

British Columbia-Indigenous Nation Agreements

Lessons for Reconciliation?

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Summary

- There are few historical or modern treaties with Indigenous nations in British Columbia.
- Since the early 2000s, the BC government has signed several hundred bilateral agreements governing relations with more than 200 Indigenous nations.
- Although these agreements do not have the constitutional protection of treaties, they are steps toward reconciliation in an evolving relationship with Indigenous peoples.

Sommaire

- Il existe peu de traités historiques ou modernes avec les nations autochtones en Colombie-Britannique.
- Depuis le début des années 2000, la Colombie-Britannique a signé plusieurs centaines d'accords bilatéraux régissant ses liens avec plus de 200 nations autochtones.
- Sans offrir la même protection constitutionnelle que les traités, ces accords contribuent aux efforts de réconciliation nécessaires à l'évolution favorable des relations avec les peuples autochtones.

RECONCILIATION BETWEEN Indigenous peoples and non-Indigenous Canadians is part of our national discourse, but it is less obvious that Canadians share an understanding of what it means in practice. The Truth and Reconciliation Commission (TRC) provides a concise definition of what is needed: “Reconciliation not only requires apologies, reparations, the relearning of Canada’s national history, and public commemoration, but also needs real social, political, and economic change.”¹

Achieving such structural change will challenge all levels of government — Indigenous and non-Indigenous. For a start, Canada’s governance institutions will need to meaningfully treat Indigenous people as partners in our national



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success. Indeed, the federal, provincial and territorial governments have taken a number of important steps along these lines during the past few decades.

In this context, the Government of British Columbia's policies on reconciliation merit study. The province has been an important source of Canadian law and policy regarding Indigenous peoples for nearly 50 years. Unlike the situation in the other western provinces and Ontario, only a small portion of the province's territory is covered by historical treaties. British Columbians nevertheless share the challenge facing all Canadians: What is the appropriate place for Indigenous nations in Canada's social order, system of governance and economy?²

Since the early 2000s, the BC government has signed several hundred bilateral arrangements with more than 200 Indigenous nations across the province. These agreements are not treaties, but most of them provide the Indigenous community with a role in the planning of economic development on the territory where it resides and, for many of them, a share of BC's resource revenues. This article places them within a broader policy context, examines those negotiated with four Indigenous nations and considers lessons that the bilateral approach may offer for governance arrangements and reconciliation measures elsewhere in Canada.

Background

BC'S HISTORY OF RELATIONS with Indigenous nations may provide signs that nineteenth-century colonial attitudes colour modern policy choices. A brief survey of early developments is therefore necessary.

After 1846, when Britain and the United States settled their border disputes through the Oregon Treaty, two new Crown colonies were created: Vancouver Island, which was leased to the Hudson's Bay Company (HBC); and the mainland colony of British Columbia formed from HBC lands not lost to the Americans. The mainland was then sparsely settled by non-Indigenous people, but the sudden arrival of American gold prospectors led in 1866 to the colonies' unification.³

During the time of the HBC's control over Vancouver Island, its chief executive, James Douglas, who was also the Crown colony's governor, negotiated the so-called Douglas treaties with some Indigenous nations.⁴ These covered lands on southeastern Vancouver Island desired for non-Indigenous farming and a small area around Nanaimo for coal mining. Treaty making was halted in the 1850s when the Imperial government refused to provide funds for the purpose. It never extended to the mainland colony and ended entirely by 1866 when the two colonies were united.

BC joined Confederation in 1871 through an Imperial Order-in-Council. Article 1 of the Terms of Union was one of the most important to BC's negotiators: Canada became liable for the colony's "debts and liabilities." In addition to confirming the division of powers between the federal and provincial governments, Canada agreed to take "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit." In return, BC agreed to provide public lands as needed to carry out a "policy as liberal as that hitherto pursued."

As many have noted, that policy was neither liberal nor generous. When BC joined Canada, Indian reserves comprised 0.01 percent of the province's territory, while Indigenous people were the overwhelmingly majority of the population.⁵

Given the illiberal colonial policy, it is hard not to interpret the Terms of Union as an attempt by BC officials to preserve the status quo — that is, no land rights for Indigenous people and no reserves to be created without agreement by Victoria.⁶ It did not take long before the two governments disagreed on their respective responsibilities, particularly whether either was responsible for addressing Indian claims to lands being opened to intensive non-Indigenous use.

Although the federal government was actively negotiating treaties on the Prairies prior to Confederation, it did not act alone in British Columbia because it could not unilaterally offer provincial Crown lands and resources.

After joining Canada, BC saw the creation of reserves as the means to satisfy Indigenous land claims, but without the need to negotiate treaties. If more was needed to settle claims, it saw the Terms of Union making it a federal concern. For more than a century afterward, the federal government was stymied by provincial opposition in its attempts to resolve the so-called Indian land question. It even briefly considered referring the matter to the courts but backed down in the face of provincial resistance.⁷

Although there may have been occasional political qualms in Ottawa, legal theories of the time held that Indigenous rights could be extinguished unilaterally by the Crown without compensation. Over time, BC's non-Indigenous population grew quickly, while the pre-Union Indigenous majority became a minority in their own homelands.⁸

Although the federal government was actively negotiating treaties on the Prairies prior to those lands entering Confederation, it did not act alone in BC because it could not unilaterally offer provincial Crown lands and resources. The only exception was the inclusion in Treaty 8 of a portion of northeastern BC. This was done for pragmatic reasons to follow the natural boundary of the Rockies rather than the provincial boundary, which would have split Indigenous communities in the Peace River country.⁹

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Efforts to find a solution lasted well into the twentieth century through various commissions and inquiries that led to a series of federal-provincial agreements on the creation and management of Indian reserves.¹⁰ The two governments could agree to share costs for specific purposes (such as the British Columbia treaty negotiations process), but their dispute over article 13 still lies close to the surface.¹¹

Beyond setting aside parcels of land as Indian reserves, neither level of government took active steps to address Indigenous rights outside the reserves. Indigenous nations resisted the loss of their traditional lands but could not stop their appropriation, without consent or compensation.¹²

Federal policy changed only when the courts held that Indigenous land rights survived the imposition of Crown sovereignty and continued where there were no treaties that required their surrender. Most important, the courts held that, where rights survived, there were legal consequences.¹³ The failure of governments to resolve Indigenous claims did not change the modern legal reality that the nations still existed and their rights had legal force.

The federal government began negotiations with the Nisga'a Nation in 1973 in response to its court challenge.¹⁴ BC refused to join, on the basis of its position that any costs for a settlement were Ottawa's responsibility.

Patriation of the Constitution in 1982 included section 35 of the *Constitution Act, 1982*, which states that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." After 1982, the impact of section 35 was felt across BC, with growing unrest and uncertainty about Indigenous land rights. BC finally joined the federal government in negotiations with the Nisga'a and also agreed to work with Ottawa and the First Nations Summit representing Indigenous rights holders.¹⁵

In June 1991, the tripartite Claims Task Force made 19 recommendations on how the three sides should collaborate to resolve questions about Indigenous rights.¹⁶ Many statements from the task force continue to ring true:

In the negotiation of treaties certainty is an objective shared by all. These treaties will be unique constitutional instruments. They will identify, define and implement a range of rights and obligations, including existing and future interests in land, sea and resources, structures and authorities of government, regulatory processes, amending processes, dispute resolution, financial compensation, fiscal relations, and so on. It is important that the items for negotiation not be arbitrarily limited by any of the parties.¹⁷

In September 1992, the three parties agreed to create the BC treaty process to implement the task force recommendations.¹⁸ In parallel, Victoria and Ottawa reached a political agreement to set aside (but not settle) their long-standing debates and share the costs of the process and its outcomes. Across BC, there was great hope that disputes about private, public and Indigenous land interests would be resolved within a few years.

Over the past 25 years, the treaty process has had some successes, such as the treaty with the Tsawwassen First Nation; more may come.¹⁹ However, many Indigenous nations remained wary of the process, and a significant number have stayed out.²⁰ As the early optimism dissipated, numerous reviews and studies advised on ways to improve the process, including the Auditor General of Canada's report and, more recently, Douglas Eyford's 2015 report.²¹ The three sides have made changes to attract more Indigenous nations and speed up resolution, but the results have been modest.²²

Over the same period, the province's population grew significantly as a result of immigration (from 3.4 million in 1991 to 4.8 million in 2017).²³ Its economy became increasingly service-based, even though natural resources remain important outside urban centres.²⁴ Gaps between Indigenous and non-Indigenous socio-economic conditions remain significant, even as the Indigenous population has become younger and more urbanized.²⁵ Meanwhile, the proportion of British Columbians identifying as Indigenous has grown to roughly 6 percent. Ten percent of BC children 14 years and under are Indigenous.²⁶

The legal framework has also changed with Supreme Court of Canada decisions on Indigenous title (*Delgamuukw* in 1997,²⁷ *Tsilhqot'in* in 2014²⁸) and the Crown's legal duty to consult and accommodate claims to rights (*Haida Nation* in 2005²⁹). Although public policy on Indigenous issues often lags behind the legal framework set by the Supreme Court of Canada, it has evolved (e.g., Federal Self-Government Policy and government policies on the duty to consult in 1991, Canada's unconditional acceptance of the United Nations Declaration on the Rights of Indigenous Peoples, UNDRIP, in 2016). While BC is therefore not unique in changing policy to respond to the courts, it stands out for the speed of change — especially over the past 15 years.³⁰

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Before winning the 2001 election, Gordon Campbell, then leader of the opposition BC Liberal Party, challenged the Nisga'a Treaty in court.³¹ Although the case was rejected by the courts, his election as premier was followed by a referendum on principles to inform the province's treaty negotiating positions.³²

Under Premier Campbell, BC charted its own policy path without awaiting change from Ottawa.

The path seemed set for conflict, but then the BC government took a different direction. This was likely the result of a combination of factors, but key was the 2002 decision of the BC Court of Appeal that the province owed fiduciary duties to Indigenous people and was legally required to consult them about their claimed rights and, where necessary, to accommodate their concerns.³³ The core of the decision was upheld by the Supreme Court of Canada in 2004.³⁴

Soon after the Court of Appeal decision, the Throne Speech of February 2003 announced new policy directions. The government apologized for past policies and promised a “new era of reconciliation” based on a “New Relationship” with partnerships to promote “greater equity and certainty for all concerned — Aboriginal and non-Aboriginal alike.”³⁵

Under Premier Campbell, BC charted its own policy path without awaiting change from Ottawa. One of its boldest moves was a proposed *Recognition and Reconciliation Act*.³⁶ It would be a statutory framework to implement the New Relationship by recognizing “constitutionally established Aboriginal rights and title,” and facilitating “partnerships and prosperity through shared decision making and revenue sharing.” The Act would also “support the rebuilding of the historic Indigenous Nations of British Columbia and enable the establishment of political structures for meaningful government-to-government relations.”

The proposal came to naught as opposition rose from both Indigenous and non-Indigenous quarters.³⁷ Influential Indigenous leaders voiced concerns that the province lacked the constitutional power to deal with Indigenous rights, even by way of recognition, and questioned the government’s readiness to deliver real structural change. Some business leaders expressed concern about not being adequately consulted or whether the practical implications of the government’s plan were clearly thought through. In the aftermath, the province reiterated its commitment to the New Relationship³⁸ but increased its focus on bilateral arrangements in what some observers called a “let’s-make-a-deal approach.”³⁹

Even if these various changes had not occurred, it is worth asking whether the policy vision in the treaty process remains “fit for purpose.” It reflected and in many ways still reflects an early 1990s vision of the province’s society, economy and governance. Over 25 years, it has produced only three final agreements approved and implemented by both governments and Indigenous nations.⁴⁰ In contrast to the results of the treaty process, over the past 15 years BC has reached several hundred bilateral arrangements with more than 200 Indigenous nations on land and resource issues.⁴¹

At their core, the TRC's Calls to Action require a break with policy decisions reflecting past circumstances that are no longer relevant or appropriate. And yet, despite 15 years of agreements, a question remains: How far has BC policy moved from past social, political and economic behaviour that marginalized and impoverished many Indigenous people?

Standard of Review

THE TRC'S VISION OF REAL CHANGE REFLECTS EMERGING domestic and international norms. If we look at the BC government's arrangements with Indigenous nations, two norms are particularly relevant: the current and near-future state of Canadian law; and emerging international standards, most notably UNDRIP. Looking at these two sources together, a relatively coherent vision is emerging, with three main elements:

Governance — Indigenous nations and their rights predate and largely survived colonialism and claims to the imposition of the Crown's sovereignty. They remain legally recognizable entities with inherent governance powers derived from a precolonial legal order. Additional rights may flow from postcolonial events, such as treaty making. The right to govern one's own affairs is one consequence, but it should also be reflected by a meaningful role in the governance of their precolonial traditional territories.⁴²

Traditional territories — Indigenous nations have continued connections to their traditional territories as a corollary of their precolonial legal systems. The exceptions will be where changes were negotiated with the Crown. Specific rights to geographic locations may have been changed by intervening events even where not agreed to by the rights holders, but remedies for those losses need to be addressed.

Indigenous connections to traditional territories should translate into a formal role in their governance. That governance role could range along a spectrum from exclusive to differing degrees of shared jurisdiction, but it is more than simply a government obligation to seek their advice through consultations. In some instances, governments will want to obtain consent before taking action on those lands.

Fiscal relations — Indigenous nations should be treated equitably by other levels of government when it comes to apportioning the public revenue generated in Canada. Their connections to traditional territories should play

a role in decisions on allocating the public benefits derived from them. Indigenous nations have the same rights as others to economic development, but their ability to generate their own wealth should be encouraged and public policy barriers reduced where possible.

Although governments have not agreed, BC Indigenous nations have consistently articulated their vision to achieve four goals that align with those emerging policy norms:

- (1) To restore, revitalize and strengthen First Nations and their communities and families to eliminate the gap between their standards of living and those of other British Columbians, and substantially improve the circumstances of First Nations people in areas which include education, children and families, and health, including restoration of habitats to achieve access to traditional foods and medicines;
- (2) To achieve First Nations self-determination through the exercise of their Indigenous title, including realizing the economic component of Indigenous title, and exercising their jurisdiction over the use of the land and resources through their own structures;
- (3) To ensure that lands and resources are managed in accordance with First Nations laws, knowledge and values and that resource development is carried out in a sustainable manner, including the primary responsibility of preserving healthy lands, resources and ecosystems for present and future generations; and
- (4) To revitalize and preserve First Nations cultures and languages and restore literacy and fluency in First Nations languages to ensure that no such language becomes extinct.⁴³

In response to these realities, in 2017 the federal government articulated its own policy vision for its relations with Indigenous nations, based on 10 principles.⁴⁴ In contrast, BC's vision to date has been less about defining a place for Indigenous nations and more about improving Indigenous socio-economic conditions and fostering economic growth for all citizens.⁴⁵

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The New Democratic Party (NDP) government elected in 2017 has committed to fully implementing the UNDRIP and the TRC's Calls to Action.⁴⁶ Premier Horgan has instructed all ministers to determine within their mandates how to bring the UNDRIP principles into action.⁴⁷ It remains to be seen how the NDP government will put its stamp on previous policy approaches, although it has already signalled that it will go further than the previous government on some issues such as revenue sharing.⁴⁸

For purposes of this discussion, the three themes above — governance, traditional territories and fiscal relations — will be a standard for review. The goal is not to judge how well the parties achieved their aims in bilateral negotiations, but to examine how they found ways to bridge the gaps between their visions.

BC Government-Indigenous Nation Agreements

The agreements between the BC government and Indigenous nations fall into a number of categories

IN RESPONSE TO BC'S OFFER OF A NEW RELATIONSHIP, leaders from First Nations peak organizations met with provincial officials in 2005 to develop a shared vision of how to work together. From those discussions emerged the bilateral New Relationship Vision⁴⁹ and the trilateral Transformative Change Accord.⁵⁰ While these negotiations were largely driven by the province's need to respond to legal duties, Indigenous leaders were pragmatic and tactical in agreeing to work with the province.

The BC Liberal government characterized its new relationship with Indigenous nations as “based on respect, recognition and accommodation of Indigenous title and rights; respect for each others’ laws and responsibilities; and for the reconciliation of Indigenous and Crown titles and jurisdictions.”⁵¹ The province accepted the need for “new processes and structures for working together on decisions about the use of land and resources” and “revenue-sharing to reflect Aboriginal rights and title interests, and to help First Nations with economic development.”

The agreements between the BC government and Indigenous nations fall into a number of categories (see the box on page 10). A large proportion of them address BC's legal duties to consult either generally or in the context of specific industries (forestry, mining, pipelines, clean energy).⁵² The province has also made considerable effort to include Indigenous people in its local and regional planning processes for Crown lands and resources.⁵³ In most respects, the majority of such agreements and arrangements follow a template, with little room for tailoring to an Indigenous nation. This is not to denigrate the inherent value of the arrangements, but it does speak to the power imbalance implicit in their “negotiation.”

In some arrangements, a share of resource revenues, lands and other benefits is provided as a “contribution towards the reconciliation” of the parties’ interests.⁵⁴ BC characterizes the revenue sharing from mining, forestry and other resources as “a path to partnership that provides a percentage of what the Province receives from resource development on First Nations’ traditional territories directly back into the communities.”⁵⁵

British Columbia-First Nations Agreements

Strategic engagement agreements	Establish mutually agreed-upon procedures for implementation of BC's constitutional duties on consultation and accommodation
Reconciliation agreements	Create a framework for discussions on broader reconciliation, although many of these agreements are essentially strategic engagement agreements
Interim treaty agreements	Provide First Nations with land and other economic benefits as a "down payment" on an eventual treaty settlement
Economic and community development agreements	Provide for sharing the direct mineral tax revenue on new mines and major mine expansions
Forest consultation and revenue-sharing agreements	Provide First Nations with economic benefits based on harvest activities in their traditional territory
Natural gas benefits agreements	Provide financial benefits, as well as other benefits such as provincial investments in skills training and First Nations environmental stewardship projects, in return for a First Nation supporting liquefied natural gas pipelines
Atmospheric benefit sharing agreements	Clarify First Nations ownership and the right to sell tonnes of carbon in local or international carbon markets
First Nations Clean Energy Business Fund	Helps First Nations participate in the clean-energy sector, including wind energy, biomass and run-of-river hydroelectric power, by providing funds to build community capacity and invest in clean energy. Some First Nations (e.g., Tahltan) have also been given revenue sharing from clean energy projects in their traditional territory based on new, net, incremental revenues to government derived from water rentals, land rents and, eventually, wind participation rents

Source: Compiled by the author, based on Government of British Columbia, "Reconciliation & Other Agreements," <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/reconciliation-other-agreements>.

The province paid some \$60 million in revenue-sharing benefits to Indigenous nations in 2016-17.⁵⁶ It is estimated that this will rise to around \$71 million in 2017-18.⁵⁷ For a sense of scale, the most recent estimate of the BC government's natural resource revenue is \$2.3 billion out of total revenues of \$50.8 billion.⁵⁸ Revenues shared with Indigenous nations therefore represent just over 3 percent of the government's resource revenues. While not insignificant, the scale of shared revenues is more modest than in some other Canadian jurisdictions.⁵⁹

For this review, a sample of agreements with four First Nations was chosen: Haida, Musqueam, Lax Kw'alaams and Tsilhqot'in. The four share characteristics with many other Indigenous nations in BC: no treaty with the

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Crown, proven or strong likelihood of Indigenous title and rights to their traditional lands, shared purpose among their members and effective internal leadership. What distinguishes their agreements is that the province has gone further to find common ground and, to varying degrees, modified the template agreements offered to most others. Even if the province's motivation was tied to specific goals (e.g., legal claims settlement, land management, fostering specific industries), we will see whether a broader policy picture emerges.

Haida

The Haida Nation's traditional territory encompasses parts of southern Alaska, the archipelago of Haida Gwaii and its surrounding waters. Haida people make up half of the 5,000 residents of the islands. The Haida are concentrated in two main centres, Gaaw Old Massett and HlGaagilda Skidegate. Around 2,000 Haida live elsewhere, with concentrations in Prince Rupert and Vancouver.

The Haida Nation has numerous agreements with both the federal and provincial governments.⁶⁰ Two common threads run through them: recognition of the status of the council to speak on behalf of the Haida Nation and acceptance that the connection with their traditional territory is the basis for a role in its governance and a share of resource revenues.

In the bilateral agreements, the BC government has avoided a blanket acquiescence to Haida claims of title to their traditional territory. It has also continued in the courts to challenge assertions of title to specific locations. However, in order to advance a broader policy agenda, the province appears prepared to accept on a de facto basis that title exists. The following are examples of recent bilateral agreements.⁶¹

Haida Gwaii Strategic Land Use Agreement (2007)

This agreement confirms a government-to-government relationship between the Council and the provincial government as the basis for a shared land use planning process based on common management objectives. It includes provisions on Protected Areas and Special Areas as Haida Natural, Cultural and Spiritual Areas to be confirmed under provincial legislation and maintained in accordance with Haida laws, customs, traditions and decision-making processes. The agreement also deals with fiscal relations by committing to an initial timber harvest opportunity and agreement to develop a process to determine the long-term timber supply for Haida Gwaii.

Kunst'aa guu-Kunst'aayah Reconciliation Protocol (created 2009 and amended 2016)

Meaning “the beginning,” this agreement provides for joint decision-making respecting lands and natural resources on Haida Gwaii and other collaborative arrangements, including on socio-economic matters pertaining to children and families.

The protocol is cast as an agreement to work toward an overarching reconciliation agreement that would include the federal government. In the meantime, the two parties agree to collaborate on shared objectives: land and resource management, sharing carbon offset and resource revenues, forest tenures and other economic opportunities and Haida socio-economic well-being. On decision-making, the protocol confirms that each party will work under its own separate authorities and jurisdiction. It then lays out a framework for shared decision-making between the parties for land and natural resource management on Haida Gwaii.

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A core mechanism is the Haida Gwaii Management Council composed of two representatives from each party, with a chairperson jointly appointed by the Haida Nation and the province. The Council has an extensive list of strategic management and operational roles, and essentially provides a forum for shared and joint decisions on land and resource management. It also promotes technical cooperation on such matters.

The parties agreed to share carbon offsets and to pursue revenue-sharing opportunities related to new major natural resource development projects that may be proposed within Haida Gwaii.

This agreement lays out the parties' respective views of sovereignty and title, although without agreeing to each other's views.⁶² They agree that the protocol is not a land claim agreement or modern treaty protected by the Constitution. It includes a dispute resolution mechanism, as well as other provisions designed to prevent disagreements or misunderstandings that could give rise to disputes. It is also noteworthy for having a legislated base through the *Haida Gwaii Reconciliation Act*, unlike most other bilateral agreements, which rely on general legislative authorities.⁶³

The cooperative relationship reflected in the protocol has led to other arrangements, including the ones described below.

Interim Forest Benefits Sharing Agreement (2008)

This agreement reflects the province's model of sharing a fixed portion of revenues generated from forestry within a First Nation's traditional territory. BC

also commits to ongoing efforts to address the cultural aspects of Haida forest interests. The parties recognize that each will implement the agreement in accordance with its respective authorities, which for the Haida Nation are its “laws, policies, customs, traditions and their decision-making processes and authorities.”

Haida Gwaii Marine Plan Implementation Agreement (2016)

In 2011, BC and Coastal First Nations, including the Haida Nation, signed a Letter of Intent to Collaborate on Coastal and Marine Planning in the Pacific North Coast. It committed BC to develop a joint marine plan for Haida Gwaii together with an associated implementation agreement. The parties agreed that the “protection, stewardship and governance of the land and waters within the territory of the Haida Nation is integral to the existence and continuation of Haida culture, government, economy, community and Aboriginal rights and title.” They agreed to jointly implement the Haida Gwaii Marine Plan and work collaboratively to address marine issues generally. This entails agreeing on priorities and joint structures, notably the Haida Gwaii Marine Management Board, which is composed of equal numbers of representatives from each party and has a mandate to “make best efforts to achieve consensus in their recommendations and decisions.”

These agreements, along with others with local, provincial and federal governments, recognize the Haida as a self-governing nation. Equally important, they accept that the Haida merit a meaningful voice in the governance of their traditional territory. The Haida have knit these recognitions together with a well-developed economic development strategy.

As such, the agreements offer compelling examples of how to make practical, incremental gains without sacrificing Indigenous rights. Some commentators have gone as far as hailing the arrangements as a “hallmark” of Indigenous self-determination expressed through “collaborative consent.”⁶⁴ Others have noted the challenges the Haida face, including dealing with entrenched attitudes and an enduring power imbalance despite the use of language such as “government-to-government relations.”⁶⁵

Musqueam

The Musqueam people’s traditional territory extends to much of what is now Greater Vancouver.⁶⁶ The Musqueam Indian Band represents approximately 1,200 Coast Salish people with reserves in Point Grey, Vancouver, where the community resides, as well as Richmond and Tsawwassen.

In many ways, the Musqueam are a model of economic self-determination through their real estate and business investments on and off reserve. They have leveraged connections to their traditional territory to form business alliances with private industry and quasi-governmental bodies such as the Vancouver International Airport Authority. Bilateral agreements with BC have also played into the Musqueam strategy, notably through the settlement of legal claims that the province failed to consult with them before taking decisions affecting their interests. There are two noteworthy agreements.⁶⁷

Reconciliation, Benefits and Settlement Agreement (2008)

The parties acknowledge the Musqueam assertion of Indigenous rights and title over their traditional territory and seek to reconcile the prior existence of “aboriginal peoples and the assertion of sovereignty by the Crown.” The agreement settles Musqueam claims against the province for past infringements of Indigenous rights and title and failures to adequately consult and accommodate in relation to lands specified in the agreement. In exchange, the Musqueam have received several high-value land parcels and cash compensation.

Collaborative Management Agreement (2017)

The parties recognize that they have different perspectives on the scope of the Musqueam rights to fish and on BC’s consultation duties. Nevertheless, they “share the goal of establishing relationships and processes that reduce conflict, foster mutual understanding and respect, and promote collaboration.” The Musqueam are acknowledged as the custodians of traditional knowledge. The parties agree to collaborate “to support the responsible management” of the Fraser River delta through “joint stewardship initiatives that respect and consider Musqueam Aboriginal Rights.”

The core governance bodies are the Management Working Group and the Technical Working Group. The former’s role includes “high-level strategic problem solving,” while the latter (among other responsibilities) develops joint stewardship initiatives to be submitted for approval. The Technical Working Group’s responsibilities also include management of the agreement’s dispute resolution processes. Although negotiated with the Musqueam, the agreement contemplates the addition of other First Nations with rights in the same area.

As with the Haida, the Musqueam approach reinforces connections to traditional territory, together with a strong sense of community cohesion and effective governance, as the basis for a modern economic development strategy.

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Lax Kw'alaams

The Tsimshian consist of the nine tribes of Lax Kw'alaams on the northwest coast of BC.⁶⁸ The Lax Kw'alaams Band is the largest of seven communities near Prince Rupert and has more than 80 parcels of land reserved for its use. The community operates within the administrative structures of the *Indian Act*, with 3,351 members, of whom some 1,000 reside on the main reserve.

The proximity to Prince Rupert port means that the community is adjacent to a planned liquefied natural gas (LNG) terminal. Although the project was cancelled due to declining commodity prices, Lax Kw'alaams and the BC government negotiated numerous agreements to facilitate it.⁶⁹ I have selected three agreements for consideration here; one relates to forestry matters and the others to a planned LNG infrastructure in the Prince Rupert area.

Forest Consultation and Revenue Sharing Agreement (2014)

BC acknowledged that “the Lax Kw'alaams has Aboriginal interest within its Traditional Territory” and committed to consult and accommodate those interests with respect to impacts arising from provincial decisions on forest management. The agreement also provides for the Lax Kw'alaams to receive a share of revenues from forestry on their traditional territory.

Prince Rupert Gas Transmission Project Natural Gas Pipeline Benefits Agreement (2017)

The parties stated their desire to develop “an effective long-term working relationship” that would include the Lax Kw'alaams “sharing benefits” associated with the pipeline in return for not challenging provincial decisions. For its part, BC was given releases from claims related to its obligation to consult or for infringement of rights in relation to the pipeline.

Agreement on Environmental Monitoring of the Pacific Northwest LNG Project (2017)

The BC and federal governments agreed that the Coast Tsimshian have a “central and ongoing role in the environmental and compliance monitoring of the [LNG] Project, together with federal and provincial Regulatory Authorities.” To that end, they established an Environmental Monitoring Committee and supporting Technical Committee. The Committees were described as “forums for information sharing, collaboration amongst the Parties and coordination to the extent possible.” The parties also acknowledged that the Agreement was to “build a foundation” for environmental and compliance monitoring structures for “other potential major development properties within Coast Tsimshian Territories.”

BC has negotiated arrangements for decision-making regarding Tsilhqot'in title lands, as well as collaborative mechanisms with respect to its traditional territory.

Although the agreements on the LNG project were controversial within the Lax Kw'alaams community, the process allowed the latter to gain a recognized voice within its traditional territory. Once given, recognition cannot be rescinded; Lax Kw'alaams is therefore well positioned for any future developments proposed on those lands.

Tsilhqot'in

The Tsilhqot'in Nation comprises six communities in central BC, one of which (Xeni Gwet'in First Nations government) successfully convinced the Supreme Court of Canada to declare that Tsilhqot'in Indigenous title exists over a defined area.⁷⁰ The traditional territory of the Tsilhqot'in Nation extends beyond the land where Indigenous title was confirmed, but the Court's decision was a major legal and political achievement.

In response, BC has negotiated arrangements for decision-making regarding Tsilhqot'in title lands, as well as collaborative mechanisms with respect to its traditional territory. Noteworthy agreements include those described below.⁷¹

Nenqay Deni Accord (2016)

This accord's purpose is to "establish the shared vision, principles and structures" for the parties to negotiate future agreements on their relationship. In what are called "pillars of reconciliation," the parties commit to negotiate a series of issues including Tsilhqot'in governance, culture and language, the Tsilhqot'in management role for lands and resources and a "sustainable economic base." A shared goal is to "effect the practical transition of the Declared Title to Tsilhqot'in management, benefit and control, while respectfully engaging with third parties and attempting to address their interests" within those lands.

Tsilhqot'in Stewardship Agreement (2014-17 and 2017-20)

The agreement with the Tsilhqot'in Nation and the Tsilhqot'in national government is characterized as "A Strategic Engagement Agreement of Shared Decision-making Respecting Land and Resource Management." The arrangements cover Crown land within the area claimed by the Tsilhqot'in and provide the basis for "an overarching framework to which more detailed revenue-sharing and resource specific policies, protocols and agreements can be appended." The parties state that they have a "shared vision" to develop a "Cooperative Land and Resources Management Framework." BC agrees that, as recognized by the courts, the Tsilhqot'in have rights to harvest and trade skins and pelts throughout their claimed traditional territory.

The BC provincial Crown's legal duty to consult and accommodate is translated into relatively predictable terms for provincial ministries and agencies.

The agreement anticipates several joint mechanisms:

- bilateral Joint Resources Council — a technical forum to be co-chaired by Tsilhqot'in and BC government representatives;
- a Fish and Wildlife Panel for collaboration on joint initiatives to support long-term viable and ecologically functional fish and wildlife populations and habits; and
- a Senior Operational Forum to provide strategic direction to the Joint Resources Council, the Fish and Wildlife Panel and subcommittees established under the agreement.

BC agrees that its agencies will engage with the Tsilhqot'in when decisions on land and resource management are considered in the area covered by the agreement. The parties further agree to “seek opportunities to bridge socio-economic gaps and enhance governmental relations.” Funding is provided to the Tsilhqot'in to implement the agreement, and BC agrees to pursue negotiations on “revenue sharing on new major resource development projects” within the lands.

The Tsilhqot'in waged a long and expensive court battle to gain recognition of their title, with consequential benefits for the legal strategies of other Indigenous nations. The agreements now in place with BC are essentially about cooperation, sharing information and working toward future arrangements. It remains to be seen whether the outcome of negotiations will differ significantly from what the BC government offers to nations with claimed, but not yet proven, title. The Tsilhqot'in are well positioned to pursue their objective of negotiating a new relationship with Canada, but their agreements with BC are an important signal of the extent to which non-Indigenous governments are prepared to accommodate the new legal realities.

Observations

IN THE GENERIC AGREEMENTS AVAILABLE to all First Nations and the more specific ones tailored to a few nations, BC has taken a common approach with two elements:

- (1) The provincial Crown's legal duty to consult and accommodate is translated into relatively predictable terms for provincial ministries and agencies. A variety of mechanisms are used, sometimes tailored to the priorities of a given Indigenous nation, but their essence is the same: to fulfill, as efficiently as possible, the province's legal duties concerning economically valuable lands and resources in a way likely to convince a court of the merits of the final decision.⁷²

Broad, open-ended political commitments are made to improve relations, foster collaboration and deepen cooperation on issues of shared interest

- (2) Broad, open-ended political commitments are made to improve relations, foster collaboration and deepen cooperation on issues of shared interest (e.g., land and resource management). Sometimes topics (e.g., revenue sharing) are identified for future negotiation, but in many instances the main obligations are to share information and work together.

Using the lenses of governance, links to traditional territories and fiscal relations, the following pattern emerges:

Governance — BC takes a broad approach as to whom it engages with, rather than assessing whether a group could prove in court an Indigenous right to govern. This means agreeing with a variety of types of Indigenous bodies: some are bands recognized by Ottawa under the *Indian Act*; some are collections of bands acting together as a nation; some are incorporated bodies speaking for a nation; and some are nations with which the province concluded agreements directly. The common thread seems to be less about the legal structure or whether the group is an Indigenous nation with the right to self-determination, but rather who has the political power to reflect the Indigenous consensus in a geographic area.

BC accepts that these communities have their own laws and authorities in parallel to the province's jurisdiction. What is less clear is how BC envisages resolving a situation where provincial and Indigenous laws give different answers to the same question. Many of the agreements have dispute resolution provisions, but the approach seems to be one of parallel law-making regimes working together rather than specifying what matters are within their respective jurisdictions or how conflicts of laws will be resolved.

Traditional territories — Where no treaty is in place, the BC government has generally accepted Indigenous claims that rights and title exist within their traditional territories. In most cases, it has avoided admitting that title exists to specific parcels of lands, or what its impact would be. Even in the agreements with the Tsilhqot'in, who have judicially recognized title to at least a portion of their territory, the language is guarded about the consequences of that title for provincial law-making and administration.

Fiscal relations — BC has been more willing to engage in revenue-sharing discussions outside the treaty process than the federal government, but its willingness extends only to specific sources of revenues from particular natural resources. The agreements do not suggest a readiness for a broader discussion about sharing public revenues generated from traditional

territories or commensurate responsibilities to provide public services to all residents on those lands.

When the three elements are considered together, BC's approach to date seems to be primarily focused on fostering good relations, fulfilling its legal duties to consult and making qualified commitments to future action on issues such as revenue sharing.

Lessons

WHAT LESSONS CAN BE DRAWN FROM THE BC EXPERIENCE depends on one's perspective. Indigenous nations outside BC, other governments and nongovernmental actors such as industry will each draw different conclusions.

Many of BC's Indigenous nations have been tactical and methodical in advancing a strategy to protect their rights to traditional territories, to have their inherent governance powers recognized and to access public revenues for that purpose. Some have chosen the route of tripartite modern treaty making, but many have pursued bilateral arrangements — either as interim steps toward an eventual tripartite treaty or as ends in themselves.

The bilateral mechanisms reflect commitments to share and work from the same information, to collaborate on respective plans and to work toward shared goals that are worthwhile. Some of the agreements, particularly those linked to economically valuable projects, offer a route to Indigenous economic development.⁷³ They can defuse misunderstandings or disagreements before they reach the point of conflict and foster mutual recognition and respect. In taking the bilateral route, Indigenous nations have also avoided giving up or modifying their core rights — as is often the case with modern treaties.

However, unlike most modern treaties, the bilateral agreements do not significantly advance Indigenous self-determination (not least because they lack the constitutional protection of such treaties). BC has not recognized the full range of Indigenous governance powers or fully accommodated Indigenous nations in public decision-making. In some respects, the provincial government has been bolder than some other governments by creating joint mechanisms and using the language of shared decision-making. However, given that BC remains the ultimate decision-maker, the bilateral agreements do not appear to constitute truly shared decision-making by partners with equal power.

In taking the bilateral route, Indigenous nations have avoided giving up or modifying their core rights — as is often the case with modern treaties.

Where Indigenous rights and governance powers on traditional territories are acknowledged, the province has relied on general rather than specific recognition. The result, therefore, has been practical arrangements to work together, but with neither side changing its legal views.

In the immediate term, Indigenous nations in BC have achieved important steps toward their policy agenda, while keeping their legal powder dry for the future. Lessons have been learned on both sides — Indigenous and non-Indigenous — from their efforts at collaborative policy development and crafting new mechanisms to work together.

BC has shown an openness to dialogue and collaboration with Indigenous people that departs from over a century of disrespect. It remains to be seen how the multiple processes and mechanisms emerging from bilateral arrangements play out in practice. In particular, how well will they operate when BC takes decisions driven by its own policy agenda but not agreed to by an Indigenous nation?⁷⁴

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Indigenous nations may also want to reflect on how well the bilateral arrangements position them for success in the modern Canadian economy. Access to renewable resource allocations, some revenue sharing and marketable carbon credits are not unimportant. However, Indigenous peoples have been subject to agreements that locked them into past visions of the economy. For example, most nineteenth-century treaties assumed that Indians would either continue a traditional economy based on renewable resource harvesting or become an agrarian yeomanry through the provision of land, livestock and plows. With a few exceptions, this did not happen. In many ways, modern treaties and bilateral arrangements reflect an economic vision of BC as primarily a resource-based economy without obvious attention to the reality that it is largely a service-based economy.

It is therefore debatable whether the benefits available under the bilateral arrangements are the ones most conducive to Indigenous success in the global economy. Some groups have the good fortune to occupy economically advantageous locations, but for others, it is hard to see how the current bilateral arrangements on offer will significantly change their socio-economic situations.

For Indigenous nations, this poses questions. Is the current generation of bilateral arrangements offered by BC the best route to exercise their rights in ways that equip them for modern success? How should such arrangements play into broader strategic issues such as managing potential conflicts among nations in shared geographic areas or along land corridors under development pressures? Since bilateral arrangements are necessarily limited by provincial jurisdiction,

are they preferred models for bilateral or multilateral agreements with the federal government? What is the best way to engage the private sector in a broader strategy for change?

The previous Liberal government was pragmatic in its efforts to find workable arrangements on the ground, but in ways that left public lawmakers as the ultimate decision-makers. BC has used the language of shared decision-making, but in ways that are manageable and nonthreatening to existing authorities. Even where the BC government was willing to be a bit more innovative, it was driven by specific economic imperatives rather than a coherent policy vision of the place of Indigenous nations.

The emphasis on economic development for the benefit of all British Columbians, combined with the relatively modest revenues shared under the agreements, may have muted potential public opposition. Instead, public discourse focuses on broad concepts, such as reconciliation, or specific issues, such as services for Indigenous children, rather than debating the place of Indigenous nations in exercising self-determination.

For governments, a fundamental question remains. Are arrangements such as the ones BC has pursued primarily tools to protect the Crown's interests under Canada's current laws? Or should they be a vehicle to define a new place for Indigenous nations in the country's social order, economy and governance? Can the arrangements serve both objectives?

Industry and the holders of permits, licences and property interests are not parties to the bilateral arrangements, but they must live and work with the consequences. Industry is experienced in pursuing its own efforts at reconciliation,⁷⁵ but it must rely on public governments to address structural questions about governance, how land and resources are shared and the spending of public funds.

In the meantime, private interests are left to their own devices — either to negotiate arrangements with Indigenous nations or to seek remedy from the courts in the event of conflict. But at the same time, Indigenous nations' expectations with regard to private arrangements will be shaped by their agreements with governments or, conversely, by what governments fail to deliver (e.g., closing socio-economic gaps).

For nongovernmental actors, this poses a question. If Indigenous nations' visions of their role in governing traditional territories are not met by governments, will they look to the private sector to help satisfy their expectations of self-determination and socio-economic development?

Industry and the holders of permits, licences and property interests are not parties to the bilateral arrangements, but they must live and work with the consequences.

Conclusion

SINCE THE 1970s, Canadians have seen major and rapid changes in the place of Indigenous nations in Canada's legal and constitutional order. A combination of Indigenous aspirations, judicial willingness to carve out a place for them and sometimes reluctant but responsive government policy changes have likely made the direction of change irreversible. However, it remains to be seen what further steps Canada will take to define a new place for Indigenous peoples. In the meantime, BC's quite extensive experimentation with bilateral arrangements is potentially instructive elsewhere in Canada.

The tripartite treaty route remains open to those prepared to take it, but bilateral arrangements with the provincial government will likely remain a major vehicle to govern relations with Indigenous nations.

Indigenous and non-Indigenous people are unavoidably partners in BC's success. The tripartite treaty route remains open to those prepared to take it, but bilateral arrangements with the provincial government will likely remain a major vehicle to govern relations with Indigenous nations. These arrangements, most quite recent, demonstrate a willingness to explore new forms of governance — within Indigenous nations and, in particular, between them and the provincial government. The agreements reflect the various nations' differing circumstances and priorities, and they may be modified over time — as some have been already. Although their potential to foster the economic development of Indigenous nations remains to be proven, the agreements are steps toward reconciliation with Indigenous peoples.

To date, the parties to the agreements have largely focused on finding ways to bridge gaps in their legal views and to work toward shared common goals. However, if the current generation of bilateral agreements, which do not have constitutional protection, come to be seen as the best that can be achieved, there is a risk of complacency. This would not bode well for longer-term reconciliation with Indigenous peoples in BC. Indigenous expectations are likely to rise as the meaning and impact of UNDRIP — particularly core concepts such as self-determination — gain ground in Canada's policy space. The corresponding adaptation in governance arrangements of various forms will take time; some of the ones now in place will probably evolve in light of experience and changes in circumstances.

Although bilateral agreements have served to bridge the gap in expectations between the province and Indigenous nations, they are unlikely to be the final chapter in how their relationship evolves. As this proceeds, creative thinking and accommodation on all sides will be needed to find new ways to bridge both existing and new gaps and to chart the next steps forward.

Notes

1. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), 184, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf.
2. The author, who is not Indigenous, uses “Indigenous nation” to denote a collectivity of Indigenous persons, based on the definition used by the Royal Commission on Aboriginal Peoples as expressed by Mr. Justice Vickers of the BC Supreme Court in the case of *Tsilhqot’in Nation v. British Columbia* 2007 BCSC 1700, para. 457, where he referred to “the common threads of language, customs, traditions and a shared history” that connect individuals as a nation.
3. See, for example, D. Harris, *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia 1849-1925* (Vancouver: UBC Press, 2008), 18-21.
4. Indian and Northern Affairs Canada, *A History of Treaty Making* (Gatineau: Indian and Northern Affairs Canada, 2010), https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ap_htmc_treatliv_1314921040169_eng.pdf.
5. On the proportion of lands set aside as reserves, see C. Harris, *Making Native Space: Colonialism, Resistance and Reserves in British Columbia* (Vancouver: UBC Press, 2002), 66. On the Indigenous and non-Indigenous populations in 1870, see Statistics Canada, *Census of Canada 1865-1871*, <http://statcan.gc.ca/pub/98-187-x/4151278-eng.htm>. See also estimates of the overall population at BC Statistics, *Census Population of BC and Canada*, <http://www.bcstats.gov.bc.ca/StatisticsBySubject/Census/2011Census/PopulationHousing/BCCanada.aspx>
6. J.D. Belshaw, *Canadian History: Post-Confederation*, Section 2.3 “British Columbia and the Terms of Union (Vancouver: BC Open Textbook Project, 2016), <https://opentextbc.ca/postconfederation/chapter/2-3-british-columbia-and-the-terms-of-union>.
7. Harris, *Making Native Space*.
8. BC Statistics, *BC Census 1871-2011* and 2016 census figures, <http://www.bcstats.gov.bc.ca/StatisticsBySubject/Census/2016Census/PopulationHousing.aspx>.
9. D. Madill, *Treaty Research Report — Treaty No. 8 (1899)* (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986). See also *West Moberly First Nations v. BC* 2017 BCSC 1700.
10. See *Federal and Provincial Collections of Minutes of Decision, Correspondence, and Sketches* — Materials produced by the Joint Indian Reserve Commission and Indian Reserve Commission, 1876-1910, <http://jirc.ubcic.bc.ca>. Joint federal-provincial efforts on reserves included the Indian Reserve Commission, 1876-78, Indian Reserve Commissioner 1881-97, McKenna-McBride Commission 1912-16, Ditchburn-Clark inquiry 1920 and several agreements touching on reserves in 1929, 1930, 1934 and 1938. See Harris, *Making Native Space*, 260-61.
11. It remains to be seen what impact the recent Supreme Court of Canada decision in *William Lake Indian Band v. Canada* 2018 SCC 4 has on both federal and provincial strategies on cost-sharing land claim settlements. While the case involved the Imperial Crown’s fiduciary duties around a recognized village site, it may foster BC’s long-held position that pre-Confederation liabilities toward First Nations passed to Ottawa with the Union.
12. Harris, *Making Native Space*. The resistance was sometimes violent (e.g., 1864 Tsilhqot’in War), but in other instances, there were appeals to the British Imperial government and

- courts (e.g., 1909 Cowichan and 1913 Nisga'a petitions to the Judicial Committee of the Privy Council). Its most significant effect was to provoke a provision in the 1927 *Indian Act* forbidding Indigenous nations from hiring lawyers to press their demands.
13. *Calder v. BC* [1973] SCR 313, the James Bay Cree's successful injunction application against Quebec and Hydro-Québec in 1973 and *Paulette v. The Queen* [1977] 2 SCR 628.
 14. *Calder v. BC*.
 15. C. McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: UBC Press, 2014).
 16. *Report of the British Columbia Claims Task Force*, 1991, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/report_british_columbia_claims_task_force_full.pdf.
 17. *Claims Task Force*, 10.
 18. *Treaty Commission Act*, RSBC 1996, c. 461, and *British Columbia Treaty Commission Act*, SC 1995, c. 45.
 19. Tsawwassen First Nation Final Agreement, December 6, 2007, <https://www.aadnc-aandc.gc.ca/eng/1100100022706/1100100022717>.
 20. The BC Treaty Commission reports that 65 First Nations, representing 105 current or former *Indian Act* bands out of the 200 bands in BC, either have completed treaties or are in the treaty process. However, active or completed negotiations involve 40 First Nations representing less than half the bands in the province. BC Treaty Commission, *Reconciling Prosperity: BC Treaty Commission Annual Report 2017*, http://www.bctreaty.ca/sites/default/files/BC_Treaty_Commission_AR2017.pdf.
 21. Auditor General of Canada, *Report of the Auditor General of Canada*, November 2006, Chapter 7 — Federal Participation in the British Columbia Treaty Commission — Indian and Northern Affairs Canada, <http://www.oag-bvg.gc.ca/internet/docs/20061107ce.pdf>. D. Eyford, QC, *A New Direction: Advancing Aboriginal and Treaty Rights* (Ottawa: Canada, 2015), <http://www.aadnc-aandc.gc.ca/eng/1426169199009/1426169236218>.
 22. See, for example, *Multilateral Engagement Process to Improve and Expedite Treaty Negotiations in British Columbia* approved by BC, Canada and First Nations Summit on May 24, 2016, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/multilateral_engagement_process_for_treaty_-_june_7_2016.pdf.
 23. BC Statistics, *Population Estimates*, <https://www2.gov.bc.ca/gov/content/data/statistics/people-population-community/population/population-estimates>.
 24. BC Statistics, *B.C. Economic Accounts and Gross Domestic Product*, <https://www2.gov.bc.ca/gov/content/data/statistics/economy/bc-economic-accounts-gdp>. BC's gross domestic product from all industries was \$218.8 billion (2016) of which 75 percent (\$164.7 billion) was from service-producing industries. GDP from natural resources (agriculture, forestry, fishing, hunting, mining, quarrying and oil and gas extraction including support activities) was below 10 percent (\$15 billion). See *B.C. Gross Domestic Product at Basic Prices using North American Industry Classification System (1991-2016)*. Similar figures can be found regarding the split of employment among sectors. Employment in all industries was 2.4 million people (2016), of which 1.9 million were in service industries, while natural resources accounted for around 75,000 jobs. BC Statistics, *Number of Businesses & Employment by Industry*, <https://www2.gov.bc.ca/gov/content/data/statistics/business-industry-trade/number-of-businesses-and-employment-by-industry>.

25. See, for example, BC's analysis based on the 2011 census. BC Statistics, *Census Statistical Profiles of Aboriginal Peoples*, <https://www2.gov.bc.ca/gov/content/data/statistics/people-population-community/aboriginal-peoples-bc/census-profiles-aboriginal-peoples/apps-aboriginal-profiles>.
26. Statistics Canada, *Aboriginal Peoples Highlight Tables, 2016 Census*, <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/abo-aut/index-eng.cfm>.
27. *Delgamuukw v. British Columbia* [1997] 3 SCR 1010.
28. *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44.
29. *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
30. See Yale Belanger's review of the changing provincial policy: Y. Belanger, "The Road to 'Reconciliation'? Premier Gordon Campbell and BC Aboriginal Policy," in *The Campbell Revolution? Power, Politics and Policy in British Columbia*, ed. J.R. Lacharite and T. Summerville (Montreal: McGill-Queen's University Press, 2017), 61-88.
31. *Campbell v. BC, Canada and Nisga'a Nation* 2000 BCSC 1123.
32. Elections BC, *Report of the Chief Electoral Officer on the Treaty Negotiations Referendum* (Victoria: Elections BC, 2002), <http://elections.bc.ca/docs/refreportfinal.pdf>. The referendum was seen as socially divisive and costly, at \$3 million, and it drew less than 40 percent of eligible electors, even if they approved six generally worded principles.
33. *Haida Nation v. BC* 2002 BCCA 462.
34. *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
35. British Columbia Speech from the Throne 2003. Accessed November 16, 2017. https://www.leg.bc.ca/content/legacy/web/37th4th/Throne_Speech_4th_37th.pdf
36. *BC Speech from the Throne*, 2009.
37. B. Tieleman, "BC Conservative Party Blasts BC Liberals Not Consulting Business, Public on Recognition and Reconciliation Act affecting First Nations Land Claims," March 16, 2009, <http://billtieleman.blogspot.ca/2009/03/bc-conservative-party-blasts-bc.html>. A. Manuel, "Beware of B.C.'s proposed Recognition and Reconciliation Act," *Georgia Straight*, July 22, 2009, <https://www.straight.com/article-241616/beware-reconciliation-act>. S. Hui, "B.C. Recognition and Reconciliation Act Is Dead, First Nations Chiefs Say," *Georgia Straight*, August 28, 2009, <https://www.straight.com/article-253718/bcs-recognition-and-reconciliation-act-dead-first-nations-chiefs-say>.
38. See, for example, the 2015 *British Columbia-First Nations Proposed Commitment Document*, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/bc_-_fn_commitment_document__oct_1_2015.pdf.
39. J. Hunter, "Litigation In as Recognition, Reconciliation Out," *Globe and Mail*, January 5, 2010, <https://www.theglobeandmail.com/news/british-columbia/litigation-in-as-recognition-reconciliation-out/article1206834/>.
40. The Nisga'a Final Agreement was negotiated under a separate regime that predates the Process. The Process has resulted in treaties with the Tsawwassen First Nation (April 3, 2009), Maa-nulth First Nations (April 1, 2011) and Tla'amin Nation (April 5, 2016). A final agreement with the Yale First Nation (2013) is now being implemented, while the final agreement with the Lheidli T'enneh Band (2007) has not yet been ratified by the community.
41. The BC government's website has the full texts of the agreements with First Nations (BC Agreements), <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations>.

42. The term “territories” is used to capture rights to land, waters and associated resources reflected in Canada’s legal order as Aboriginal rights and title.
43. *The New Relationship*, 2005, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/new_relationship_accord.pdf.
44. Department of Justice Canada, *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*, July 14, 2017, <http://www.justice.gc.ca/eng/csjsj/principles-principes.html>. Department of Justice Canada, *Government of Canada Sets a Principled Foundation for Advancing Renewed Relationships with Indigenous Peoples Based on the Recognition of Rights*, July 14, 2017, https://www.canada.ca/en/department-justice/news/2017/07/government_of_canadasetsaprincipledfoundationforadvancingrenewed.html.
45. *The New Relationship* (2005) articulated the province’s goals as to make BC the best-educated jurisdiction on the continent; to lead the way in North America in healthy living and physical fitness; to build the best system of support in Canada for persons with disabilities or special needs, children at risk and seniors; to lead the world in sustainable environmental management; and to create more jobs per capita than elsewhere in Canada.
46. See, for example, the mandate letter to the Minister of Energy, Mines, and Petroleum Resources, <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/mungall-mandate.pdf>.
47. Similar commitments have been made by many other provinces and territories, though to date they have had modest impacts on public policy.
48. D. Meissner, “B.C. Indigenous Leader Praises Horgan’s Commitment to First Nations Issues,” *Globe and Mail*, July 25, 2017, <https://www.theglobeandmail.com/news/british-columbia/leader-praises-horgans-commitment-to-first-nations-issues/article35801926>. J. Hunter, “Horgan’s Acknowledgment of Unceded Indigenous Territory a Milestone for B.C.,” *Globe and Mail*, October 22, 2017, <https://www.theglobeandmail.com/news/british-columbia/horgans-acknowledgment-of-bcs-unceded-territory-part-of-a-path-forward/article36686705>. D. Meissner, “First Nations Treaties, Revenue Sharing Top Priorities with B.C. NDP Government,” CTV News, July 25, 2017, <http://www.ctvnews.ca/politics/first-nations-treaties-revenue-sharing-top-priorities-with-b-c-ndp-government-1.3519062>.
49. *The New Relationship* (2005).
50. The Transformative Change Accord (2005) is a 10-year, tripartite agreement signed in 2005 between the province, the federal government and Indigenous nations represented by the BC Assembly of First Nations, First Nations Summit, and the Union of British Columbia Indian Chiefs. It was signed by the Paul Martin government on the eve of the 2005 federal election. The federal Conservative government distanced itself from the agreement, but BC continues to cite the accord as part of its policy framework, https://www2.gov.bc.ca/assets/gov/zzzz-to-be-moved/9efbd86da302a0712e6559bdb2c7f9dd/9efbd86da302a0712e6559bdb2c7f9dd/agreements/transformative_change_accord.pdf
51. Government of British Columbia, *Reconciliation & Other Agreements*, <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/reconciliation-other-agreements>.
52. For information on the different policies and types of agreements, such as strategic engagement agreements with mutually agreed-upon procedures for consultation and accommodation, see Government of British Columbia, *First Nations Negotiations*,

- <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations>.
53. See Integrated Land Management Bureau, *A New Direction for Strategic Land Use Planning in BC: Synopsis* (Victoria: British Columbia 2006), 3, https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/policies-guides/new_direction_synopsis.pdf. See, for example, the Great Bear Rainforest ministerial order, <http://extwprlegs1.fao.org/docs/pdf/bc164238.pdf>.
 54. Resource revenues come from forestry, new mines and major mine expansions within Indigenous traditional territory and water and/or land rentals from clean energy projects that impact their traditional territory on the basis of provincial resource rents (land and water rentals). Government of British Columbia, *Natural Resource Stewardship*, <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship>.
 55. British Columbia Ministry of Aboriginal Relations and Reconciliation, *Factsheet: Reconciliation at the Heart of Relationship with Aboriginal Peoples*, April 2017, <https://news.gov.bc.ca/factsheets/factsheet-reconciliation-at-the-heart-of-relationship-with-aboriginal-peoples>.
 56. *Factsheet: Reconciliation*. A breakdown of payments to individual First Nations and Aboriginal organizations by department can be found in British Columbia Office of the Comptroller General, *Public Accounts 2016/17 Consolidated Revenue Fund: Detailed Schedules of Payments for the Fiscal Year Ended March 31, 2017*, http://www.fn.gov.bc.ca/OCG/pa/16_17/CRF%20Detailed%20Schedules%20of%20Payments.pdf.
 57. Private communication with BC Ministry of Indigenous Relations and Reconciliation on November, 20 2017. Current forecasts for annual revenue sharing: mineral tax sharing of \$17.8 million as the result of sharing up to 37.5 percent of mineral taxes from eligible mines; forestry revenue sharing of \$34.3 million in stumpage revenue, with an additional \$13.9 million from forestry, though not directly linked to stumpage revenues; and clean energy revenue sharing (under the FN Clean Energy Business Fund) of \$4.6 million from up to 37.5 percent of land and water rentals received from eligible clean energy projects. Resource revenues can be highly variable so these reflect best available estimates as of November 2017.
 58. British Columbia Ministry of Finance, *Estimates: Fiscal Year Ending March 31, 2018*, http://bcbudget.gov.bc.ca/2017/estimates/2017_Estimates.pdf.
 59. For example, the Northwest Territories where up to 25 percent of resource revenues can be shared with Indigenous governance institutions. See J. Sabin, *A Federation within a Federation? Devolution and Indigenous Government in the Northwest Territories*, IRPP Study 66 (Montreal: Institute for Research on Public Policy, 2017). Another example is Ontario, where since 2011, 1.7 percent of all gross gaming revenue generated by Ontario Lottery and Gaming Corporation goes to First Nations; this is estimated to generate approximately \$3 billion by 2033. See Ontario First Nations (2008) Limited Partnership, *About Us*, <http://www.ofnlp2008.org/aboutUs.asp>.
 60. Haida Nation, *Documents and Agreements*, http://www.haidanation.ca/?page_id=56
 61. BC Agreements.
 62. Coast Funds, *Kunst'aa Guu-Kunst'aayah — Moving to a Sustainable Future Together*, <https://coastfunds.ca/stories/kunsta-guu-kunstaayah-reconciliation-protocol-moving-to-a-sustainable-future-together/>.
 63. SBC 2010, c. 17. In addition to the statute's main focus — authorizing provincial authorities to implement their part of the protocol — its preamble describes the Kunst'aa

- guu-Kunst'aayah Reconciliation Protocol “as representing the development of a new relationship between the Haida Nation and British Columbia” and an “incremental step in the process of the reconciliation of the Haida and Crown titles” to “guide joint decision-making regarding land and natural resource management on Haida Gwaii.”
64. R. Simms, M. Phare, O. Brandes, and M. Miltenberger, “Collaborative Consent as a Path to Realizing UNDRIP,” *Policy Options* (Montreal: Institute for Research on Public Policy), January 2018, <http://policyoptions.irpp.org/magazines/january-2018/collaborative-consent-as-a-path-to-realizing-undrip>.
 65. J. Townsend, *On Haida Terms: Self-Determination and Land Use Planning in Haida Gwaii*, MA Thesis, January 2009, University of Toronto, <http://www.collectionscanada.gc.ca/obj/thesescanada/vol2/002/MR51605.PDF>.
 66. Musqueam Indian Band, *Our Story*, <http://www.musqueam.bc.ca/our-story>.
 67. BC Agreements.
 68. Lax Kw'aalams Band, *Indigenous Richness and Originality*, <http://laxkwalaams.ca/>.
 69. BC Agreements.
 70. Tsilhqot'in Nation, *Our National Government*, <http://www.tsilhqotin.ca>. *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44.
 71. BC Agreements.
 72. In recent years, BC has been largely successful in convincing courts of the legal soundness of its approach. See, for example, *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* 2017 SCC 54.
 73. For example, see media stories about how Indigenous nations' approvals of development projects are expected to drive their own economic opportunities. The Canadian Press, “B.C. First Nation Signs Agreement with Province over Land, Resource Talks,” CBC News, February 12, 2016, <http://www.cbc.ca/1.3446885>. The Canadian Press, “‘This Is the Way Forward’: First Nations Hail New Deal with B.C. Government,” *Financial Post*, May 8, 2014, <http://business.financialpost.com/commodities/energy/b-c-first-nations-hail-new-way-forward-for-business>. G. Hoekstra and L. Pynn, “First Nations Staking Their Claims in the B.C. Economy,” *Vancouver Sun*, April 6, 2015, <http://www.vancouversun.com/life/first+nations+staking+their+claims+economy/11094723/story.html>.
 74. Recent disputes between the Haida and BC over forestry management in Haida Gwaii will be informative in this regard. A. Kurjata, “Tension Escalates in Haida Gwaii Forestry Dispute: Haida Nation Says Province Doesn't Have Permission to Grant Logging Contracts,” CBC News, December 14, 2017, <http://www.cbc.ca/news/canada/british-columbia/forestry-haida-gwaii-cuts-1.4449770>.
 75. See, for example, the work of the Business Council of BC, <http://www.bcbc.com/publications/aboriginal>.



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