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Negotiations and Agreements Outside the BCTC Process

A Brief Review of Developments, Trends, and Challenges

Table of Contents

1. **Summary of Pre-2016 Agreements** **4**
2. **Post-2016 Legal and Policy Developments** **6**
3. **New Agreements Post-2016** **10**
4. **Moving Forward** **16**

Schedule: ***Memorandum from 2016 on Negotiations and Agreements Outside the BCTC Process***

In September 2016 I prepared a memo for the UBCIC analyzing 13 reconciliation agreements and 8 decision-making agreements completed between First Nations and British Columbia outside of the British Columbia Treaty Process.[1] A core conclusion of that analysis was that while there were a growing number of innovative agreements, there were not yet agreements that fully recognized and implemented Indigenous Title and Rights, operationalized free, prior and informed consent, or the roles and responsibilities of Indigenous laws and jurisdictions.

In the five years since that analysis there have been some significant developments. Canada and British Columbia have stated they are committed to transformed relations with Indigenous peoples. Both governments adopting new principles to guide their public service.[2] The *United Nations Declaration on the Rights of Indigenous Peoples* has been endorsed without reservation. The *Declaration on the Rights of Indigenous Peoples Act*[3] was passed in BC and a similar federal law, Bill C-15[4], is moving through Parliament. The MMIWG Inquiry completed its work, and Nations across BC and Canada are accelerating the work of rebuilding their Nations and governments and exercising their right of self-determination.

These developments are signs of some progress. But have they made an impact on the ground? Specifically, are these new words, commitments, and laws manifesting themselves in transformed negotiations and agreements outside of the BCTC process?

[1] A copy of the 2016 analysis is attached.
[2] The "10 Principles": https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html; https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/about-the-ten-principles
[3] https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples
[4] https://parl.ca/DocumentViewer/en/43-2/bill/C-15/first-reading

When Nations sit down at the negotiation table with Canada or BC outside of the BCTC process can they expect new and principled approaches from the Crown?[5]

The short answer to these questions is not really. Not yet.

Are there some signs of change? Yes.

Are there a few examples of new agreements outside of the BCTC process that reflect important shifts? Yes.

But the operative word remains "few". Systemic, comprehensive shifts are not clearly visible at many tables. There are some tangible outcomes that indicate innovation and principled change. What has been done that is new holds some promise. But there remain important shifts still to be taken and applied broadly across relations with Indigenous peoples.

This analysis briefly reviews these developments in negotiations and agreements outside the BCTC process since 2016.

1. **Summary of Pre-2016 Agreements**

To see where negotiations are at in 2021, it is helpful to revisit the main conclusions reached in 2016 when the previous UBCIC analysis was done. The main findings of that analysis were the following:

[5] There has been some policy developments within the BCTC process through the "Recognition and reconciliation of Rights for Treaty Negotiations in British Columbia". Policy developments within the BCTC process are not a subject-matter of this memo, which focuses exclusively on negotiations and agreements outside of the BCTC process. The BCTC policy can be accessed at: https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/recognition_and_reconciliation_of_rights_policy_for_treaty_negotiations_in_bc_aug_28_002.pdf).

- There are no models of comprehensive agreements that BC or Canada are willing to negotiate other than modern treaties.
- The vast majority of agreements BC enters into are transactional agreements established as programs to try to provide some interim economic accommodation in an effort to limit conflict over resource development activity. Examples include forestry (Forestry Consultation and Revenue Sharing Agreements), mining (Economic and Community Development Agreements), and energy (LNG Benefits Sharing Agreements). These agreements are not based on recognition of Title and Rights or their economic component.
- There were a small number (around 13) of "reconciliation agreements" signed outside the BCTC process. These agreements were each quite distinct. Often, they set the stage, at a high level, for broader and more expansive negotiations. Some of them include substantive measures that constitute a form of accommodation, such as land transfers or other economic and environmental benefits. They do not recognize, define, limit, surrender, or extinguish Title and Rights.
- There were a small number (around 8) of decision-making agreements between BC and First Nations. These agreements were primarily, though not exclusively, about how procedural consultation will take place, and many have a focus on structuring and routinizing Provincial decision-making.
- These agreements do not legally recognize First Nations' inherent jurisdiction or governance authority, and largely exist within current legislation and policy.
- The standard of consent is not present in any decision-making agreements, though the agreements can lead to increased engagement and influence in decision-making, as well as increased capacity support.

The UN Declaration was not a focus of or referenced in the agreements reviewed in 2016.

2. Post-2016 Legal and Policy Developments

There have been some policy and legal shifts since 2016 relevant to agreements and negotiations outside the BCTC process. These shifts are outgrowths of some progress – as a result of on-going advocacy of Indigenous peoples – to see recognition and implementation of Title and Rights and the standards of the UN Declaration as the basis for all relations between Indigenous peoples and the Crown.

Both BC and Canada adopted the 10 Principles that directly state that negotiation agreement practices must change. The Principles are express in saying that negotiations must be grounded in recognition, and cannot be limited to processes such as the BCTC process. Principle 5 "recognizes that Indigenous peoples have diverse interests and aspirations and that reconciliation can be achieved in different ways with different nations, groups, and communities." It further states that the government (both BC and Canada) "prefers no one mechanism of reconciliation to another…[and] 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." Principle 9 states that "processes for negotiation and implementation of treaties, agreements and other constructive arrangements, will need to be innovative and flexible and build over time in the context of evolving Indigenous-Crown relationships" and that "these relationships are to be guided by the recognition and implementation of rights."

The adoption of the Declaration Act also has implications for negotiations. The UN Declaration states minimum human rights standards for the survival, dignity, and well-being of Indigenous peoples. These include rights of self-determination and self-government, rights to lands and resources, free, prior, and informed consent, redress, and others. The Declaration Act requires these standards to be upheld and

implemented. Section 2 says that the UN Declaration applies to the laws of BC – meaning that the UN Declaration should be used to interpret the laws of BC. Section 4 requires an action plan to meet the objectives of the Declaration, and section 3 requires that BC take all measures necessary to align the laws of the BC with the UN Declaration. The federal government's proposed Bill C-15 has similar provisions to the Declaration Act.

The Declaration Act should by necessity result in numerous changes to negotiations and agreements. Agreements need to be consistent with the UN Declaration. They need to uphold and reflect the human rights of Indigenous peoples, that are now endorsed and affirmed in the Declaration Act. This means agreements should be principled, based on recognition, and meet standards such as those of consent. It also means that positions such as the refusal to address the past (to effect redress) should change.

In addition, section 7 of the Declaration Act (but not Bill C-15) creates a process for negotiating a consent-based decision making agreements. Specifically, section 7 allows for the negotiation of agreements for decisions to be made jointly by an Indigenous governing body and the statutory decision-maker, or where the consent of the Indigenous government body is required prior to the exercise of a statutory power of decision.

The effect of the 10 principles and the Declaration Act is that they necessitate a shift to a principled foundation for negotiations and agreements that meet the clear human rights standards in the UN Declaration and the recognition of Title and Rights in section 35(1). The following chart reflects the direction of shifts that should be reflected in negotiations and agreements as a result of developments such as the 10 principles, the endorsement of the UN Declaration, and the Declaration Act:

Arbitrary	Principled
Transactional or Final	Comprehensive and Evolving
Asserted	Recognized
Program/Policy Economic Benefits	Economic Benefits as a Component of Title
Consultation	Consent
Unitary Crown Jurisdiction and Laws	Roles for Indigenous Jurisdictions and Laws
Single Model	Plural models
Legal Certainty	Relationship-based and Predictable

As well, in May, 2019 the UBCIC held a symposium on negotiations outside the BCTC process. At the symposium the Chiefs developed a set of principles to guide negotiations that would effect the principled shifts and ensure negotiations were consistent with standards of the UN Declaration. The UBCIC principles are summarized as follows:

> **Self-Determination.** Negotiations and agreements must support and advance the right of self- determination.
>
> **Indigenous governments, laws, and jurisdictions.** Negotiations and agreements should prioritize structuring proper relations between Indigenous governments, laws, and jurisdictions and Crown governments, laws, and jurisdictions.
>
> **Recognition and Implementation of Title and Rights.** Negotiations and agreements should have as a priority the co-operative and systematic recognition and implementation of the fundamental aspects of Title, including consent-based decision-making and title-based fiscal relations, such as revenue-sharing.
>
> **Nation and government re-building.** Nation and government re-building, determined and led by First Nations, must be appropriately supported and advanced through negotiations and agreements.

Unity. The historic practice of the Crown has been to promote division and conflict between First Nations, especially through the development and implementations of negotiations and agreements.

Redress. The right to redress must be respected as part of true reconciliation – building the future requires acknowledging and addressing the wrongs of the past.

Flexible and Adaptable. The imperatives of recognition, respect, and self-determination necessitates approaches to negotiations and agreements that are open, fluid, co-designed, adaptable and flexible.

Legislative Change. Governments must explicitly recognize that legislative change is urgently needed to design and implement agreements that meet basic standards of recognition and the UN Declaration, and to meet Canada's commitment to have renewed relations with Indigenous peoples.

Transparency. A perpetual challenge and obstacle to negotiations is transparency about how and why governments make decisions about negotiations and agreements.

Political involvement. There has long been a disparity between the roles played by Indigenous leaders and those played by government ministers and senior executive officials in negotiations.

Third Party Assistance. There has long been a resistance to seeking help from experts, mediators, facilitators, and others to help guide, advance, and accelerate negotiations and achieve success in agreement implementation.

In April, 2021 the UBCIC held a follow-up symposium where strategies for further implementing and using the UBCIC principles were examined. A negotiations strategies report has been prepared and is under consideration by the Chiefs Council.[6]

[6] The negotiations strategies report is being first presented at the UBCIC Chiefs Council meeting in June 2021.

3. New Agreements Post-2016

Have these legal and policy shifts been reflected in actual agreements?

There are a few examples of new agreements between First Nations and BC that do break with the models of agreements that existed in 2016. At the same time, the full promise of the shifts that are necessary has not yet been fully realized, or made widely available.

The *shíshálh* Nation – British Columbia Foundation Agreement[7] and the Lake Babine Nation Foundation Agreement[8], while distinct in many details and substance, share a number of important features that illustrate some important shifts:

- The agreements are long-term, comprehensive agreements that lay out an expansive pathway for implementing proper recognition-based relations between the Nation and BC (the Lake Babine Nation Foundation Agreement also includes Canada as a signatory, but only for limited purposes).
- The agreements are expressly framed as having the purpose to implement the recognition and implementation of Title and Rights, and the UN Declaration, in the relationship between the Nation and BC.
- The agreements include expansive substantive, legally binding land, resource and economic measures that are delivered to the Nation within the first years of the agreement. For both Nations, these measures are far beyond the scope of any previous model of agreement they may have completed outside the BCTC process.

[7] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted-_signed.pdf
[8] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/lake_babine_nation_foundation_agreement.pdf

- The agreements include commitments to develop and implement consent-based decision making, and recognition of Nation jurisdiction and laws.
- The agreements include milestones to be achieved at different intervals that deepen the recognition-based relationship between the parties, including in governance, cultural, social, economic, and environmental matters.
- The agreements do not provide legal certainty to BC, and being based on recognition, there is no language that relates to the extinguishment, surrender, or modification of rights, no releases of Ritle and Rights, and maintenance of a Nation's legal rights to seek remedies through the Courts.
- The agreements are dynamic and affirm that proper relationships are never "final", and that reconciliation is always on-going.

The negotiation of both of these agreements began outside of any established BC policy framework, and were the result of specific strategies and advocacy by the Nations. BC has now come to call this approach to negotiations as "comprehensive reconciliation agreements", though unlike some aspects of negotiations in the BCTC process historically, there does not appear to be a fixed policy or set mandates for this types of agreement. The intent of these agreements is that they are built around the vision and priorities of the Nation at the table. In this regard, they reflect an aspect of how self-determination can manifest itself in the negotiations process.

Some other agreements completed since 2016 have also illustrated elements of a new approach where expansive agreements are shaped around the priorities determined by Nations, and not rigidly driven by Crown imperatives and interests. These agreements also illustrate progress on critical matters. For example, the Carrier-Sekani Tribal Council entered into The Pathways Forward 2.0 Agreement[9], which in many respects is a significant step to a comprehensive reconciliation agreement. The agreement provides some substantive measures, including compensation regarding forestry, economic

[9] https://news.gov.bc.ca/releases/2020PREM0004-000164

development, and self-government, while setting the stage or negotiations of a full long-term agreement. As well, a Letter of Understanding was entered into that implemented a consent-based decision making process regarding aquaculture in the Broughton Archipelago.[10]

These agreements are steps forward with BC, and do indicate some important shifts. But there remains a ways to go.

First, the new BC agreements appear to remain the exception, not the norm. This needs to change. Innovative, co-developed, agreement models that reflect the priorities determined by Nations need to be the standard for all agreements. There is no clear or coherent policy framework or process that currently supports and enables this.

Second, a number of sections of these agreements – including elements of title recognition and consent-based decision making – require legislative change in order to be fully designed and enacted. But this legislative change should not be agreement dependent, especially after the Declaration Act. There are vital and long overdue areas of legislative change to create mechanisms to support proper recognition-based relations that should be made now. By doing this, agreements could be negotiated, completed, and implemented more effectively and efficiently. To give a few examples:

- To implement section 7 agreements under the Declaration Act legislative amendments are needed so that statutory decision-makers are bound to follow those agreements, even where they are not consistent with existing statutory provisions. These amendments could have been made at any time since the passage of the Declaration Act. BC has not done this, meaning that even where section 7 agreements were completed, their implementation will be delayed while legislative amendments are made.

[10] https://news.gov.bc.ca/releases/2018PREM0151-002412

- BC has stated that all relations are to be based on recognition of Title and Rights in a few innovative agreements, the 10 principles and *de facto* through the endorsement of the UN Declaration and the Declaration Act. Despite this, BC has not created a mechanism to effect formal legal recognition of any Title lands in the province. One way BC could do this is through legislation that states that it recognizes the existence of Aboriginal title, as defined in *Tsilhqot'in Nation,* to the lands identified in a schedule. As Nations complete agreements with BC regarding Title recognition of certain lands, those lands could be added to the schedule.

Third, recognizing that all of these new agreements were well along in development prior to the passage of the Declaration Act, there remains space for new agreements to more explicitly include measures that demonstrate how they implement the UN Declaration in the relationship between the parties. This could be achieved through more specific provisions and commitments around critical issues such as self-government, consent, and redress, as well as through how the agreements are structured, designed, and framed to uphold the human rights standards in the UN Declaration.

Fourth, it is imperative to end the Crown practice, that has long existed, of developing rigid models of negotiations and agreements and trying to force First Nations to adopt those. This has been a pattern in relation to the BCTC process, as well with many other models of agreements. It is especially necessary to avoid this if negotiations and agreements are to be consistent with the UN Declaration. Agreements must be built around the priorities determined by Nations, including how they are re-building their governance, and areas on which they are focusing for exercise of their jurisdiction. This will necessitate an approach to government policy and mandating which is dynamic, open, flexible, and focused on responding to the priorities and needs determined by Nations.

Fifth, the implementation of agreements has always been a major challenge for BC and Canada This remains true for treaties (historic or modern) and other agreements. There have long been a range of implementation challenges including lack of capacity, ineffective cross-Ministry coordination, legislative and policy obstacles, and a lack of political will or focus. These challenges continue to exist in relation to the new agreements that have been entered into. What this points to is the challenge with, for example, how the BC government is organized for negotiations and agreements. Decades ago BC organized itself to focus its relationship with Indigenous peoples on: (1) fighting through the courts; and (2) adopting a 'rag the puck' approach to negotiations, so that they would largely be minimalist or near endless. The effects of the decisions to do this placed disproportionate reliance on the role of lawyers and trying to protect legal positions grounded in denial, and to structure negotiations (both at the table and internally throughout the system) to accomplish little, and to do so slowly.

Today, BC (and even moreso Canada given the presence of the *Indian Act)* largely remains structured in this way – and as such is unprepared for the new era of negotiations and agreement implementation that we are purportedly moving into today. BC does not have its 'house in order' to efficiently negotiate and fully implement agreements grounded in the UN Declaration or recognition-based relationships. Major shifts in government structures and culture are needed to actualize this.

Sixth, for full recognition and implementation of Title and Rights, Canada has critically important roles to play. Yet, in many ways Canada has not been present as it must. There are some advanced processes that are tripartite that have produced some important outcomes and measures, including with Heiltsuk (Tuígila "To Make a Path Forward" Agreement for Implementation of Heiltsuk Title, Rights and Self-

government)[11], Wet'suwet'en (MOU signed February, 29, 2020)[12], and Tsilhqot'in Nation (Gwets'en Nilt'i Pathway Agreement)[13]. In all of these instances, however, negotiations are on-going, and the agreements entered into, while in a few instances detailed, are setting the stage for the broader negotiations to be completed. It may be that we start seeing more of the concrete results of these active processes in the near future.

In 2018 Canada stated it would be making broad and transformative shifts to reset relations with Indigenous peoples – including through passage of a recognition and implementation of rights framework.[14] Such a framework would have required transformed approaches to negotiations. However, this has not yet come to pass. What Canada has done is is establish its "Recognition of Indigenous Rights and Self-Determination" tables. At least count 80 such "discussion tables" were established across Canada.[15] While many high level memorandums of agreement have been signed to establish these tables, along with workplans and capacity funding in some instances, there are few concrete examples of innovative and far-reaching agreements and outcomes, and few examples of agreements that explicitly recognize and implement Indigenous Title and Rights or uphold the standards of the UN Declaration.

As well, Canada has not established a new policy framework that applies outside of the BCTC process. While Canada says it is no longer applying the long-standing policies for comprehensive claims and self-government, it has not been expressly repudiated or replaced in a way that facilitates or enables principled negotiations for those who reject the BCTC process.

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[11] https://www.heiltsuknation.ca/tripartite-agreement-creates-path-to-negotiate-the-implementation-of-heiltsuk-nation-title-and-rights/
[12] https://www.rcaanc-cirnac.gc.ca/eng/1589478905863/1589478945624
[13] https://www.tsilhqotin.ca/wp-content/uploads/2020/11/2019_08_Agreement_gwetsen_nilti_pathway_agreement_signed.pdf
[14] https://pm.gc.ca/en/news/speeches/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights
[15] https://www.rcaanc-cirnac.gc.ca/eng/1511969222951/1529103469169

4. Moving Forward

In light of the current state of negotiations outside the BCTC process – the signs of some tangible and important shifts, but still certain substantive changes needing to be made – the challenge arises about how to take the next steps.

As has been the case throughout Canada's colonial history, First Nations in BC have advanced the recognition and implementation of Title and Rights through coordinated action, as well through their independent advocacy and efforts. To that end, as noted earlier, the UBCIC Chiefs Council has been developing principles and strategies for advancing these efforts. A "negotiations strategies report" outlining approaches to advancing still needed changes in negotiations outside of the BCTC process is being presented to the UBCIC Chiefs Council in June, 2021.

SCHEDULE

MEMORANDUM

To: **UBCIC**

From: **Dr. Roshan Danesh**

Date: **September 1, 2016**

Re: **Analysis of Themes in Decision-Making and Reconciliation Agreements in British Columbia outside the BCTC Treaty Process**

This memo analyzes the approximately 13 reconciliation agreements and 8 decision-making agreements between First Nations and British Columbia that have been completed over the last decade. All of these agreements are outside of the BCTC Process, and represent some of the main developments in agreement making between First Nations and the Crown since the *Haida* (2004) decision and the adoption of the *New Relationship Vision.*

Background

Agreement making between First Nations and British Columbia has become a predominant focus of reconciliation efforts. It can now be assumed that every First Nation is engaged in some way in negotiations with British Columbia, and the Provincial government itself estimates that at any given time it is involved in over 400 active negotiations with First Nations. In one form or another, all of these negotiations touch on issues of Aboriginal Title and Rights, and have their genesis in the fact of the unresolved land question.

These negotiations, and the agreements that may flow from them, come in all shapes and sizes. At a general level, it might be said that they fall into the following categories:

Treaty Agreements: A small number of negotiations are through the BCTC Process where it is estimated there are now only around 25 active negotiations in addition to the four completed modern treaties. In this track of negotiations interim agreements are also reached from time to time. Around 22 incremental treaty agreements (ITA) have been completed, primarily about the transfer of land parcels prior to the completion of a final treaty.

Program Agreements: The vast majority of the negotiations and agreements between First Nations and British Columbia relate to programs established by British Columbia to address land and resource matters, and to provide a form of accommodation" and/or economic opportunity. These negotiations and agreements are relatively transactional in nature. The main examples are as follows:

- Forestry Consultation and Revenue Sharing Agreements (FCRSA): Approximately 125 forestry revenue-sharing agreements have been signed with individual Bands. In addition, many Bands have forestry tenures through agreements with the Province.

- Economic and Community Development Agreement (ECDA): Approximately 13 mineral revenue sharing agreements have been signed, some with multiple Bands.

- Atmospheric Benefit Sharing Agreements: Approximately 3 have been signed some of which involve multiple Bands.

- First Nations Clean Energy Business Fund Revenue Sharing Agreements: Approximately 30 Clean Energy Agreements have been signed.

- Natural Gas Pipeline Benefits Agreements: Approximately 27 LNG related agreements have been signed, some of which involve multiple Bands.

Decision-Making Agreements: Some agreements are particularly focused on how decision-making takes place regarding land and resources matters –and called by various names, including strategic engagement agreements", framework agreements", and shared decision-making agreements". There are approximately 8 such agreements all of which involve multiple Bands.

Reconciliation/Government-to-Government Agreements: Agreements - wholly outside of the BCTC process - that are very diverse in nature and scope, and which range from addressing specific matters between a First Nation and British Columbia to establishing an overarching framework through which reconciliation of Aboriginal Title and Rights may be pursued. There are approximately 13 such agreements, most of which involve multiple Bands. Some of these also include components more typically seen in a decision-making agreement.

In addition to the above categories there are a number of one-off agreements between British Columbia and First Nations on specific topics and issues that are of particular interest.

This memorandum focuses specifically on analyzing reconciliation agreements and decision-making agreements. It does <u>not</u> set out to summarize and describe the substance of every agreement. Rather, it seeks to identify some of the critical themes, trends, opportunities and challenges with these models of agreements and

how they relate to the essential and inevitable work of achieving full recognition and implementation of Aboriginal Title and Rights.

It is noted that there have been a number of studies and summaries of the landscape of these agreements that provide extensive detail about them. One recent one was prepared by Simon Fraser University and can be accessed at https://www.sfu.ca/content/dam/sfu/centre-for-dialogue/Watch-and-Discover/SDM/SDM_Final_Report.pdf. While I have different views and interpretations then a number of the points raised in the SFU report it does still provide valuable information that you may wish to review.

Summary of Key Themes

Based on an analysis of reconciliation and decision-making agreements the following key themes have been identified. Each of these themes is analyzed in detail below.

Reconciliation Agreements

1. Reconciliation Agreement" is not a term of art that describes any particular content of an agreement, and does not reflect a particular or fixed set of mandates.
2. Reconciliation agreements often set the stage, at a high level, for broader and more expansive negotiations.
3. Reconciliation agreements have included some substantive measures that constitute a form of accommodation, such as land transfers or other economic and environmental benefits.
4. Reconciliation agreements do not recognize, define, limit, surrender, or extinguish Aboriginal Title and Rights.

5. Reconciliation agreements, while often framed as a step on the path of reconciliation, have not to date resulted in any final reconciliation agreements, treaties, or other comprehensive agreements.

Decision-Making Agreements

1. Shared decision-making is not a term with set or defined meaning, and does not refer to a particular set of principles, standards, structures or approaches.
2. Decision-making agreements are primarily, though not exclusively, about how procedural consultation will take place, and many have a focus on structuring and routinizing Provincial decision-making.
3. Decision-making Agreements do not legally recognize First Nations inherent jurisdiction or governance authority, and largely exist within current legislation and policy.
4. The standard of consent is not present in any decision-making agreements, though the agreements can lead to increased engagement and influence in decision-making,
5. Decision-making agreements often provide necessary capacity support for First Nations to build up their decision-making processes and structures

Reconciliation Agreements

Reconciliation agreements between First Nations and British Columbia began to appear after the *Haida* decision in 2004 and the inauguration of the *New Relationship Vision* in 2005. Unsurprisingly one of the early reconciliation agreements was the *Kunst aa guu - Kunst aayah Protocol* between the Haida and British Columbia in 2009. Other early agreements included the *Musqueam Settlement, Reconciliation, and Benefits Agreement* in 2008, *the Reconciliation Protocol* of the Coastal First Nations in 2011, and the *Nanwakolas Reconciliation Protocol* in 2011. Since that time, Carrier Sekani, Snuneymuxw, Lake Babine,

Gitanyow Hereditary Chiefs, Saulteau, Sechelt, Secwepemc, and Tseycum have all signed reconciliation agreements. In addition, the Tsilhqot in recently completed the *Nenqay Deni Accord*.

The following themes and trends emerge from a review of these agreements.

1. Reconciliation Agreement" is not a term of art that describes any particular content of an agreement, and does not reflect a particular or fixed set of mandates

There is no precise meaning to the term reconciliation agreement" – it does not reflect a particular model, template, or approach to First Nation – Crown relations. All of the reconciliation agreements that have been completed appear particularly tailored to issues and interests specific to the particular First Nation(s) – British Columbia relationship involved.

For example, some reconciliation agreements – such as those of the Haida, Coastal First Nations, Nanwakolas, Lake Babine, Carrier Sekani, and Tsilhqot in - are primarily about setting out a path to achieving broader reconciliation through negotiations and joint work, and the structures and approaches that will be used to move that path forward. Others are primarily substantive, such as transferring land to a First Nation (e.g. Musqueam; Snuneymuxw; Sechelt) or a broader range of economic and other benefits (e.g. Saulteau). Often specific issues are dealt with – whether cultural heritage matters (e.g Tseycum), marine areas (e.g Snuneymuxw), or particular litigation (e.g Musqueam). A few of them also provide degrees of legal certainty on specific or broad matters (e.g. Saulteau) Some of these agreements also combine what is typically seen in decision-making agreements with commitments to broader reconciliation discussions and negotiations (e.g. Secwepemc; Saulteau; Gitanyow).

Given this, Reconciliation Agreements should not be thought of as one coherent category of agreements – they more properly are understood as stand –alone

arrangements between a First Nation(s) and the Provincial government that represent a particular set of topics that those parties have decided to tackle as part of the broader work of advancing reconciliation.

2. Reconciliation agreements often set the stage, at a high level, for broader and more expansive negotiations

A majority of reconciliation agreements involve establishing an approach to on-going negotiations to advance broader reconciliation. Often this involves the creation of a structure, process, and set of topics for negotiations. For example, many of the agreements will identify a forum (e.g. the Nanwakolas Strategic Forum) for moving the reconciliation negotiations forward, or organize a set of structured tables to move forward specific topics (e.g. *Nenqay Denay Accord*). Many of the agreements will also typically have some high-level elements of process for how meetings will take place and when, and some timelines for trying to address certain matters. At the same time, almost all of the agreements will have a breakdown of core topics to be tackled. For example, the Haida protocol is organized around four main topics: shared and joint decision-making; carbon offset and resource revenue sharing; forest tenures and other economic opportunities; and enhancement of Haida socio-economic well-being.

The degree of detail in structuring further negotiations will vary. Some of the agreements contain just a general commitment to broader negotiations and the identification of a few specific topics (e.g. Snuneymuxw). More typically, the agreements will set out a fairly high-level approach to negotiations to achieve reconciliation, with some detail outlined in workplans or appendices (e.g. Haida; Sechelt; Nanwakolas; Coastal First Nations). In contrast, a few agreements provide fairly detailed and comprehensive approaches to negotiations – including some of the substantive baselines that are to be achieved on different topics. The *Nenqay Denay Accord* is the best example of this as it covers a comprehensive range of

social, governance, jurisdictional, and land and resource topics, and in some of these establishes some details of the benchmarks to be achieved, such as the scale, scope, and character of potential land transfers.

Where reconciliation agreements are focused on future negotiations it is also typical to include some capacity funding to support those negotiations. The range of capacity funding is significant from tens to hundreds of thousands of dollars at one end, to millions of dollars at the other (e.g. capacity funding for negotiations in the *Nenqay Deni Accord* is around $11 million over a number of years).

3. Reconciliation agreements have included some substantive measures that constitute a form of accommodation, such as land transfers or other economic and environmental benefits

Some Reconciliation Agreements include substantive accommodation measures – however the scope of the measures, and the degree to which they are accommodation, will vary significantly.

One trend in more recent reconciliation agreements is that they may be vehicles for land transfers. This might be seen as part of a broader process - and inevitable given the evolution of the law - of so-called crown" land being returned" to First Nations. This is a trend that is also seen in the growth of incremental treaty agreements" in the BCTC process. The Snuneymuxw reconciliation agreement included the transfer of a number of parcels of forestry land whose land and timber is valued in the millions of dollars, as well as the transfer of a parcel within Nanaimo city limits of cultural heritage significance. Similarly, the Sechelt reconciliation agreement includes the transfer of three parcels of land, of both economic and cultural significance.

In all reconciliation agreements that include land transfers the transfer is in fee simple. In some instances there is a limitation on the land being placed in reserve (e.g. Snuneymuxw) while others do not contain express restrictions (e.g. Musqueam; Sechelt). In no instance is land recognized as Aboriginal Title land – the only recognized Title land in Canada is the Tsilhqot in Title land declared by the Supreme Court of Canada.

In the Sechelt and Snuneymuxw agreements the land transfers are not acknowledged as accommodation for anything specific or particular. Rather, all the First Nations agree is that they are contribution to any final reconciliation regarding Aboriginal Title and Rights (e.g. a future land claims agreement, treaty etc.) that may be achieved by the Parties. Such a statement likely just re-states a legal fact – that the land transfers are part of the broader work to achieve reconciliation between the Crown and First Nations pursuant to section 35.

Some agreements are more express in specifically accommodating a particular decision or action, or providing forms of legal certainty. For example, the Musqueam settlement agreement fully addresses matters (including consultation, accommodation, and infringement of Aboriginal Title and Rights) regarding certain discrete lands and settles certain legal actions. To be clear, this is not resolution of Aboriginal Title and Rights matters broadly throughout the Territory, or modifying or extinguishing Title and Rights, but rather fully addressing some specific infringements regarding particular land parcels by accommodating them.

The Saulteau Agreement provides a different model of both benefits and certainty. It provides a range of land protection and planning measures and processes, opportunities for revenue sharing and other forms of benefits. At the same time, it provides a level of procedural certainty for many decisions in the Territory, as well as some confirmations that accommodation has been provided.

4. Reconciliation agreements do not recognize, define, limit, surrender, or extinguish Aboriginal Title and Rights

Reconciliation agreements are not treaties or land claims agreements. They do not resolve the outstanding land question. They are effectively without prejudice" to Aboriginal Title and Rights – and this is expressly stated in all of them through various clauses, including non-derogation clauses. Some of them are also express in acknowledging and stating that the Parties hold very different views regarding Title and Rights (e.g. Haida). As such, to the degree the agreements may impact Title and Rights is where those that have substantive benefits may provide a form of accommodation – but as noted above where this is the case the scope and nature of the accommodation is typically quite specific and defined.

The fact that they are without prejudice to Title and Rights has its corollary that these agreements are not forms of legal recognition of Title and Rights. While as a matter of fact and reality the agreements are entered into because of section 35 of the *Constitution*, the imperative of reconciliation, and the unresolved land question – these agreements are explicitly acknowledged as just steps (or in some cases just establishing the steps to be followed) on the path of reconciliation.

One shift that may be occurring post-*Tsilhqot in* is that some of the more recent reconciliation agreements identify that the Parties will discuss the potential for recognition and implementation of Title. In various ways both the Carrier Sekani agreement and the *Nenqay Deni Accord* set the table for a potential recognition discussion. Whether or not they lead to such recognition is an open question.

5. Reconciliation agreements, while often framed as a step on the path of reconciliation, have not to date resulted in any final reconciliation agreements, treaties, or other comprehensive agreements

While a common feature of almost all reconciliation agreements is that they lay out a path for broader negotiations to advance reconciliation, none of them to date has resulted in any broad, comprehensive agreement being reached – such as land claims agreement or treaty.

While reconciliation agreements have not led to broad, comprehensive agreements being achieved, many of the reconciliation agreements have been entered into alongside other agreements, or resulted in further agreements on particular topics and themes. For example, the Carrier-Sekani and Lake Babine agreements were entered into alongside other agreement including related to LNG development. The Nanwakolas agreement is one part of a series of agreements that relate to decision-making, forestry, human well-being, the Great Bear Rainforest, and other topics, and the Coastal First Nations agreement is similarly part of a series.

This pattern of a series of agreements unfolding over time is in contrast to the BCTC Process which has largely focused on completing a single, comprehensive agreement and which has proven to be largely unattainable for most First Nations in the BCTC Process. Reconciliation agreements appear to reflect a model of building reconciliation incrementally over time.

Decision-Making Agreements

Shared decision-making agreements are currently in place with Kaska, Nanwakolas, Ktunaxa, NNTC, Sto:lo First Nations, Taku River, Tahltan, and Tsilhqot in. As well, a number of the reconciliation agreements noted above are also shared decision-making agreements or have led to companion shared decision-making agreements, including the Haida, Coastal First Nations, Gitanyow, Saulteau and Secwepemc agreements.

1. Shared decision-making is not a term with set or defined meaning, and does not refer to a particular set of principles, standards, structures or approaches

The term shared decision-making has a long history in Aboriginal-Crown relations, but has taken on increasing use in British Columbia over the last decade since the adoption of the *New Relationship Vision*. While the term is frequently used it has no agreed upon meaning. Most typically, the Province will tend to interpret the term as referring to how First Nations participate in Crown decision-making – e.g. sharing in their decision-making processes. As such, for the Crown shared decision-making often becomes a proxy for consultation" or some enhanced" process of consultation. On the other hand, First Nations will tend to interpret the term as referring to distinct jurisdictions, with distinct governments and laws, coming together to establish how their respective systems will engage and interact with each other as respective decisions are made. Often implied in this latter usage is the need for forms of consensus and consent.

Similarly, there is no necessary structure or process that flows out of the term shared decision-making". It may imply the creation of joint structures (boards, tribunals, working groups), the design of shared processes, the delineation of how separate processes and structures may interact, or even the demarcation of wholly distinct jurisdictional lines between who does what.

Soon after the adoption of the *New Relationship Vision* the Province unilaterally sought to define the parameters of shared decision-making through creating its model of the strategic engagement agreement". Some of the main features of this model included the following:

- A focus on how procedural consultation takes place in an efficient manner.

- The establishment of a matrix which is organized around types and categories of provincial decisions by statutory decision-makers.
- The use of the matrix to identify categories of provincial decisions which, by agreement, will not require consultation or only very minimal engagement.
- The establishment by agreement of target timelines for Crown decision-making.
- The provision of capacity for First Nations to participate in decision-making.
- Establishment of forums or venues for addressing higher level strategic planning and decisions, as well as agreement on strategic level matters where that ground work had been done (such as through land use planning work).

A majority, though not all, of the shared decision-making agreements that have been completed are broadly consistent with some elements of the Province s strategic engagement model (e.g. Nanwakolas; Secwepemc; Ktunaxa; Tahltan; Tsilhqot in; Saulteau; Coastal First Nations; Sto:lo).

2. Decision-making agreements are primarily, though not exclusively, about how procedural consultation will take place, and many have a focus on structuring and routinizing Provincial decision-making

A common feature of all decision-making agreements – or the aspects of agreements that deal with decision-making – is that they are quite focused on process and procedure. Some of the agreements provide extensive details on the mechanics of what information will be shared, for what kinds of decisions, on what timelines, and who is responsible for doing what with that information. This procedural focus is typically explicitly linked to being the mechanics through which the Province will implement and work to meet its duty to consult. In other words, decision-making

agreements typically express an agreement about how consultation will take place – though in some of the agreements this does not mean that a First Nation is agreeing in advance to the adequacy of consultation (or accommodation) should that process be followed.

Of course, some procedural focus makes sense in any decision-making agreement. Many of the agreements structure this procedural focus around facilitating the mechanics of how a statutory decision-maker can get to a decision in a relatively fixed and predictable way. This predictability can also be of assistance to First Nations as they try to manage the large number of decisions they must process. This is the case with agreements that largely utilize the matrix" model – which is the vast majority of the current decision-making agreements. This is somewhat distinct, for example, from a procedural focus on how two governments with distinct jurisdictions will engage together as they make their respective decisions.

There are a few examples of decision-making agreements that do not primarily adopt a procedural focus based on the matrix model – most notably in approaches advanced by the Haida and the NNTC. In the NNTC example – which is a pilot - a joint board is established with joint appointees, and a goal of seeking consensus on some decisions, and there is little pre-categorization of decisions, or detailed procedures, for those categories. Rather there are guiding principles, some general guidelines, and a workplan for building the infrastructure of the board.

Another aspect of this procedural focus is that little linkage is often made in the agreements between the types of decisions that are contemplated, the process being followed, and the substantive outcomes and accommodations that may be necessary. While process is often delineated in significant detail, typically only general statements or categories are stated about potential accommodations. In some respects this should be understood as reflecting some of the Province s legal and policy positions over the years that have resisted substantive accommodations. For example, the Province has long held the unprincipled and indefensible legal

position that economic accommodation of Aboriginal Title and Rights prior to the proof of Title and Rights was not required or engaged. This position has been utterly destroyed by the reasoning of the *Tsilhqot in* decision, as well as a number of recent consultation and accommodation cases.

One last point regarding decision-making agreements is that they are often not Band based, in the sense that that they do not appear to have been typically completed or available to single Bands. Rather, the tendency has been for them to be formed with multiple communities together. On the one hand this may be seen as providing a level efficiency and coherence – potentially for both First Nations and the Crown. On the other hand, in some instances, it may be seen as efforts by a Nation to advance and articulate a principled position on the proper Title and Rights holder through language that clearly reflects a largely collective orientation to Nationhood.

3. Decision-making Agreements do not legally recognize First Nations inherent jurisdiction or governance authority, and largely exist within current legislation and policy

Decision-making agreements are not agreements that legally recognize the inherent jurisdiction and governance authority of First Nations. In this respect, similar to reconciliation agreements, they are effectively without prejudice" to respective positions regarding jurisdiction, Territorial boundaries, and Title and Rights. While the agreements outline structures and processes to be used, and place some obligations on both Parties, they also make explicit that the Province s decision-maker and their discretionary authority to make a decision is not fettered" by the agreement.

Given this without prejudice construct, the current reality is that only in extremely rare or particular circumstances has any legislative change been required to

implement shared decision-making. In the case of the Haida, some legal changes were needed to enact and effect certain land use and forestry decisions, and enable those to have legal strength. Similarly, up and down the coast certain legal changes were need to enact and enable certain elements of decision-making regimes, such as related to the Great Bear Rainforest.

But beyond these important examples – which may generally be considered as the implementation of high level strategic decisions related to land and resource use that have been negotiated – we have not yet seen the shifts to provincial legislation that would be necessary to recognize that they are not the sole jurisdictional authority over the land base of the Province, or to shift to the standard of consent.

Finally, it should be noted that almost all decision-making agreements apply in areas that are subject to overlapping claims with First Nations who are not party to the agreement. This has been a source of controversy and conflict between Nations. The without prejudice nature of the agreements and the fact they do not legally recognize Territorial boundaries, jurisdiction, or Title and Rights is a response to some of the concerns that legal prejudice to Title and Rights may flow to neighbouring Nations. However, this does not address the political, negotiation, relational, and decision-making complexities and challenges raised through trying to advance different decision-making regimes in the context of overlapping claims, and illustrates more broadly how the persistence of overlaps is a hindrance to the full recognition and implementation of Title and Rights.

4. The standard of consent is not present in any decision-making agreements, though the agreements can lead to increased engagement and influence in decision-making

None of the current decision-making agreements adopt the standard of consent – or use the term in any meaningful way. Primarily the focus on language and standards of information-sharing, consultation, engagement, consideration of views etc. There are some references in some agreements to seeking consensus". Consensus

might be seen as step in the direction of consent – but this concept has not been fully explored and broadly implemented to date.

It can be said that some of the work done by First Nations with the Province under the umbrella of their agreements has de facto resulted in a consent scenario taking place on some matters without it being formally labelled as such. For example, First Nations have reported certain decisions that were no because of the understandings reached in their process under their agreement, or certain decisions that were a yes on the terms they set because of understandings reached in their process. Similarly, the adoption of joint high-level strategic decisions on certain matters and certain areas can also be understood in some instances as a de facto application of consent. These examples illustrate what some First Nations report that through strategic and systematic implementation of their agreements they are able to exert greater control and influence over critical decisions in their Territory, and advance their interests.

5. Decision-making agreements often provide necessary capacity support for First Nations to build up their decision-making processes and structures

One feature of all decision-making agreements is that they provide capacity support to First Nations for implementation of the agreement. This support is primarily in the form of monetary payments. It may be said that in some instances other non-monetary forms of capacity building often flow tangentially from the agreements through systems and technical offices that can be built up to support Nation decision-making.

To be clear, the forms of capacity support provided is not in the nature or scale of support needed to implement a full and proper decision making structure. Typically, the amounts provided are somewhere in the hundreds of thousands of range per year. In many instances these are the amounts to support a number of First Nations collectively in their decision-making work.