

**United Nations Permanent Forum on Indigenous Issues, Fifteenth session**  
**Special theme: "Indigenous peoples: Conflict, Peace and Resolution"**  
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Item 4 of the provisional agenda (continued)

Implementation of the six mandated areas of the Permanent Forum with reference to the United Nations Declaration on the Rights of Indigenous Peoples

**Statement by the British Columbia Treaty Commission, Acting Chief Commissioner Celeste Haldane**

**INTRODUCTION**

On May 10, 2016 Canada announced its full, unequivocal support for the *UN Declaration on the Rights of Indigenous Peoples* ("Declaration"). This is a significant moment for Canadian indigenous peoples - now the hard work of implementing begins. A new era of recognition of indigenous rights is at hand and the BC treaty negotiations process is well placed to embrace this change and lead the world in reconciliation.

The "World Outcome Document"<sup>1</sup> from the September 2014 World Conference on Indigenous Peoples outlines significant commitments by States, including Canada, to Indigenous Peoples. UN Permanent Forum on Indigenous Issues ("PFII" or "Forum") Expert Member, Grand Chief Ed John, has recommended that "Consistent with paragraphs 7 and 8 in the Outcome Document and with the full and effective participation of Indigenous Peoples, Canada needs to develop and implement a "national action plan" to achieve the ends of the Declaration."<sup>2</sup> The British Columbia Treaty Commission ("Treaty Commission" or "BCTC") agrees.

As an independent body that oversees negotiations for the reconciliation of indigenous rights, the Treaty Commission proposes the following recommendations to assist with national action plans by States, consistent with paragraphs 7, 8, and 21 of the World Outcome Document. These would assist in implementing and infusing the *Declaration* into State negotiations processes; and ensure they advance the rights of Indigenous Peoples to their lands, territories and resources, through processes that are fair, independent, impartial, and transparent.

**RECOMMENDATIONS**

The Treaty Commission offers the following recommendations for consideration by the Forum:

1. Consistent with the commitments in the World Conference on Indigenous Peoples Outcome Document and standards for Indigenous Peoples survival, dignity and well-being contained in the United Nations Declaration on the Rights of Indigenous Peoples (the *Declaration*), the Permanent Forum recommends to States to fully engage Indigenous Peoples in good faith negotiations of treaties, agreements and other constructive arrangements based on unequivocal recognition of Indigenous Peoples rights to lands, territories and resources and to fully reject extinguishment of Indigenous Rights in form or result. Further, the Permanent Forum recommends to States to address the call for full and effective redress for the loss of lands, territories and resources and State breaches of treaties, agreements and other constructive arrangements.
2. The Permanent Forum reiterates the urgent need for States to institute, in conjunction with Indigenous Peoples, high-level oversight bodies to guide and oversee conduct of negotiations and implementation of

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<sup>1</sup> Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, Adopted by the GA on September 22, 2014

<sup>2</sup> Presentation of Grand Chief Edward John, UN PFII Expert Member, and First Nations Summit Executive Member, at Engagement in advance of the 15th session of the UN Permanent Forum on Indigenous Issues, Ottawa, Ont., May 4, 2016

treaties, agreements and other constructive arrangements in light of ongoing negotiation and implementation issues.

3. Building on previous recommendations advanced at the 11th session of the Permanent Forum, States are encouraged to support inter-Indigenous Peoples dispute resolution by providing State financial and other methods of support to achieve peaceful resolution. Further, the Permanent Forum continues to urge United Nations agencies, including country teams, to actively support and promote conflict resolution processes of dialogue and consensus-building.

## **BACKGROUND**

The Treaty Commission is an independent body that oversees treaty making in British Columbia.<sup>3</sup> An independent commission is at the core of the negotiations process. The Treaty Commission is the only tripartite statutory body<sup>4</sup> in Canada whose mandate is to support reconciliation.

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*<sup>5</sup>. As such, the Treaty Commission's role is critically important: to assist the three parties in living up to this constitutional imperative. As stated by the Canadian Minister of Indigenous Affairs, on May 10, 2016, modern treaties reflect the principles of the *Declaration*, and the Treaty Commission's mandate also reflects the goals and principles of the *Declaration*.

## **NEGOTIATIONS PROGRESS**

The investment by Indigenous Peoples and the governments of Canada and British Columbia<sup>6</sup> and the public into treaty negotiations 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, implemented by 10 former Indian Act Bands.

Modern treaties, agreements and other constructive arrangements when fairly negotiated and honourably implemented, are a successful mechanism for the protection and reconciliation of indigenous rights, and can generate significant economic benefit for Indigenous Peoples. Since signing its treaty in 2009, Tsawwassen First Nation created a billion-dollar retail and residential development, and the largest non-resource agreement ever signed by a First Nation in BC. The development is a direct result of the Tsawwassen treaty.

## **NATION TO NATION**

Reconciliation is the fundamental goal of the BC treaty negotiations process. The 1991 Report of the British Columbia Claims Task Force ["Task Force Report"] – the blue print for the negotiations process - describes

<sup>3</sup> The Treaty Commission was established in 1992 by agreement among the governments of Canada and British Columbia and the First Nations Summit [collectively referred to as the "Principals"], with the signing of the British Columbia Treaty Commission Agreement, 1992 [the "BCTC Agreement"].

<sup>4</sup> 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.

<sup>5</sup> The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [hereinafter, "*Constitution*"]

<sup>6</sup> The First Nations Summit, the Government of Canada and the Government of British Columbia are collectively referred to as "the Principals."

reconciliation as “the establishment of a new relationship based on mutual trust, respect, and understanding — through political negotiations.”<sup>7</sup> 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.”

At the heart of 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.”<sup>8</sup>

The Minister of Justice and Attorney General of Canada, in her remarks at the opening of this 15<sup>th</sup> session of the Permanent Forum stated, “We must complete the unfinished business of Confederation. Rebuilding the Nation-to-Nation relationship and achieving reconciliation lies at the heart of a strong Canada.” Rebuilding the Nation-to-Nation relationship lies at the heart of treaty negotiations in Canada, and mirrors the goals of the *Declaration*, especially that of self-determination.

## **RECOGNITION, NOT EXTINGUISHMENT**

A lasting Nation-to-Nation relationship through treaty negotiations requires the recognition of indigenous rights, not extinguishment. This notion of extinguishment has been outright rejected by Indigenous Peoples participating in negotiations and has no place in modern-day treaties.

The concept of extinguishment was rejected by the architects of the treaty negotiations process:

In the past, blanket extinguishment of First Nations’ rights, title, and privileges was used to achieve certainty. The task force rejects that approach. Section 35 of the Constitution Act, 1982 gives express recognition and affirmation to aboriginal and treaty rights. First Nations should not be required to abandon fundamental constitutional rights simply to achieve certainty for others. Certainty can be achieved without extinguishment.<sup>9</sup>

A new era of rights recognition is evolving in Canada, and it is essential that negotiations evolve with it. Flexibility is an essential part of negotiations process,<sup>10</sup> and the parties are examining new certainty mechanisms for treaties. These should be consistent with the *Declaration*, informed by the World Outcome Document<sup>11</sup> and past recommendations of the Permanent Forum (“...the Forum calls upon States to fairly and equitably redress the long-standing unresolved land rights issues through good-faith negotiations, consistent with the ... *Declaration* and without extinguishing indigenous peoples’ land rights.”)<sup>12</sup>

## **SELF-DETERMINATION**

Self-determination is at the heart of both the BC treaty negotiations process and the *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 negotiations is a decision to be made by each First Nation.”

The first paragraph in the preamble of the *Declaration* affirms: “*Guided* by the purposes and principles of the Charter of the United Nations”. These “purposes and principles” include the principle of “equal rights and self-

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<sup>7</sup> Report of the British Columbia Claims Task Force, 1991, Recommendation 1.

<sup>8</sup> Ibid pages 7-8

<sup>9</sup> Ibid, p. 11.

<sup>10</sup> Ibid, Recommendation 2: “Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.”

<sup>11</sup> Supra note 1.

<sup>12</sup> See recommendation 36, Report of the 14<sup>th</sup> session of the Permanent Forum on Indigenous Issues, 20 April-1 May, 2015, E/2015/43-E/C.19/2015/10

determination of peoples.”<sup>13</sup> This is reflected in the provisions of the Declaration<sup>14</sup> and provides further guidance for their interpretation. The right of Indigenous Peoples to self-determination is a prerequisite to the enjoyment of all other human rights.<sup>15</sup> It is “a foundational right, without which Indigenous Peoples’ human rights, both collective and individual, cannot be fully enjoyed.”<sup>16</sup>

Self-determination is a foundational, but also challenging, principle as Indigenous Peoples go through the process of Nation building. Forcing collective approaches to negotiations or amalgamation of Nations is contrary to self-determination and is bound to fail.<sup>17</sup>

## **OVERLAPPING AND SHARED TERRITORIAL CLAIMS**

Overlap disputes between Indigenous Peoples interfere with the implementation of the *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.

Indigenous Peoples are best placed to resolve overlapping and shared territory issues themselves.<sup>18</sup> 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.

State imposed solutions run counter to this principle that Indigenous Peoples should resolve overlap and shared territory issues. State imposed solutions also interfere with Article 3 of the *Declaration*, and the efforts of an Indigenous Peoples to self-determine.

Nationhood is very complex, and as noted above, forced amalgamation of Indigenous Peoples is bound to result in failure and is contrary to self-determination and Article 8 of the *Declaration*.

## **EVOLUTION OF NEGOTIATIONS**

In the Treaty Commission’s view, the *Declaration* can assist in breathing renewed life into negotiations and serve as a guide to improve the made-in-BC negotiations process, ensuring they are Nation-to-Nation and reflect this new era of recognition of Indigenous Peoples’ rights. As the Honorable Wilson-Raybould stated, we can breathe life into s. 35 of Canada’s *Constitution*, including treaty negotiations, by “embracing the principles or minimum standards articulated in the *Declaration* on the Rights of Indigenous Peoples ...”

This commitment to minimum standards is consistent with Article 38 of the *Declaration* that “States, in consultation and cooperation with Indigenous Peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

The World Outcome Document<sup>19</sup> notes the importance of fair, independent, impartial, open and transparent processes, established with Indigenous Peoples, to advance their rights to lands, territories and resources. Treaty negotiations are such a process, as long as negotiations are fair and treaties implemented honourably.

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<sup>13</sup> *Charter of the United Nations*, arts. 1(2) and 55c.

<sup>14</sup> See, e.g., *UN Declaration*, Art. 2. See also art. 3 on Indigenous peoples’ right to self-determination.

<sup>15</sup> Human Rights Committee, *General Comment No. 12, Article 1*, 21<sup>st</sup> sess., A/39/40 (1984), para. 1.

<sup>16</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, UN Doc. A/HRC/12/34 (15 July 2009), para. 41.

<sup>17</sup> See Task Force Report, p. 19.

<sup>18</sup> See recommendation 8 of the Task Force Report

<sup>19</sup> World Outcome Document, *supra* note 11, para. 21.