 35 and their interaction with individual *Charter* rights pursuant to Section 15.

The BC Treaty Commission focused its submission calling for an interpretation of the law that protects the constitutional differences promised to Indigenous Peoples in its constitution against arguments that advocated for a narrowing of the realm within which Indigenous peoples can exercise their fundamental right of self-determination. This narrowed approach is at odds with years of advocacy by Indigenous peoples and jurisprudence protecting the distinctness of Indigenous collective rights.

The BC Treaty Commission, through its submission to the highest Court of the country is advocating that constitutions of self-governing Indigenous nations established through a State-Indigenous treaty or agreement be shielded from individual legal challenge. Self-government is a fundamental means through which Indigenous peoples express their “distinctive, collective, and cultural” identities, and an essential element of self-government is the constitution by which the Indigenous peoples developed collectively, and their government operates.

Citing the UN Declaration and in particular articles 3, 4, and 5, the BC Treaty Commission intervened and calls for an interpretation of the Canadian Constitution, consistent with the UN Declaration and UNDRIPA, (section 25 of the *Charter*), as a shield to protect the unique distinctive, collective, and cultural identities of Indigenous Peoples, including Indigenous constitutions,[[11]](#footnote-12) from unnecessary individual rights challenges to collective indigenous rights.

If the Supreme Court of Canada decides these cases in a manner respecting and upholding Indigenous rights and laws, this will contribute to the realization of the objectives of the UN Declaration and represent the next step in the evolution of courts role in the protection of Indigenous rights domestically in Canda, and can serve as precedent for other regions globally.

1. Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia, (2019), see <https://bctreaty.ca/wp-content/uploads/2016/08/RecognitionandReconciliationofRightsPolicyforTreatyNegotiations.pdf> [↑](#footnote-ref-2)
2. Please note: the BC Treaty Commission has endorsed the Coalition for the Human Rights of Indigenous Peoples submission analyzing in detail the UNDRIPA. [↑](#footnote-ref-3)
3. *Canada's Collaborative Modern Treaty Implementation Policy*, (2023) Government of Canada, see <https://www.rcaanc-cirnac.gc.ca/eng/1672771319009/1672771475448#chp7> [↑](#footnote-ref-4)
4. Gitanyow Governance Accord (2021), see <https://bctreaty.ca/wp-content/uploads/2021/12/GitanyowGovernanceAccord_August_11_2021.pdf> [↑](#footnote-ref-5)
5. GayG̱ahlda “Changing Tide” Framework Agreement (2021) see <https://bctreaty.ca/wp-content/uploads/2021/12/GayGahldaChangingTideFrameworkforReconciliationAgreement_August_13_2021.pdf> [↑](#footnote-ref-6)
6. Haida Nation Recognition Act (2023) see <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/42nd-parliament/4th-session/bills/third-reading/gov18-3> and <https://www.haidanation.ca/the-haida-nation-british-columbia-and-canada-sign-the-nang-k%CC%B2uula-nang-k%CC%B2uulaas-recognition-agreement/> [↑](#footnote-ref-7)
7. Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families (Order in Council No. 1288-2019) 2022 QCCA 185 (CanLII). [↑](#footnote-ref-8)
8. Attorney General of Canada, (2022), see <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/40061/FM025_Appellant-Respondent_Attorney-General-of-Canada_En.pdf> [↑](#footnote-ref-9)
9. Ibid. [↑](#footnote-ref-10)
10. BC Treaty Commission Annual Report 2022, see <https://bctreaty.ca/wp-content/uploads/2022/11/BCTC_Annual_Report_2022_Digital.pdf> [↑](#footnote-ref-11)
11. Factum of the Intervener British Columbia Treaty Commission, (2023) see [www.scc-csc.ca/WebDocuments-DocumentsWeb/39856/FM080\_Intervener\_British-Columbia-Treaty-Commission.pdf](http://www.scc-csc.ca/WebDocuments-DocumentsWeb/39856/FM080_Intervener_British-Columbia-Treaty-Commission.pdf) [↑](#footnote-ref-12)