



British Columbia Treaty Commission
Submission

House of Commons
Standing Committee on Indigenous and Northern Affairs
Specific Claims and Comprehensive Land Claims Agreements

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“It is important for all Canadians to understand that without Treaties, Canada would have no legitimacy as a nation. Treaties between Indigenous nations and the Crown established the legal and constitutional foundation of this country.”

“Treaties are a model for how Canadians, as diverse peoples, can live respectfully and peacefully together on these lands we now share.”

Honouring the Truth, Reconciling for the Future,” Summary of the Final Report of the Truth and Reconciliation Commission of Canada, P.195–196

INTRODUCTION

The British Columbia Treaty Commission [“Treaty Commission” or “BCTC”] is an independent body that oversees negotiations in BC for the reconciliation of indigenous rights through modern treaties.

The evolution of case law in Canada, and internationally with the *UN Declaration on the Rights of Indigenous Peoples* [“*UN Declaration*”] have further clarified that treaty negotiations are a constitutional imperative mandated by *Section 35* of the *Canadian Constitution*¹. A modern treaty, fairly negotiated and honourably implemented, is the greatest expression of reconciliation.

A new era of recognition of indigenous rights is at hand and the BC treaty negotiations process is well positioned to embrace this change and lead reconciliation in Canada.

Nation-building, essential to reconciliation, is at the heart of self-determination for Indigenous peoples. A key part of nation-building is resolving overlapping and shared territory issues: determining who is the representative governing body – who is the “proper rights and title holder.” If resolution of these issues is to be lasting and constructive, it must be by First Nations themselves, with support and with resources.

The Treaty Commission makes recommendations at the end of this submission, including support for a dedicated source of funds to support First Nations’ efforts to resolve shared territory and overlap issues. This ultimately will support Nation-to-Nation relationships.

UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

Treaties and treaty negotiations embody and uphold the rights protected in the *UN Declaration*.²

The Treaty Commission attended the 15th session of the United Nations Permanent Forum on Indigenous Issues [UNPFII], in May 2016, at which Canada endorsed without qualification, for the first time, the *UN Declaration*. The Minister of Indigenous Affairs stated in her speech at the UN that modern treaties reflect the core principles and rights contained in the *UN Declaration*.

The Treaty Commission made a submission that was adopted by, and included in the UNPFII final report³, recommending good-faith negotiations for treaties, and other constructive agreements; based on

¹ The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c.11 [hereinafter, “*Constitution*”].

² See BCTC 2016 Annual Report *UN Declaration > Negotiations > Treaties > Reconciliation*
<http://www.bctreaty.ca/sites/default/files/BCTC-AR2016-WEB.pdf>

³ See recommendation 40, Report of the 15th session of the Permanent Forum on Indigenous Issues, May 9-20, 2016, E/2016/43-E/C.19/2016/11

recognition of indigenous peoples' rights; rejecting extinguishment; and calling for redress for the loss of lands, territories and resources.

The UNPFII report reiterates the need for oversight bodies to guide and oversee the conduct of negotiations and implementation of treaties, agreements and other constructive arrangements. The Treaty Commission is a unique, statutory, independent body that oversees treaty making in British Columbia.⁴ An independent commission is at the core of the negotiations process. The Treaty Commission is the only tripartite statutory body⁵ in Canada whose mandate is to support reconciliation. BCTC is well-positioned to implement the work recommended by the UNPFII.

The UNPFII report also encourages support for the resolution of overlap disputes between indigenous peoples by providing financial and other methods of support. We comment further on the issue of overlaps below.

NATION-TO-NATION AND SELF-DETERMINATION

The Government of Canada recently released its *Principles respecting the Government of Canada's relationship with Indigenous peoples [Canada's 10 Principles]* committing to achieving reconciliation with Indigenous peoples through a “renewed, nation-to-nation, government-to-government, relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change.”

This is also the fundamental goal of the BC treaty negotiations process. The 1991 Report of the British Columbia Claims Task Force [“Task Force Report”] – the blueprint for the negotiations process – describes reconciliation as “the establishment of a new relationship based on mutual trust, respect and understanding – through political negotiations.”⁶ This goal is to be achieved “through voluntary negotiations, fairly conducted, in which the First Nations, Canada, and British Columbia are equal participants. [...] The negotiations will conclude with modern-day treaties. These treaties must be fair and honourable.”

Self-Determination is at the heart of both the BC treaty negotiations process and the *UN Declaration*. Recommendation 6 of the Task Force Report states that “The treaty negotiation process be open to all First Nations in British Columbia.” And Recommendation 7 states: “The organization of First Nations for the negotiation is a decision to be made by each First Nation.”

Essential to the negotiations process is the recognition of a Nation-to-Nation relationship: “Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship.”⁷

SHARED SOVEREIGNTY

Reconciliation must include not only the sharing of lands and resources, but also the sharing of jurisdiction. True self-determination for Indigenous Peoples – as mandated by s.35 of our Constitution, and the *UN Declaration* – cannot be achieved without it.

⁴ Treaty Commission was established in 1992 by agreement among the governments of Canada and British Columbia and the First Nations Summit, with signing of the British Columbia Treaty Commission Agreement, 1992.

⁵ Federal and provincial legislation was enacted to further strengthen the basis for the Treaty Commission. These Acts not only form the legal foundation for the BCTC, but also ground the BC treaty negotiations process. See the federal British Columbia Treaty Commission Act, S.C. 1995, c.45, and the provincial Treaty Commission Act [RSBC 1996] c.461.

⁶ Report of the British Columbia Claims Task Force, 1991, Recommendation 1.

⁷ Ibid, Pages 7-8.

To better understand how negotiated First Nations jurisdiction compares with Aboriginal title, the Treaty Commission turned to some of Canada's foremost Constitutional experts.

In the legal opinion, *Treaties and the Sharing of Sovereignty in Canada*,⁸ Peter W. Hogg, C.C., Q.C., and Roy W. Millen, examine the status of treaties under the BC treaty negotiations process, and their allocation of jurisdiction among First Nations and governments.

In Hogg and Millen's view, a treaty represents a constitutionally-protected sharing of sovereignty among the signatories to the treaty. This status is inherent in the nature of a modern, constitutionally protected treaty, and the "prevailing law" rules in the treaty: the provisions that specify which government's laws apply in the event of a conflict. In the treaties that have been negotiated in the B.C. treaty negotiations process to date, there are significant areas of jurisdiction in which the First Nation's law prevails over inconsistent B.C. or federal law. These spheres give primary authority to the First Nation's government, and are subject to constitutional protection. Any infringement of the First Nation's law in these areas by the government of British Columbia or Canada would have to be justified in accordance with stringent requirements set by the Supreme Court of Canada.

This legal structure provides substantial clarity and protection for the First Nations' self-government. The unique aspects over land held and recognized in a treaty, combined with the sharing of sovereignty, results in a lasting and comprehensive resolution that advances reconciliation within the unique Canadian constitutional context.

FREE PRIOR AND INFORMED CONSENT

Canada's 10 Principles [#6] include efforts to secure the free, prior, and informed consent [FPIC] of Indigenous peoples when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources, and that Canada will look for "opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together."

Modern treaties provide concrete mechanisms to secure the consent of Indigenous peoples and live up to this fundamental right of the *UN Declaration*:

"Chapter 10 of the Nisga'a treaty, Environmental Assessment and Protection, is our free, prior, and informed consent. There is no economic chapter in the Nisga'a treaty. The rights and interest of the Nisga'a citizens are in Chapter 10, and they are perfected and constitutionally protected to provide certainty for all Parties." – Former President Mitchell Stevens, Nisga'a Nation⁹

"Free, prior and informed consent is about decision-making. The right to make decisions. You exercise that authority in many ways, but it's a decision-making right. The ability to make decisions really underscores free, prior and informed consent." – Grand Chief Edward John, First Nations Summit Task Group Member and former UNPFII Expert Member¹⁰

MADE-IN-BC NEGOTIATIONS

The negotiations process in BC was created as a unique approach to reconciliation. Its principles, the Task Force Report and its recommendations, to this day, are a successful process to advance reconciliation. While progress has not been as rapid as the parties would like, the treaties that have been achieved are

⁸ Blake, Cassels & Graydon LLP, 2017, <http://www.bctreaty.ca/sites/default/files/LegalOpinionHoggMillen.pdf>.

⁹ BCTC 2016 Annual Report, P.9.

¹⁰ See BCTC 2016 Annual Report P.16.

successful expressions of reconciliation. The opportunities to conclude several treaties in the near future are significant.

The investment by Indigenous Peoples and the governments of Canada and British Columbia¹¹ and the public into treaty negotiation is significant and ongoing:

- 65 First Nations, representing 105 current and former Indian Act Bands out of all 200 Indian Act Bands in BC, are participating in, or have completed, treaties through the treaty negotiations process. This is 52.5% of all Indian Act Bands in British Columbia.
- There are 7 First Nations implementing modern treaties in British Columbia: the five Maa-nulth First Nations, Tsawwassen First Nation, and Tla'amin Nation. The Nisga'a treaty, the first modern treaty in BC, was completed outside the BC treaty negotiations process.
- This brings the total to 8 modern treaties in BC, which is 27.5 % of all modern treaties in Canada.

Currently there are 14 First Nations¹² in advanced negotiations

Stage 5 Final Agreement Negotiations – 7 First Nations

In-SHUCK-ch Nation (2 Indian Act Bands)

K'ómoks First Nation

Lheidli T'enneh First Nation [second ratification vote]

Te'mexw Treaty Association

Tsimshian First Nations [Kitselas and Kitsumkalum] [2 Indian Act Bands]

Wuikinuxv Nation

Yekooche First Nation

Stage 4 Advanced AIP Negotiations – 7 First Nations

Ditidaht First Nation

Gwa'Sala-'Nakwaxda'xw Nation

Katzie First Nation

Ktunaxa Kinbasket Treaty Council [4 Indian Act Bands]

Northern Shuswap Tribal Council [4 Indian Act Bands]

Pacheedaht First Nation

Stó:lō Xwexwilmexw Treaty Association [6 Indian Act Bands]

Tsimshian First Nations [Metlakatla]

Five of these First Nations are multi-community, with several *Indian Act* bands coming together to build their vision of nationhood. These are Canada's best opportunities to advance reconciliation and Nation-to-Nation relationships right now.

Completion of several of these advanced negotiations is possible within the next two years. This will be a major achievement and concrete implementation of the *UN Declaration* for the current government. To accomplish this, political will is necessary from all parties. For the federal government, this means that the current efforts and energy devoted to reconciliation and Nation-to-Nation relationships, as expressed in its *Canada's 10 Principles* must also be part of these advanced treaty negotiations.

¹¹ The First Nations Summit, the Government of Canada and the Government of British Columbia are collectively referred to as "the Principals."

¹² The Negotiations Overview, P. 36 BCTC 2017 Annual Report, has 17 FNs listed as advanced [8 First Nations in Final Agreement and 9 First Nations in Advanced AIP] BCTC counts 14 First Nations in "advanced negotiations" as Yale, 'Namgis, and Tla-o-qui-aht, while having reached milestones of a completed treaty or AIP, have taken pauses to focus on internal governance and community engagement. Tsimshian is counted as one First Nation, but has communities in various stages.

RIGHTS RECOGNITION AND SELF-DETERMINATION

In this last year, Canada began exploratory discussions with several Indigenous groups across the country, including BC. These efforts are applauded, and it is hoped that these will result in advancing reconciliation with those Indigenous peoples. At the same time, these non-treaty discussions, now called “Rights Recognition and Self-Determination” have left many First Nations in treaty negotiations wondering what all their years of dedicated efforts, negotiations, capacity-building and nation-building are all about. These nations have led the way and deserve the best mandate Canada can bring forward.

The concept of extinguishment was rejected by the architects of the treaty negotiations process: “First Nations should not be required to abandon fundamental constitutional rights simply to achieve certainty for others. Certainty can be achieved without extinguishment.”¹³ *Canada’s 10 Principles* [#5] states that the federal government is prepared:

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. ... where agreements are formed, they should be based on the recognition and implementation of rights and not their extinguishment, modification, or surrender.

The same effort and creative approach at the Rights Recognition and Self-Determination tables should also be applied to treaty tables in BC – treaty negotiations must also be Rights Recognition and Self-Determination negotiations.

OVERLAPPING AND SHARED TERRITORIAL CLAIMS

Overlap disputes between Indigenous peoples interfere with the implementation of the *UN Declaration* by disrupting negotiations, and slowing the advancement and implementation of treaties and reconciliation generally. These issues are made more complicated by the fracturing of Indigenous peoples by colonialism, and the creation of colonial and neo-colonial indigenous entities.

While it is important to address issues of who is proper rights and title holder and who is the proper representative body, diligence must be taken not to further exacerbate these complex issues with assumptions and/or assertions based on constructs such as linguistics groupings.

Indigenous peoples are best placed to resolved overlapping and shared territory issues themselves.¹⁴ These issues – and their resolution – have been part of traditional indigenous governance for thousands of years. It is an essential function of self-determination and self-governance.

Government imposed solutions run counter to this principle that Indigenous peoples should resolve overlap and shared territory issues, and forced amalgamation of Indigenous peoples is bound to result in failure and is contrary to self-determination.

To assist with the resolution of overlaps the Treaty Commission calls on the federal government to implement the following recommendations from *Multilateral Engagement Process to Improve and Expedite Treaty Negotiations in British Columbia*.¹⁵ While all the recommendations from the report are important to implement, the following will particularly assist with overlapping and shared territory issues, and therefore advance nation-building:

14. explore options for a dedicated, cost-shared source of funds for supporting First Nations’ efforts to resolve shared territory and overlap issues.

¹³ Ibid, P. 11.

¹⁴ See recommendation 8 of the Task Force Report.

¹⁵ Multilateral Engagement Report, http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/bc_multiprop_1465303885525_eng.pdf

The Treaty Commission also strongly urges innovative solutions to overlapping and shared territory issues that promote efforts to build relationships among Indigenous neighbours: those advancing in treaty negotiations and those not far advanced, or not in treaty negotiations. The treaty / non-treaty dichotomy has resulted in unnecessary and damaging conflict among Indigenous peoples, and to the collective efforts of all the parties in reaching reconciliation.

18. The Principals will instruct officials to explore approaches jointly with First Nations that:
- (a) provide for recognition and protection of the rights of First Nations that are not party to treaty negotiations (e.g., shared decision-making between Canada, British Columbia, and First Nations),
 - (b) result in multi-party shared decision-making agreements that could include First Nations in treaty negotiations, First Nations not participating in treaty negotiations, British Columbia, and/or Canada, and
 - (c) reflect shared ownership and governance of specific parcels of land by both First Nations with and without treaties.

TREATY NEGOTIATION LOAN POLICY

It has long been the position of the Treaty Commission that the Government of Canada eliminate the need for First Nations to borrow funds through federal loans to negotiate treaties. *Canada's 10 Principles* [#8] recognizes that reconciliation requires a renewed fiscal relationship that promotes a mutually supportive climate for economic partnership and resource development. This cannot happen with large loan indebtedness hanging over Indigenous peoples during treaty negotiations, and during implementation of a new relationship.

RECONCILIATION AS SHARED PROSPERITY

The INAN Committee has been tasked with examining the outcomes and impacts of modern treaties for Indigenous communities. The Treaty Commission's last two annual reports feature success as expressed in interviews with First Nation leaders.

"The [UN Declaration] article about self-governance is really important for First Nations to be able to take on their own responsibility, whether it be economics, social development, land, ownership over their land and how they want to manage it, is all something that is attainable through the treaty."¹⁶
– Chief Anne Mack

"The Huu-ay-aht treaty has woven us into the fabric of Canada. Being constitutionally self-governing and shedding the shackles of the Indian Act makes it possible to flourish by investing in our own territory. The treaty is slowly pulling us out of 150 years of poverty." –Tom Happynook, BC Treaty Commissioner

From the perspective of the Treaty Commission, reconciliation means a true sharing of prosperity: of land, resources, economic, social, cultural, and governmental space. Understanding this shared prosperity has the ability to advance reconciliation significantly in BC and in Canada. When a First Nation prospers, the entire region prospers.¹⁷

¹⁶ See BCTC 2016 annual report, <http://www.bctreaty.ca/sites/default/files/BCTC-AR2016-WEB.pdf>

¹⁷ See BCTC 2017 annual report, <http://www.bctreaty.ca/sites/default/files/BCTreatyCommission-AR2017.pdf>

Modern treaties, when fairly negotiated and honorably implemented, are a successful mechanism for the protection and reconciliation of indigenous rights, and can generate significant economic benefit for Indigenous peoples, as well as local and regional government and communities.

RECOMMENDATIONS

The Treaty Commission offers the following recommendations. That the Government of Canada:

1. Provide the Treaty Commission with a dedicated, cost-shared [with British Columbia] source of funds for supporting First Nations' efforts to resolve shared territory and overlap issues
2. Apply its "rights recognition self-determination" mandate to treaty tables

The Treaty Commission has always advocated the following regarding loan funding [also in the First Nations' of the Maa-nulth Treaty brief to the INAN Committee]:

3. Loan funding
 - eliminate the required borrowing provisions in the comprehensive claims policy
 - forgive the loans that are currently outstanding for communities that have been engaged in treaty negotiations, and
 - to the extent that any community has repaid any portion of their loans, those communities should be reimbursed for those funds.

The Treaty Commission also endorses the recommendations from the First Nations of the Maa-nulth Treaty that reconciliation should be viewed as an on-going process and treaties as a living expression of a relationship, and that Canada and British Columbia:

4. Data collection
 - adopt policies to foster data collection in post-treaty First Nations
 - use various generally accepted criteria of social, economic and policy indicators in this process
 - work directly with First Nations in this data collection, and
 - invest the necessary resources in this data collection.

The BC Treaty Commission made similar recommendations through a report it commissioned from Deloitte in October 2016, *Socio-economic Benefits of Modern Treaties in BC*¹⁸ [see "A common measurement framework," pages 16-17].

¹⁸ See Deloitte Report, <http://www.bctreaty.ca/sites/default/files/Deloitte-BCTC-FinalReport.pdf>