**Office of the United Nations High Commissioner for Human Rights**

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

Report focusing on establishing effective monitoring mechanisms at the national and regional levels for implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

Submission of the British Columbia Treaty Commission

**Introduction**

**This submission** focuses on the EMRIP call for input on the following topics:

* Examples of human rights institutions existing practices in the monitoring of the UN Declaration in their work, including through awareness raising activities, the analysis of the compatibility of existing laws with the UN Declaration, and production of annual reports on the implementation of the UN Declaration for national, regional and international bodies, including the EMRIP.
* State and regional practices on existing monitoring mechanisms for the implementation of the UN Declaration, including existing examples on the purpose and the mandate of those mechanisms.
* Priorities of the monitoring mechanisms relative to Indigenous Peoples rights: inter alia: self-determination; free, prior and informed consent; equality, culture; land, territories and resources; constitutional and legal reform, establishment of treaties and agreements, the development of a national plan of action to facilitate better implementation of the Declaration;

**Recommendations**

The British Columbia Treaty Commission (“BC Treaty Commission”) recommend the following:

1. National and regional monitoring mechanisms be co-developed, established, and maintain involvement of Indigenous peoples and States, and be independent bodies with statutory legislation to ensure mandate of work longevity and realization of commitments.
2. Mandates of monitoring mechanisms include an active role in current implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, including formal public reporting for accountability and educational tools, and provide long-term sufficient resources and capacity to effectively assess implementation of the UN Declaration and fulfill mandate.
3. Agreements between State and Indigenous peoples must include effective periodic review and orderly processes to ensure robust monitoring and implementation. These provisions and processes must be co-developed with and maintain the involvement of Indigenous peoples.
4. States fully and effectively support the enforcement of Indigenous laws and implementation of modern treaties achieved with Indigenous peoples as integral monitoring mechanisms. Consistent with Articles 37 and 38 States should provide sufficient resources and undertake judicial and administrative coordination reform to be responsive to Indigenous peoples’ systems of governance, including traditional legal customs and practices.
5. EMRIP and States consider mechanisms achieved in British Columbia and Canada as good practices for monitoring the implementation of the UN Declaration*,* such as, the independent British Columbia Treaty Commission and negotiations process; the British Columbia *Declaration on the Rights of Indigenous Peoples Act,* including shared decision-making Agreements and the Declaration Act Secretariat*;* and Canada’s *United Nations Declaration on the Rights of Indigenous Peoples Act*, including recent federal developments to collaborative implementation of modern treaties and agreements.

**Independent body to oversee and facilitate an open and transparent process to recognize and protect Indigenous rights**

Although established prior to the UN Declaration on the Rights of Indigenous Peoples, the BC Treaty Commission and the negotiations process are good examples of, and are consistent with the following articles:

*Article 27*, States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

*Article 37 1*. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

*Article 38,* States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

The Treaty Commission is an independent bodythat advocates and facilitates for the recognition and protection of Indigenous title and rights through modern treaties and agreements in the province of British Columbia (BC), Canada.

The Treaty Commission was jointly established by Indigenous peoples and the State. In 1992, the First Nations Summit and the governments of Canada and British Columbia (collectively the “Principals”), signed the *British Columbia Treaty Commission Agreement* (the “BCTC Agreement”).

Its mandate is to facilitate the modern treaty negotiations process between the Parties, provide funding to First Nations to participate in negotiations, and provide public information and education about the negotiations process. In 2018, the Principals enhanced the existing mandate of the Treaty Commission to including supporting the implementation of the UN Declaration, Truth and Reconciliation Commission’s Calls to Action, and rights recognition through negotiations of treaties and agreements.

An independent commission is at the core of the BC treaty negotiations process. The Treaty Commission is the only tripartite statutory body in Canada whose mandate is to support reconciliation. Federal and provincial legislation were enacted to underpin and strengthen the independent basis of the Treaty Commission and its longevity.[[1]](#footnote-1) These Acts provide legal foundation for the Treaty Commission and ground the BC treaty negotiations process in the legal framework of Canada.

Consistent with the World Outcome Document,[[2]](#footnote-2) and Articles 37 and 38 of the UN Declaration, the *Report of the British Columbia Claims Task Force* – 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.” This goal is achieved “through [open, fair, and transparent] 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.”[[3]](#footnote-3)

The evolution of case law in Canada has further clarified that treaty negotiations are a constitutional imperative mandated by *Section 35* of the Canadian *Constitution*[[4]](#footnote-4). Treaties, agreements and other constructive arrangements are the preferred methods of achieving the reconciliation of Crown title and the inherent titles of Indigenous Nations, and the reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty; and the implementation of the UN Declaration.[[5]](#footnote-5)

**Treaty Commission Interpretation of section 25 is consistent with the UN Declaration**

State courts continue to be called upon to interpret the meaning and scope of treaties, agreements and other constructive arrangements, including implementation and infringement. Independent monitoring mechanism should act in instances that are at odds with the full and effective implementation of the UN Declarations, including taking legal action in courts.

In February 2023, the Treaty Commission was granted intervener status at the Supreme Court of Canada in *Dickson v Vuntut Gwitchin First Nation*, advocating for a broad interpretation of section 25 of the Charter in the Canadian Constitution, as a shield to protect the unique distinctive, collective, and cultural identities of Indigenous Peoples, including Indigenous constitutions, [[6]](#footnote-6) from unnecessary individual rights claims against collective indigenous rights.

**Provisions for periodic renewal and orderly process for effective monitoring**

Treaties, agreements and constructive arrangements are living agreements, and protect the continuation of Indigenous rights. Treaties and agreement must include periodic reviews and renewal provisions and provide an orderly process for the evolution of agreements where needed and where desired by Indigenous peoples, and most importantly with Indigenous peoples.

Periodic reviews of treaties and agreements are integral for comprehensive monitoring and effective implementation. Modern treaties, comprehensive land claim agreements, including self-government agreements require periodic reviews to ensure assessment of progress towards achieving agreement provisions, identifying broader gaps, including challenges in implementing the UN Declaration.

Reviews should include a detailed analysis of obligations, an assessment of the impact of the land claim agreement, an examination of implementation issues, and recommendations on how to improve the implementation process in the future.[[7]](#footnote-7)

**Latest developments and need for the establishment of a national monitoring mechanism to ensure full and effective implementation of treaties, consistent with the UN Declaration**

Consistent with Article 37, Indigenous-led monitoring mechanism include the enforcement of Indigenous laws and the implementation of treaties, agreements and constructive arrangements. Indigenous modern treaty nations have long criticized failures in oversight of the implementation of treaties and self-government agreements, and the lack of oversight in the implementation of these agreements does not respect and honour the original spirit and intent of their respective agreements. The Land Claims Agreement Coalition (LCAC) in Canada, a nation-wide coalition of modern treaty Indigenous governments and rights-holders have called on the government of Canada to establish a Modern Treaties Implementation Review Commission, guided by fundamental objectives of credibility, effectiveness and independence.[[8]](#footnote-8) This proposal provides Indigenous insights and analysis of structures, reporting, mandate, authority and more.

*Canada’s Collaborative Modern Treaty Implementation Policy* was announced at the LCAC conference in March 2023. This draft policy is a strong indication and example of the State’s commitment to honour, uphold, and advance implementation of modern treaties. The Treaty Commission commends the government of Canada for moving toward full, effective and timely implementation of all modern treaties in Canada, and future treaties. It is worth noting for the objectives of this report on monitoring mechanisms, section 8, “commitments to further work on essential component of this policy”, will be co-developed with Indigenous Modern Treaty Partners, including establishing new implementation mechanisms to ensuring that Indigenous Modern Treaty Partners are able to fully exercise their jurisdictional powers as set out in their agreements.[[9]](#footnote-9)

**Enforcement of Indigenous Laws**

Effective and comprehensive monitoring of the implementation of the UN Declaration requires States to support the enforcement of Indigenous laws and implementation of modern treaties. There is no better monitoring mechanism that Indigenous Nations themselves monitoring and enforcing their own laws, in their territories, protecting their culture and lands and rights. With proper resources and support, and legal foundation, indigenous laws and their enforcement by indigenous peoples can lead the way in implementing the UN Declaration.

Modern treaties provide an important framework for the revitalization of Indigenous laws and governance, and the ability to enforce laws is an essential component to self-government and self-determination. Previously, the Treaty Commission raised key challenges for the enforcement of Indigenous laws.[[10]](#footnote-10) Laws are only as good as they are enforced. Respect and authority for law is only through enforcement and this is the same for Indigenous laws and legal orders. Law making should come with the essential tools to enforce those laws, if not, Indigenous self-government is an empty promise and the implementation of rights, and the UN Declaration are not fully realized.

**Legislative reform and compatibility of existing laws and modern treaties with the UN Declaration**

In Canada, and in the province of BC, there are federal legislation, *United Nations Declaration on the Rights of Indigenous Peoples Act*, and provincial legislation, *Declaration of the Rights of Indigenous Peoples Act* (DRIPA), to implement the UN Declaration into domestic law. Both legislations require annual public reporting to their respective legislative bodies, which serves in part as implementation monitoring. As well, these legislations commit to align existing laws to be consistent with the UN Declaration.[[11]](#footnote-11)

**British Columbia Shared Priorities Framework and the Declaration Act Secretariat**

Building from the provincial legislation, the DRIPA, implementing the UN Declaration into provincial law, two recent developments are worth noting. Firstly, the Declaration Act Secretariat, an independent office was created to coordinate and assist across-government to ensure provincial laws align with the UN Declaration, as set out in section 3 of the *Declaration on the Rights of Indigenous Peoples Act*.[[12]](#footnote-12)

Created in 2022, the Secretariat’s core functions are to: provide guidance on consultation and cooperation and consistency of laws; develop processes and measures to support alignment of laws; inform government’s legislative agenda; and serve in an interlocutor role. It is reported that over a dozen legislative reforms to existing provincial laws have been amended to be consistent with the UN Declaration. The Secretariat also recently shared its interim approach.[[13]](#footnote-13)

Another recent development is the Shared Priorities Framework, which was co-developed with Modern Treaty Indigenous Nations and the provincial government to address shared priorities related to the effective and meaningful implementation of modern treaties and the new relationship. This framework details fulfilling treaty rights and obligations, including fiscal arrangements renewals, and commitment to ensure that DRIPA is implemented in a manner consistent with distinct modern treaty rights the provincial UN Declaration legislation.[[14]](#footnote-14)

1. 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. World Outcome Document, supra note 11, para. 21. [↑](#footnote-ref-2)
3. The Report of the British Columbia Claims Task Force, (1991), see https://bctreaty.ca/sites/default/files/BC\_Claims\_Task\_Force\_Report\_1991.pdf [↑](#footnote-ref-3)
4. The Constitution Act, (1982), Schedule B to the Canada Act 1982 (UK), 1982, c 11 [↑](#footnote-ref-4)
5. *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia, (2019), see* [*https://www.bctreaty.ca/sites/default/files/RecognitionandReconciliationofRightsPolicyforTreatyNegotiations.pdf*](https://www.bctreaty.ca/sites/default/files/RecognitionandReconciliationofRightsPolicyforTreatyNegotiations.pdf) [↑](#footnote-ref-5)
6. Factum of the Intervener British Columbia Treaty Commission, (2023) see [www.scc-csc.ca/WebDocuments-DocumentsWeb/39856/FM080\_Intervener\_British-Columbia-Treaty-Commission.pdf](http://www.scc-csc.ca/WebDocuments-DocumentsWeb/39856/FM080_Intervener_British-Columbia-Treaty-Commission.pdf) [↑](#footnote-ref-6)
7. Final Agreements and Related Implementation Matters, (2018) Government of Canada, see <https://www.rcaanc-cirnac.gc.ca/eng/1100100030583/1529420498350> [↑](#footnote-ref-7)
8. Modern Treaties Implementation Review Commission Proposal, (2017), see <https://landclaimscoalition.ca/wp-content/uploads/2018/02/MTIRC-Doc-and-Letter-to-Trudeau-1.pdf> [↑](#footnote-ref-8)
9. *Canada's Collaborative Modern Treaty Implementation Policy*, (2023) Government of Canada, see <https://www.rcaanc-cirnac.gc.ca/eng/1672771319009/1672771475448#chp7> [↑](#footnote-ref-9)
10. BC Treaty Commission Submission to EMRIP study, (2022), see <https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples/treaties-agreements-and-other-constructive-arrangements-between-indigenous-peoples-and-states> [↑](#footnote-ref-10)
11. See provincial legislation <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>, see federal legislation <https://www.laws-lois.justice.gc.ca/eng/acts/u-2.2/page-1.html> [↑](#footnote-ref-11)
12. Declaration Act Secretariat, (2022), see, <https://declaration.gov.bc.ca/2022/10/20/declaration-act-secretariat/> [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. Shared Priorities Framework, (2022), see <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shared_priorities_framework.pdf> [↑](#footnote-ref-14)