**British Columbia Treaty Commission submission to the to the United Nations Expert Mechanism on the Rights of Indigenous Peoples – Second report on efforts to achieve the ends of the Declaration on the Rights of Indigenous Peoples (UNDRIP) (for 2019): Recognition, Reparations and Reconciliation**

The British Columbia Treaty Commission (“BC Treaty Commission” or “BCTC”) welcomes the opportunity to provide the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) with the following submission to inform EMRIP’s report on Recognition, Reparations and Reconciliation.

**Background on the BC Treaty Commission**

The BC Treaty Commission is an independent oversight body that advocates and facilitates the recognition and protection of Indigenous title and rights through modern treaties between the governments of Canada and British Columbia and Indigenous Nations in the province of British Columbia (BC), Canada. The Treaty Commission is the only tripartite statutory body in Canada whose mandate is to support reconciliation.[[1]](#footnote-1)

EMRIP is looking at best practices and initiatives over the last 10 years that deal with the rights of indigenous peoples. While the BC Treaty Commission was established in 1992, significant changes have been made to the negotiations process and to the BC Treaty Commission within the last 10 years, most notably, the recognition of the United Nations Declaration on the Rights of Indigenous Peoples (“UN Declaration”) to these recognition and reconciliation negotiations.

The development and establishment of the BC Treaty Commission is consistent with *Article 27* of the UN Declaration of the Rights of Indigenous Peoples and the World Outcome Document. The BC treaty negotiations process was established and implemented by the two levels of public government in Canada, in conjunction with indigenous peoples. It is a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs, to recognize the rights of indigenous peoples pertaining to their lands, territories and resources. Challenges to the process exist, some of which we discuss below. However, the BC Treaty Commission and the negotiations process is adapting and becoming a stronger reflection of the values and rights reflected in the UN Declaration.

In 2016 there was a review of the negotiations process and the BC Treaty Commission which resulted in a tripartite multilateral report[[2]](#footnote-2) which expanded and enhanced the BCTC’s mandate to include supporting the implementation of the UN Declaration, the Truth and Reconciliation Commission’s 94 Calls to Actions, the federal principles respecting the Government of Canada’s relationship with Indigenous peoples[[3]](#footnote-3), and the recognition of First Nations (Indigenous) rights and title.

One of the recommendations from this report included an instruction letter to the BCTC clarifying its roles and responsibilities. We (the BCTC) specifically requested that this letter of instruction include reference to the implementation of the UN Declaration and the recognition of Indigenous rights and title. After this letter was completed in early 2018, the parties determined that a similar document would be beneficial to the negotiations. This resulted in Principals’ Accord on Transforming Treaty Negotiations in British Columbia.[[4]](#footnote-4) This Accord also notes the importance of the UN Declaration to treaty negotiations.

**Operationalizing FPIC**

Modern treaties, when fairly negotiated and honourably implemented, are an effective mechanism to implement the UN Declaration, and in particular, the right to free, prior and informed consent. Last fall, the Treaty Commission obtained a legal opinion “The BC Treaty Negotiations Process and the Realization of Free, Prior and Informed Consent” (<http://www.bctreaty.ca/sites/default/files/LegalOpinion-FPIC-BCTC-2018.pdf>) .

The opinion notes that the BC treaty negotiations process facilitates voluntary, independent and transparent tripartite nation-to-nation negotiations of constitutionally-protected agreements for shared governance, stability, certainty and reconciliation. Treaties represent a constitutionally-protected sharing of sovereignty[[5]](#footnote-5) and are entirely consistent with free, prior and informed consent [“FPIC”], as described in UN Declaration and conceptualized in Canadian law.

Importantly, the legal opinion finds that the BC treaty negotiations process provides a model for operationalizing FPIC and breathing life into the indigenous rights underlying UNDRIP.

**The Inherent Rights of Indigenous Peoples and Treaty Negotiations**

Treaty negotiations in British Columbia between the governments of Canada, BC, and participating indigenous nations have been ongoing since 1993. To date eight (8) modern treaties have been negotiated in BC (seven in the current BC treaty negotiations process, with the five Maa-nulth First Nations, and with Tsawwassen and Tla’amin Nations; and another with the Nisga’a Nation negotiated prior to the process)[[6]](#footnote-6). A consistent challenge to the negotiations has been the various mandates and policies of government departments outside the department tasked with negotiating a treaty on behalf of government.  While the BC treaty process is stated to bring a “whole of government” approach (and with it, in theory, the prioritization of indigenous rights), the reality is that government departments bring their own, often conflicting policies, that diminish or interfere with the recognition of indigenous rights.

There are of course past “extinguishment” policies whereby governments approached treaties as a one-time, “full and final” exchange of lands, cash, and some self-government, in return for a “surrender” and “extinguishment” of indigenous claims and rights. Much has been written about the inequity and injustice of such policies, and efforts are being made in BC and Canada to end any remnants of these policies. However, in order to achieve significant and substantive recognition of indigenous rights, a stronger foundation must be established to ensure all policies and mandates, whether direct or indirect, that interfere with the full expression of indigenous rights, or also changed and eliminated.

As an example, government lands transferred to indigenous nations as part of modern treaties in Canada are subject to “exclusions” for government interests, such as roads, forestry roads, utility lines and rights of way, trails, and gravel pits.  These are under the jurisdictions of departments or ministries such as the Forests, Transportation and Highways, Hydro, etc. Each of these departments have brought policies to the negotiations that roads, rights of way, etc. be excluded from the lands transferred. The result is a land base covered with exclusions (a “swiss cheese” view of indigenous territories). If indigenous territory, and indigenous jurisdiction that comes with it, were respected, such interests should not be excluded, but transferred to the jurisdiction of the indigenous nation. The interests can be maintained, and conditions negotiated for their continuance, but it would be more reflective of indigenous rights to lands, territories and resources, if they were transferred to the jurisdiction of the indigenous nation.

Treaty negotiations in BC are based on a statement of intent / claim submitted by indigenous nations. This statement includes a description and map of the indigenous nation’s territory. While this statement forms the basis of the negotiations, they are considered political negotiations. Rights are not recognized until negotiations are concluded and a treaty passed into law. While these negotiations have resulted in successful treaties, many challenges to the full recognition of indigenous rights remain.

If, on the other hand, *inherent* indigenous rights, including jurisdiction and self-government, to their lands, territories and resources, are acknowledged from the outset, without being contingent on legal or court declarations, or agreements with States, or even the UN Declaration, then a stronger foundation would be established for negotiation processes. This would also provide impetus to better implement the UN Declaration, and rights such as Article 27, that calls for the establishment of processes to recognize the rights of indigenous peoples. Recognizing the inherent indigenous rights to self-government, and to lands, territories and resources, within States, by States, will enable processes for the recognition of indigenous rights to be truly fair, independent, impartial, open and transparent.

Recognition of inherent indigenous rights will “level the playing field” and elevate the UN Declaration and negotiation processes. It could assist in the recognition and repatriation of indigenous rights by making such processes a priority and help overcome obstacles and other policies within States that interfere with recognition and repatriation processes. State recognition of inherent indigenous rights will lead to better implementation of indigenous rights, and better legal mechanisms, as called for in Article 26(3): that “States give legal recognition and protection” to indigenous lands, territories and resources. Recognition of *inherent* indigenous rights to lands, territories and resources, will encourage more substantive legal recognition of indigenous rights when States are faced with the balancing of possible competing legal orders of States and indigenous peoples.

Another obstacle to recognition, repatriation and reconciliation is the costs that States attribute to lands transferred to indigenous nations. In the BC treaty negotiations process a “cost-sharing” agreement is established between the Canada and the province of British Columbia on their respective costs to settling treaties. No doubt all States put a value or cost to the transferring ownership of lands to indigenous peoples. This cost inevitably puts a cap to recognition and repatriation efforts. In BC, this has been estimated as a “5%” formula whereby lands transferred in full ownership to indigenous nations have been approximately 5% of their territories. This does not include other forms of recognition such as resource tenures, rights to fish and harvest throughout the territory, etc. However, the highest and most valuable form of land ownership – one that is essential to the economic well-being of indigenous nations - is restricted by the costs governments attribute to the transfer. If a mechanism could be developed to address this issue, States would be encouraged to recognize and repatriate more lands, territories and resources of indigenous peoples, and better reflect the value of the territorial resources, and not be based simply on a per capita or other arbitrary formula. It would also lead to fairer revenue sharing that is based on a fair share of the value of the resources extracted from territories.

We acknowledge the complexities behind such a proposal. However, the United Nations should consider creating a value mechanism (an analogy to carbon credits might help), to encourage States to recognize and repatriate indigenous peoples’ lands, territories and resources. Such a mechanism would incentivize the recognition and repatriation of specific indigenous lands, territories and resources. States inevitably put a monetary value to the transfer of lands, and this can create resistance to recognition and repatriation. A mechanism that adds a value to the transfers might encourage recognition and repatriation, and reward reconciliation.

**Recommendations**

The BC Treaty Commission offers the following recommendations for EMRIP consideration:

1. States are encouraged to establish independent bodies to oversee and facilitate the recognition, repatriation and reconciliation of indigenous lands, territories and resources, including jurisdiction and self-government. These bodies should be established in law and adequately resourced to conduct this important work.
2. States are encouraged to explicitly recognize the *inherent* indigenous rights, including jurisdiction and self-government, to their lands, territories and resources, without being contingent on legal or court declarations, or agreements with States. This will provide impetus to better implement the UN Declaration, and rights such as Article 27, that calls for the establishment of processes to recognize the rights of indigenous peoples. Recognizing the inherent indigenous rights to self-government, and to their lands, territories and resources, within States, by States, will enable processes for the recognition of indigenous rights to be truly fair, independent, impartial, open and transparent. Recognition of the inherent nature of indigenous rights to lands, territories and resources will “level the playing field” and will support legal mechanisms, as called for in Article 26(3) of the UN Declaration.
3. The United Nations should consider creating a value mechanism, loosely analogous to carbon credits, to encourage States to recognize and repatriate indigenous peoples’ lands, territories and resources. Such a mechanism would incentivize the recognition and repatriation of specific indigenous lands, territories and resources. States inevitably put a monetary value to the transfer of lands, and this can create resistance to recognition and repatriation. A mechanism that adds a value to the transfers might encourage recognition and repatriation, and reward reconciliation.

1. Canadian 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. [↑](#footnote-ref-1)
2. Multilateral Engagement Process to Improve and Expedite Treaty Negotiations in British Columbia. May 24, 2016 https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/bc\_multiprop\_1465303885525\_eng.pdf [↑](#footnote-ref-2)
3. Principles respecting the Government of Canada’s relationship with Indigenous Peoples. February 14 2018 https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html [↑](#footnote-ref-3)
4. “Principals’ Accord on Transforming Treaty Negotiations in British Columbia. December 1, 2018 https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/principals\_accord\_signed\_dec\_1\_2018.pdf [↑](#footnote-ref-4)
5. See 2017 legal opinion, “Treaties and the Sharing of Sovereignty in Canada,” <http://www.bctreaty.ca/sites/default/files/LegalOpinionHoggMillen.pdf>. [↑](#footnote-ref-5)
6. See BCTC’s 2018 Annual Report, <http://www.bctreaty.ca/sites/default/files/BCTC-AR2018.pdf>, page 30. [↑](#footnote-ref-6)