

Alternatives to Treaty: Evaluating BC's Approach to Accommodation Agreements

by

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Abstract

The problems associated with the BC government's approach to non-treaty agreements stem from an unpredictable variety that does not ensure certainty for investors, nor equity for First Nations. The province is taking positive steps, through the New Relationship, to find ways of reconciling assertions of Crown sovereignty and Aboriginal title in BC. This paper completes a two-step policy analysis of this issue through literature and background reviews, a case study analysis and key informant interviews. In order to address these specific problems, there needs to be a standardized, base-level content minimum for consultation and accommodation agreements. This will not become a cookie-cutter approach with template agreements, but rather a set of minimum standards on which to begin negotiations. This approach provides certainty, clarity and equality. Implementing this basket of standards through legislation will ensure the necessary certainty and equality to move forward with non-treaty agreements.

Keywords: Non-treaty agreements; consultation and accommodation; aboriginal rights and title; aboriginal negotiations; lands and resource use

Dedication

For Eva Leigh,

In the hopes that my generation makes the world a better place for yours.

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List of Acronyms

BSA	Benefit Sharing Agreement
ECDA	Economic and Community Development Agreement
FRO	Forest and Range Opportunity Agreements
FRSA	Forest Revenue Sharing Agreement
G2G	Government-to-Government
MARR	Ministry of Aboriginal Relations and Reconciliation (BC)
NTL	Northwest Transmission Line
PIB	Penticton Indian Band
SCC	Supreme Court of Canada
SEA	Strategic Engagement Agreement
SSN	Stk'emlúpsenc of the Secwepemc Nation
TRT	Taku River Tlingit
UBCIC	Union of British Columbia Indian Chiefs
UN DRIP	United Nations Declaration on the Rights of Indigenous Peoples

Executive Summary

British Columbia is a hotspot for the policy work surrounding the recognition and reconciliation of largely undefined aboriginal rights and title with the assertion of Crown sovereignty. One way that the provincial government works with First Nations to reconcile their rights and title claims with the economic needs of a resource dependent provincial economy is to seek out various accommodation agreements. These agreements, completed outside of the BC Treaty Process, come in a wide variety of shapes and sizes, addressing everything from specific mining projects to entire land use plans over wide ranges of habitats and resources.

The policy problem I address in this report is as follows: British Columbia's approach to accommodation agreements with First Nations lacks consistency. This absence of a standardized policy framework for approaching non-treaty agreements leads to inconsistency in their application, uncertainty around land and resource development and a chilly investment climate clouded with unpredictability. Additionally, this has the potential to lead to inequity and unfairness among First Nations in BC and may favour those First Nations with the resources and capacity to negotiate agreements.

In order to fully understand and analyze this problem, I use various methodological approaches. First of all, a comprehensive background and literature review, including relevant Supreme Court decisions and policy statements, provide context for the problem as well as offer partial solutions. Key informant interviews provide more in-depth information and expert opinions into this matter. Next, I examine six agreements in a case study format in order to assess the variety in these agreements. Finally, the report concludes with a two-step multi-criteria policy analysis to address the idea of minimum content standards in these agreements and implementation options.

I interviewed representatives from five distinct groups: provincial government employees from the Ministry of Aboriginal Relations and Reconciliation, First Nations organizations, provincial politicians, legal experts, and private industry. Four main

themes arose in the interviews. The first was how these non-treaty agreements impacted the BC Treaty Process. Here, opinion was mixed, with some believing it had positive, trust-building effects, while others say that these non-treaty agreements replaced the need to complete comprehensive tripartite treaties. The next main theme was the challenges posed by the windfall concept. This refers to the idea that a First Nation whose traditional territories include large amounts of profitable resources will be in a better negotiating position, and will receive more attention from the provincial government, than those without these plentiful resources. Another main theme that arose was resource revenue sharing. Key informants noted that providing First Nations with a share of provincial revenues garnered from resource development was an important source of income but the current program has some limitations. Finally, key informants all pointed to the lack of financial, human resources and negotiating capacity within First Nations communities as a detriment to the ability to develop non-treaty agreements.

Taking into account the literature and background review and the key informant interviews, it became clear that a good consultation and accommodation agreement includes First Nation decision-making power over traditional territories as well as economic certainty over lands in the province. This ensures both aboriginal and provincial objectives are addressed through these agreements.

Variety in non-treaty agreements is both a blessing and a curse. Content measures aimed to address geographic resource realities are very beneficial to ensuring good consultation and accommodation agreements. These differences allow the agreement to be specifically tailored to the needs, wants and realities of each First Nation, without limiting their ability to allow for good consultation and accommodation. This flexibility allows provincial negotiators to avoid the problems, both legal and practical, of cookie-cutter templates, like those struck down by the court decisions *Huu-ay-aht* and *Wil'litswx*.

Variety in content measures in consultation and accommodation is not entirely positive. Applying different content inclusions in different situations without any clear explanation leads to uncertainty and unpredictability around the negotiating process. First Nations, industry representatives and even provincial government employees are

unsure as to what to expect from these agreements. Often, a First Nation must rely on strong human resources, financial and negotiating capacity in order to secure good consultation and accommodation measures. This results in unequal treatment of First Nations in British Columbia. So the question arises: How to limit the harmful variety in non-treaty agreements while preserving the important flexibility?

The provincial government should adopt a set of minimum standards to include in consultation and accommodation agreements to address problems arising from variety of content. This basket of minimum standards would help to standardize negotiations and bring equality to the process. It is important to note that the implementation of minimum standards is not a move towards formula-based approaches or cookie-cutter agreements. Ensuring minimum content inclusions allows for the variability of First Nations' situations in BC while also permitting aboriginal communities in BC to have equitable footing in entering into these negotiations with the province.

After evaluating a wide variety of possible content inclusions against a set of ten comprehensive criteria, the analysis shows that the following content measures should be included in a minimum basket of standards for all non-treaty agreements.

- Resource Revenue Sharing
- Economic Accommodation
- Implementation Funding
- Engagement Framework
- Business Participation
- Government to Government Forum
- Dispute Resolution
- Land Use Plans
- Socio-Economic Objectives

In order to implement this minimum basket of standards, I analyzed four options against a set of six criteria. Based on the multi-criteria analysis, I recommend implementing the minimum basket of standards through specific legislation. It would provide high levels of certainty for the province and would be feasible for the legislature to effect. Private industry and the business community would benefit from the standardization and predictability of such reliable legislation. It would legislate equal treatment of First Nations at the negotiating process.

Implementing a minimum basket of standards through specific legislation is a positive step in the right direction. No policy option is perfect and none will ultimately bring a definitive end to all the aboriginal rights and title issues in British Columbia. But, with the provincial government is in a place where it can make informed, pragmatic decisions to move towards reconciliation in British Columbia.

1. Introduction: Defining the Policy Problem

After a century and a half long policy of denying aboriginal rights and title in Canada, there has been a recent flurry of activity in the area. British Columbia in particular, with its lack of formalized treaties, is a hotspot for the policy work surrounding the recognition and reconciliation of largely undefined aboriginal rights and title with the assertion of Crown sovereignty.

One way that the provincial government has attempted to work with First Nations and reconcile their rights and title claims with the economic needs of a resource dependent provincial economy is to seek out various accommodation agreements. For the purposes of this study, consultation and accommodation agreements mean any agreements entered into between the province and a First Nation that are outside of the treaty process that include any amount of consultation and accommodation measures. Other terms for these agreements are non-treaty agreements, benefit sharing agreements, and impact benefit agreements. These consultation and accommodation agreements come in a wide variety of shapes and sizes, addressing everything from specific mining projects to entire land use plans over wide ranges of habitats and resources.¹

The approach to these non-treaty agreements by the provincial government has not been consistently applied and lacks grounding in any standardized policy. Provincial staff negotiate and implement these agreements, of which there are approximately 200 in various forms, independently without reference to any formulated guidelines. Why do some agreements only include a cash transfer while others add resource revenue

¹ For the purposes of this report, I will use the terms consultation and accommodation agreements, accommodation agreements and non-treaty agreements interchangeably, in order to avoid repetition and reader fatigue.

sharing and capacity development clauses? Why do some recognize resource tenures and others do not? Why do some include co-management while not others? This lack of standardization leads to a whole host of problems such as differences in the equity of treatment of First Nations. This also has the potential to unfairly advantage those First Nations who possess the financial capacity and human resources to field a strong negotiating team. This leaves those First Nations without such capacity at a weaker bargaining position and ultimately receiving less benefits.

Not only that, operating without a standardized approach to non-treaty agreements puts the province at a greater risk of being sued in court by affected First Nations groups. Aboriginal rights and title cases are expensive, time-consuming and tiresome for all involved. Additionally, court cases regarding aboriginal rights and title contribute to a very chilly investment climate for BC. With our economy so dependent on foreign investment for resource extraction projects, it is in the province's best interest to avoid litigation with First Nations and settle rights and title issues fairly and equally through negotiations.

This study addresses the following policy problem: **British Columbia's approach to accommodation agreements with First Nations lacks consistency. This absence of a standardized policy framework for approaching non-treaty agreements leads to inconsistency in their application, uncertainty around land and resource development and a chilly investment climate clouded with unpredictability. Additionally, this has the potential to lead to inequity and unfairness among First Nations in BC and may favour those First Nations with the resources and capacity to negotiate agreements.**

My research questions which stem from this are: **Should the British Columbia government create a baseline policy directive on approaching consultation and accommodation agreements in order to provide for a greater degree of standardization? What kind of standards should the government use to assess accommodation agreements? How should minimum standards be implemented into these agreements?**

In this study, I use three methodologies to answer the research questions. First a comprehensive background and literature review provides a scan of the relevant information on this subject. Next I assess six different accommodation agreements in a case study format. Using information gained from the literature review and background I assess the value of consultation and accommodation measures in these agreements. I also use these case studies to highlight the similarities and differences across these non-treaty agreements. My next research method is key informant interviews. These allow me important insight into the major issues surrounding non-treaty agreements in BC.

The report concludes with a policy analysis. Here, I use all the information in the report to compile a list of potential content options for consultation and accommodation agreements. I then evaluate these according to set of criteria, also informed by the research. I arrive at a minimum basket of standards and then turn to implementation options. I evaluate four separate implementation options using a multi-criteria analysis framework. This involves compiling a list of criteria to measure and compare the relevant implementation options. I conclude with policy recommendations for the provincial government.

2. Background: Consultation in BC

Non-treaty consultation and accommodation agreements have a very short history in British Columbia. Yet, BC is home to some of the most storied and dramatic aboriginal land claims issues in the country. A history of the provincial government's approach to non-treaty agreements is incomplete without a look back into the recent history of aboriginal rights and title development in land claims, court cases and public policy.

2.1. Significant Court Cases

Up until the early 1970's, federal and provincial policy makers largely ignored aboriginal rights and title claims. This was underscored by the White Paper proposal from Prime Minister Pierre Trudeau's liberal government that sought to abolish the *Indian Act* and any special status for Indians. In fact, when musing on whether or not aboriginal rights existed in Canada, Trudeau emphatically claimed in Vancouver in 1969 that "our answer is 'No.'"²

Things took a significant turn in 1973 with the Supreme Court of Canada's (SCC) ruling on *Calder v. British Columbia (Attorney General)*. In this case, brought forth by the Nisga'a Nation of BC, the SCC ruled that aboriginal rights and title had indeed existed in Canada prior to European contact. The SCC was split on whether or not the Nisga'a claim to the land was valid – a question of whether the Crown had already extinguished aboriginal title. But the ruling that aboriginal rights had at one time existed,

² Prime Minister Pierre Trudeau. "Remarks on Indian Aboriginal and Treaty Rights." Part of a Speech given August 8, 1969 in Vancouver. <
<http://ycdl4.yukoncollege.yk.ca/~agraham//nost202/trud1.htm>>

and thus may continue to exist in non-treaty areas, opened the door for a whole new era of aboriginal rights and title claims.

Aboriginal rights and title were legally recognized and affirmed by section 35 of the *Constitution Act, 1982*. This put the onus on the Crown to confirm and protect aboriginal rights and title. Section 35 did not name what aboriginal rights and title were, where they existed or how they applied. It was left to government policy, court decisions and the common law to fill in this “empty box.”³ This approach to rights and title law, from a legal standpoint, is “both unprecedented and vague.” Its unique situation created a complex legal doctrine within Canadian common law.⁴

The Supreme Court of Canada addressed Section 35 rights in the 1990 case *R v Sparrow*. Here, the SCC ruled that Aboriginal rights exist and that the government cannot unilaterally infringe upon these rights.⁵ In the first mention of the duty to consult, the Court here stressed that in upholding the honour of the Crown, governments must work to minimize infringements and award compensation if necessary.⁶ In terms of resource allocation, this decision gave the Musqueam First Nation priority to the Pacific salmon fishery to address the infringement upon their Section 35 rights.⁷

Following *Sparrow*, which concerned Aboriginal rights, the SCC’s ruling on *Delgamuukw v. British Columbia* in 1997 confirmed the existence of aboriginal title in BC and defined its unique meaning of ownership.⁸ The SCC described aboriginal title as encompassing “the right to use the land held pursuant to that title for a variety of

³ Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples*, Purich: Saskatoon, 2009: 14.

⁴ Thomas Isaac and Anthony Knox, “Canadian Aboriginal Law: Creating Certainty in Resource Development,” *Journal of Energy and Natural Resource Law* 25.4 (Nov 2004): 428-439.

⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

⁶ Maria Morellato, *The Crown’s Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights*, National Centre for First Nations Governance Research Paper, Feb 2008: 8-9.

⁷ Morellato, *The Crown’s Constitutional Duty to Consult*, 7.

⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

purposes.”⁹ The Court specifically referred to consultation and accommodation in terms of resource development. The ruling stated that the Crown must consult with aboriginal communities in land-use decision-making processes.¹⁰ It added that Aboriginal title has an inherent economic aspect to it that must be acknowledged.¹¹ The Court stated that the Crown must pro-actively address potential infringements of Aboriginal title. Yet, the Court maintained that the Crown can infringe upon aboriginal rights and title for the greater economic good of society, as long as the Aboriginal group is properly consulted and accommodated. The proper procedures are expressed in what the courts refer to as the duty to consult, or Consultation requirements.

In 2004 the SCC ruled on two cases that again affected the BC Government’s relationship with First Nations.¹² *Haida Nation v British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* expanded on the duty to consult and accommodate outlined in both *Sparrow* and *Delgamuukw*.¹³ Chief Justice McLachlin asserted that the Crown must consult with First Nations prior to any perceived action that may infringe upon aboriginal rights or title. Also, the Crown’s duty to consult is not limited to proven aboriginal rights and title, but arises prior to proof.¹⁴ This is especially important in BC, where the vast majority of the land is not subject to historical treaties and aboriginal groups have asserted their claims to aboriginal title over the entire land mass.

Chief Justice McLachlin iterated that the content and scope of the duty to consult and accommodate is very contextual and fact-specific. The scope of the duty to consult is determined by a spectrum of possibilities: the stronger the *prima facie* evidence of

⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para 117.

¹⁰ Morellato, *The Crown’s Constitutional Duty to Consult*, 19.

¹¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; Morellato, *Crown’s Constitutional Duty to Consult*, 20-21.

¹² Newman, 9

¹³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.

¹⁴ Newman, 14; Morellato, *The Crown’s Constitutional Duty to Consult*, 24.

claim and the stronger the potential adverse impact on those claims, the richer is the duty to consult. Consultation measures also lie upon a spectrum, from minimal notice to the accommodation of rights and title. So, the Crown's consultation strategy must be approached differently in each situation.¹⁵ The Court added that consultation should take place at the strategic and policy-making level in order to be effective and not just at the operational level of government decision-making.¹⁶

Other significant court cases followed *Haida/Taku*. The 2007 *Tsilhqot'in v British Columbia* ruling marked the first time that a court ruled that aboriginal title over specific lands existed.¹⁷ This was, however, a non-binding decision wherein Justice Vickers could not legally award title due to the manner in which the case was argued. The decision stated that shared decision-making processes and consensus building activities are necessary components to meaningful consultation practices. This builds upon the insistence in *Haida/Taku* that consultation go beyond operational decisions and extend to strategic, policy and legislative decision-making.

Justice Vickers went on to criticize the Crown for limiting their acknowledgement of aboriginal title during treaty negotiations and not approaching the ideas outside the process.¹⁸ In his words, "provincial policies either deny Tsilhqot'in title and rights or steer the resolution of such title into a treaty process that is unacceptable to the plaintiff."¹⁹ This decision's significance is yet unknown as all three parties are currently appealing it. But the possible determination that title exists, and the insistence that consultation and accommodation includes strategic level decision-making is significant to the future of non-treaty agreements in BC.

¹⁵ Newman, 59; Morellato, *The Crown's Constitutional Duty to Consult*, 29.

¹⁶ Morellato, *The Crown's Constitutional Duty to Consult*, 26.

¹⁷ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700; Morellato, *The Crown's Constitutional Duty to Consult*, 53; Pricewaterhouse Coopers, 44.

¹⁸ Meyers Norris Penny, LLP, *Best Practices for Consultation and Accommodation*, prepared for the New Relationship (Sep 2009): 6; Pricewaterhouse Coopers, *Financial and Economic Impacts of Treaty Settlement in British Columbia*, prepared for the BC Treaty Commission (2009): 47; Morellato, *The Crown's Constitutional Duty to Consult*, 55.

¹⁹ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para 1137.

The *Wil'litswx v. BC* (2008) case found that in honouring their duty to consult and accommodate, the Crown must acknowledge the distinct features of the aboriginal group with whom they are engaging.²⁰ The province cannot justify cookie-cutter templates if they are not attuned to the complex differences of BC's First Nations in non-treaty agreements. This expands upon the 2005 BC Supreme Court decision involving the Huu-ay-aht First Nations. This stated that good faith negotiations must go beyond any one-size-fits-all approach, and per capita allocations and population based formulas are not acceptable in satisfying the Crown's duty to consult and accommodate.²¹

The development of the common law around aboriginal rights and title demanded that the provincial government take proactive steps to honour these rights and title. In British Columbia, the vast majority of aboriginal rights and title have not been extinguished or altered into codified treaty rights, leaving them undefined. Because of this, federal and provincial governments looked to the treaty process to address these issues and approach reconciliation.

2.2. BC Treaty Process

The provincial government of British Columbia entered into the treaty process in 1993 with the creation of the BC Treaty Commission. Litigation, court decisions, protests and blockades were significantly harming the provincial government's political, social, and economic reputation. Negotiating tripartite treaties with Canada and First Nations was the best way to reconcile aboriginal claims while also ensuring economic certainty for provincial resource development.

²⁰ Pricewaterhouse Coopers, 43.

²¹ *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.* (2005) BCSC 697; Ben Parfitt, *True Partners: Charting a New Deal for BC, First Nations and the Forests We Share*, Canadian Centre for Policy Alternatives, Resource Economics Project (Vancouver, January 2007): 20.

Uncertainty, in the economic sense is one of the main reasons that BC governments, whether NDP or Liberal, have pursued the treaty project. As SCC cases show, aboriginal rights and title to land do exist in BC and have not been extinguished by either treaties or assertion of Crown sovereignty. Title over land is not assured. Those who seek to invest major amounts of capital into resource development are wary to commit money to lands without clear property and development rights. As BC is a resource-dependent economy, anything that threatens the investing climate is highly undesirable for the provincial government.

On the other hand, certainty over title to land provides stability that fosters investment and leads to long term economic benefits for the province.²² In order to obtain complete and final certainty, undefined aboriginal rights and title named in Section 35 must be transformed into explicit treaty rights through the completion of a finalized treaty.²³ A treaty modifies existing uncertain and un-codified rights into specific rights set out in the treaty. Certainty, and the stability and predictability that flow from it, remain one of the main drivers behind the provincial government's desire to complete comprehensive treaties.²⁴

The British Columbia Treaty Process involves BC First Nations, the provincial government, the federal government and the BC Treaty Commission (the independent keepers of the process). The process is split up into a six-stages of negotiations with the ultimate goal of a comprehensive, modern treaty that becomes constitutionally protected under Section 35. The treaty process does not take place in a static, controlled environment; instead treaty negotiations occur within a changing social, political and

²² Christopher Alcantara, "Old Wine in New Bottles? Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements," *Canadian Public Policy* 35.3 (Sep 2009): 382.

²³ Carole Blackburn, "Searching for Guarantees in the Midst of Uncertainty: Negotiating Aboriginal Rights and Title in British Columbia," *American Anthropologist* 107.4 (2008): 586.

²⁴ Tony Penikett, *Reconciliation: First Nation Treaty-Making in British Columbia*, Douglas & McIntyre: Vancouver, 2008: 146.

legal landscape.²⁵ This has led to some problems with the process since its creation in the early 1990s.

Although the Supreme Court continually reiterates that negotiating is the preferred avenue for reconciliation, the BC Treaty Process has not worked as effectively or efficiently as all participants originally hoped. Problems arise due to the inflexibility of government mandates, power inequalities, incomplete First Nations participation, the extremely slow pace, and resulting increases in negotiations costs.²⁶

The federal and provincial governments negotiate treaties with a per capita land and cash settlement offer. This approach is fairly limited and it creates an inflexible position for the senior levels of government, as they cannot explore more creative solutions within treaties.²⁷ Even when government negotiators toy with the idea of a new approach, they must seek approval of the mandate from central agencies. This requires much more time and slows down an already lengthy process.

Christopher Alcantara, an aboriginal rights scholar, posits that Aboriginal groups occupy a much weaker position in negotiations and must accept western forms of knowledge, proof and discourse.²⁸ In order to avoid damage to communities, lands and resources resulting from government actions, First Nations feel forced into negotiating these treaties as the only available option to protect their rights.²⁹

The BC treaty process, originally predicted to be completed in a twenty-year time frame, is still glaringly incomplete. To date, there are only two completed treaties stemming from the system: Tswassen and Maa-Nulth. The Nisga'a Treaty was negotiated on similar principles but because negotiations started before the BC Treaty

²⁵ Pricewaterhouse Coopers, 41.

²⁶ Christopher Alcantara, "To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada," *Publius* 38.2 (Dec 2007): 347; 356.

²⁷ Penikett, 161-163; Pricewaterhouse Coopers, 41.

²⁸ Alcantara, "To Treaty or Not to Treaty?" 350.

²⁹ Angela C. Angell and John R. Parkins, "Resource Development and Aboriginal Culture in the Canadian North," *Polar Record* 47 (2011): 70.

Commission was established, it was negotiated outside the Treaty Commission process. Policy scholar Ben Parfitt has commented that “it is a rare feat to see modern-day treaties concluded in BC.”³⁰ He then goes on to suggest that this “glacial pace of treaty talks” has sparked mounting resentment among many participating First Nations.³¹ Today, one-third of BC First Nations have yet to even enter the process.³²

The treaty process in BC is very expensive. The cost is borne by BC taxpayers and First Nations as a whole. A 2008 report estimated that the project’s fifteen year costs totalled \$1.1 billion.³³ Some First Nations are withdrawing from the process because the amount of the negotiation loans they are taking out exceeds the expected potential cash settlement of the treaty.³⁴ Additionally, if a First Nation formally drops out of the treaty process, they are expected to repay their loans immediately.³⁵ The result is a stagnation, yet not complete cessation, of many treaty tables across the province.

With all of these challenges in mind, the BC government developed policy tools outside of the treaty process to help encourage reconciliation and economic certainty.

2.3. BC Policy Approaches Outside the Treaty Process

In 2005, the BC government embarked on the New Relationship with First Nations. The First Nations Leadership Council, the Union of BC Indian Chiefs, the BC Assembly of First Nations and the BC Premier met and agreed to a new policy

³⁰ Parfitt, 9.

³¹ Ibid., 12.

³² Penikett, 146.

³³ Mark Milke, *Incomplete, Illiberal and Expensive: A Review of 15 Years of Treaty Negotiations in British Columbia and Proposals for Reform*, The Fraser Institute Studies in Aboriginal Policy, July 2008:

³⁴ Alcantara, “Old Wine in New Bottles?” 356; Penikett, 170.

³⁵ Penikett, 170.

framework based on government-to-government relationships.³⁶ This policy directive aims to reduce uncertainty, litigation and conflict.

The parties agreed to work together in an environment based on respect, recognition and reconciliation of Aboriginal title.³⁷ Additional guiding principles include openness, transparency and collaboration. The New Relationship document acknowledges the inherent right of aboriginal communities to make land use decisions. It also names an inherent right to the political structures necessary to make those decisions – which equates to an acknowledgement of self-government rights for First Nations.³⁸ Significantly, this was completed outside and apart from the treaty process. It is bilateral in nature, with no participation from the federal government.

The New Relationship advanced the use of consultation and accommodation agreements as a policy tool. Unlike the previous approach of Interim Measures Agreements, wherein the province ceded eventual parts of the treaty settlement before a Final Agreement, these agreements existed completely outside of the treaty process. Now, Aboriginal groups in BC finally had an alternative to the stagnant treaty process in attempting to protect their interests, their lands and their rights that was legitimized by both sides.³⁹

These new policy instruments, referred to as accommodation agreements, non-treaty agreements and consultation and accommodation agreements are shorter and more specific in topics. They offer time and money advantages over treaties and are more flexible than the rigid mandates associated with tripartite treaties.⁴⁰ This provides Aboriginal groups with a promising option that will allow them some involvement in resource development in the immediate future.⁴¹ Accommodation agreements in BC

³⁶ Province of British Columbia, *The New Relationship*, March 2005.

³⁷ *The New Relationship*, 1; Pricewaterhouse Coopers, 46.

³⁸ *The New Relationship*, 1.

³⁹ Alcantara, "To Treaty or Not to Treaty," 357-358.

⁴⁰ Christopher Alcantara, "To Treaty or Not to Treaty?" 360.

⁴¹ *Ibid.*

cover everything from large, broad land use plans, specific agreements related to infrastructure developments, addressing historical grievances over hydro projects, the 2010 Olympics, and resource-specific topics like mining or forestry. These agreements allow for the provincial government to satisfy the Crown's duty to consult and accommodate in the face of unproven aboriginal rights and title. A good agreement incorporates First Nation decision-making into consultation and accommodation measures and creates some economic certainty over the land base.

Although there are many different types of consultation and accommodation agreements, this report narrows the analysis to three different types. The first is an agreement that is specific to particular resource development projects within a First Nation's traditional territory. These are generally limited to the project in question and expire when the lifetime of the project ends.

Sector-specific agreements are another type of non-treaty arrangements. These are usually applicable to one specific resource, most commonly forestry, and apply to a First Nation's entire traditional territory. These are heavily policy driven from the provincial end. A standardized template is put forth to all the First Nations and they can either accept the deal or choose to go to court. These involve very little negotiations.

Finally, there are comprehensive land use planning and management agreements. These have a variety of monikers, such as reconciliation protocols or strategic engagement agreements. These are broad, high-level commitments that are based on strategic land use plans agreed to by both the province and First Nations. These incorporate many consultation and accommodation measures into them, like resource revenue sharing, joint decision-making arrangements and control over place names.

2.4. Content Options for Non-Treaty Agreements

A good consultation and accommodation agreement satisfies the duty to consult and accommodate in a way that offers First Nations meaningful power in decisions regarding lands and resources in their traditional territory. It also must achieve provincial objectives of certainty and clarity over the land question. Generally, there are three

broad categories which lend to an agreement that satisfies the duty to consult and accommodate in a good way: relationship-building, certainty and economic provisions. Because of the wide variety in non-treaty agreements in BC, there is a correspondingly wide variety of content measures utilized to address consultation and accommodation. I describe some of these options that exist in agreements today by grouping them into the three categories: relationship-building, certainty and economic provisions. This is not an exhaustive list of content options, and is complimented by further analysis in the Literature Review below.

2.4.1. Relationship-Building Content

Certain consultation and accommodation measures allow for relationships built on trust and reconciliation between the two parties through a solid working relationship. Communication is one of the fundamental building blocks of consultation. Content regarding shared decision-making through co-management, whether in relation to lands and resources or socio-economic priorities, is very important in ensuring good consultation and accommodation.

In *Delgamuukw* the Supreme Court stated that, “aboriginal title encompasses within it a right to choose to what ends a piece of land can be put.”⁴² With this in mind, non-treaty agreements that include some semblance of co-management, joint decision-making or shared strategic planning are much more successful in uniting Aboriginal and government interests. Co-management is a concept that operates along a spectrum: from complete equal partnership in the decision-making to mere provision of aboriginal expertise and information to the government decision-makers. True co-management is based upon a government-to-government relationship that promotes respect and mutual recognition.⁴³

⁴² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 Para 168.

⁴³ Penikett, 216, Woodward & Company, *Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments* 2007, II-21.

Unlike the treaty process, co-management and co-jurisdiction models are based on recognition of aboriginal title rather than extinguishment and transformation.⁴⁴ This amounts to aboriginal communities participating in land use decisions and resource development policy in their traditional territories with primacy for their views, ideas and concerns.⁴⁵ Importantly, this does not have to be limited to just decisions regarding lands. The inclusion of socio-economic priorities is important in developing consultation and accommodation relationships. This ensures that the two parties work collaboratively to address social well-being of their communities in conjunction with the land-based economy.

One of the best avenues to achieve co-management and joint decision-making, and thus enhance consultation and accommodation, is a Government-to-Government (G2G) Forum. This is a co-management structure where First Nations and the province are 50/50 partners in decision-making, development and implementation of land use plans.⁴⁶ Equal representation to both the First Nation representatives and provincial officials means that both sides have the same amount of decision-making power over land and resources management. These bodies also have regularly scheduled meetings, often in the communities themselves. This ensures that consultation will continually take place, on a regular schedule, and will involve both parties at the ever-important strategic high-level planning phases, as directed by the SCC in *Haida/Taku*.

By working together through these joint forums, and the technical working groups they utilize, the parties build a more respectful relationship through dialogue and common understanding. Joint decision-making models are one of the preferable ways to ensure adequate and sustained consultation levels that lead to meaningful reconciliation.⁴⁷ This satisfies one of the provincial government's main objectives. In the *Tsilhqot'in* case, Justice Vickers confirmed that joint decision-making and consensus

⁴⁴ Penikett, 216.

⁴⁵ Meyers Norris Penny, LLP, 8.

⁴⁶ Parfitt, 6.

⁴⁷ *Ibid.*, 36.

building are the building blocks of any successful, meaningful and productive consultation and accommodation agreement.⁴⁸

2.4.2. *Certainty Assuring Content*

A good consultation and accommodation agreement includes content that promotes economic certainty over the land base. Economic certainty means that the British Columbia land question be settled by definitive measures that address jurisdiction over land management. Predictability and stability are main drivers in economic certainty.

The term of an agreement is important to signifying long-term certainty. An agreement with an indefinite term means that it continues unchanged into the foreseeable future. This provides stability for First Nations, the provincial government, private industry and other stakeholders. All three parties can refer to the agreement and make sound economic, social or business decisions, free from doubt or uncertainty. Short-term agreements limited to five years or less do not guarantee any sort of economic certainty. The limited length of forestry and range non-treaty agreements are especially problematic in ensuring certainty on the land base over the long-term.⁴⁹ By providing for high-level long term strategic planning, content in non-treaty agreements can extend the province's duty to consult and accommodate into a predictable framework for the future.

To work towards long-term certainty, an important inclusion in accommodation agreement is a land use plan. A clear vision that consists of First Nations community endorsed goals and values, a land-use plan gives strength to the aboriginal negotiating position while also providing a document that both the provincial government and the aboriginal community can work together towards implementing.⁵⁰ Land-use plans can

⁴⁸ Morellato, *The Crown's Constitutional Duty to Consult*, 57.

⁴⁹ Parfitt, 28.

⁵⁰ Meyers Norris Penny, LLP, 8-11.

involve the establishment of no development zones, sustainability measures and the commitment to on-going environmental monitoring.⁵¹ They help to give guidance to lower level operational plans in areas such as forestry, mining, tourism and business development.⁵² This content measure offers predictability for all provincial government officials and relevant stakeholders looking for potential resource development possibilities.

2.4.3. Economic Provisions

A good non-treaty agreement includes economic and funding measures. In *Delgamuukw*, the SCC defined aboriginal title as having an inescapable economic aspect to it. Proper consultation and accommodation of potential infringements upon aboriginal rights and title must include some aspect of economic considerations. Economic consultation and accommodation measures can take the form of compensation payments, high level business participation through joint ventures or equity stakes or something more specific like employment, contracting or training commitments.⁵³ These measures can provide adequate accommodation for potential rights and title infringements while also developing economic capacity within the aboriginal communities. Possible content options in this area are capacity funding, resource revenue sharing, employment and education provisions and business participation measures.

Capacity to negotiate is a crucial aspect in regards to consultation and accommodation agreements.⁵⁴ The human and financial resources to participate in negotiations and succeed at achieving the goals of a negotiation are extensive. For smaller First Nations, particularly those inexperienced in the treaty process, it can be

⁵¹ Ibid., 29.

⁵² Meyers Norris Penny, LLP, 42.

⁵³ Newman, 61.

⁵⁴ Parfitt, 40.

difficult to find and employ skilled negotiators. And without this skill and experience, they do not have much power at the bargaining table with the province.

In the *Platinex* case, the Ontario Supreme Court ruled that the provincial government must provide certain funding for First Nations participation in consultation and accommodation. This ruling concerned mining development in the Kitchenuhmaykoosib Inninuwug traditional territory. The Court stated that in order to uphold the honour of the Crown, they had to negotiate in good faith and this meant acknowledging the First Nation's lack of capacity to adequately participate. Things like honoraria for elder and community leader participation and sharing of their traditional knowledge, legal fees, technical and professional salaries, travel subsidies and administrative fees should be provided for by the Crown within a non-treaty agreement.⁵⁵

Resource revenue sharing is another content option for any agreement that concerns resource extraction. This is a form of financial transfer that is directly correlated to the economic activity within a First Nation's traditional territory. The province agrees to pay a certain amount of provincial revenues from resource extraction or resource rents to the First Nations.⁵⁶ Resource revenue sharing helps involve the local First Nations while also accommodating for the potential infringements upon their rights due to disruptions caused by resource extraction. In BC, this a very valuable tool to ensure certainty over land prior to major resource projects.⁵⁷

Economically, a good consultation and accommodation agreement will include jobs, training, education and scholarships and capacity funding for administrative staff and management positions.⁵⁸ Inclusion of First Nation members in resource extraction jobs is very important: in a Memorandum of Understanding mandated by the Ontario Court, both the Ontario provincial government, the private mining company Platinex and

⁵⁵ Morellato, *The Crown's Constitutional Duty to Consult*, 51.

⁵⁶ Parfitt, 33.

⁵⁷ *Ibid.*

⁵⁸ Meyers Norris Penny, LLP, 29.

the Kitchenuhmaykoosib Inninuwug First Nation agreed that members must be included as employees in plant operations.⁵⁹

Enhancing First Nations capacity through job training and education incentives will help promote another potential addition to accommodation agreements – that of business opportunities for aboriginal communities. These can include joint ventures, involvement as shareholders, contracting opportunities or financing for small-businesses.⁶⁰ This is an important step in First Nations community development and self-sufficiency. One example is the tie-in of forestry agreements with wood-processing business ventures. Allotting a First Nation a certain amount of harvestable timber can be turned into a real economic opportunity by helping develop a high-value wood product industry in their traditional territories.⁶¹

⁵⁹ Morellato, *The Crown's Constitutional Duty to Consult*, 50.

⁶⁰ Meyers Norris Penny, 29, 39.

⁶¹ Parfitt, 26.

3. Literature Review

I examine four key pieces of literature pertaining to consultation and accommodation agreements. Each provides this discussion with background to the problem but also possible solutions. Importantly, these pieces all offer suggestions as to what makes a good and valuable consultation and accommodation agreement.

3.1. Tony Penikett's *Reconciliation: First Nation Treaty-Making in British Columbia*

Tony Penikett has been involved in aboriginal negotiations for over twenty years in various capacities, including as the Premier of the Yukon and Deputy Minister of Negotiations in British Columbia. His 2008 book *Reconciliation: First Nation Treaty-Making in British Columbia* offers not only a well-balanced assessment of the current situation regarding aboriginal rights and title in BC but some comments on moving forward with non-treaty agreements.

Penikett criticizes the modern treaty process in BC as originating from strict government mandates based on a per capita land and cash transfer that leaves little room for the necessary give and take of negotiations. He argues that this cookie-cutter approach to treaties limits the creativity of negotiators on all sides of the table.⁶² Although specifically regarding comprehensive land claim treaties in BC, this critique is important to keep in mind for how the province should approach negotiating non-treaty agreements.

⁶² Penikett, 163, 170.

Penikett describes how interim measures agreements, a type of consultation and accommodation agreement that is linked with the treaty process are a beneficial policy tool. These agreements and the benefits they entail can be a building block to self-government but can also create a distraction or diversion from the treaty process.⁶³

Interim measures agreements that work have three commonalities: consultation, accommodation, and capacity building. Through these three building blocks, alternate roads to certainty can be achieved by the province and the First Nations while waiting for treaties to be completed. These core tenets of interim measures agreements can be applied to accommodation agreements that exist outside of the treaty process.

Penikett comments on two content options in non-treaty agreements seen recently in BC: co-management and joint decision-making. He says that co-jurisdictional arrangements like co-management and joint decision-making bodies “may be the best possible model for true accommodation of aboriginal ideas about land tenure and governance.”⁶⁴ He notes that comprehensive land use planning agreements are “drifting surprisingly close to making co-jurisdictional arrangements” wherein the First Nations involved would be on equal footing with provincial decision-makers.⁶⁵

Agreements with co-management and joint decision-making help build government-to-government relationships and facilitate lands and resource management based on the recognition of aboriginal title, versus its extinguishment as seen in the treaty process. For this reason, these co-management inclusions make consultation accommodation agreements appealing for First Nations who find themselves frustrated with the land-selection treaty model currently employed by the BC Treaty Process.⁶⁶

⁶³ Penikett, 148.

⁶⁴ Penikett, 216.

⁶⁵ Penikett, 216.

⁶⁶ Penikett, 217.

3.2. Meyers Norris Penny LLP's Best Practices for Consultation and Accommodation

The New Relationship Trust is an independent non-profit organization designed to build First Nations capacity so they can effectively participate in the New Relationship with the provincial government. It issued *Best Practices for Consultation and Accommodation*, a report prepared by Meyers Norris Penny (MNP) LLP in September 2009. This offers suggestions on what First Nations should prioritize in seeking accommodation agreements.

The report asserts that consultation and negotiations between the provincial government and First Nations in BC is very inconsistent.⁶⁷ Still, the report encourages First Nations to participate as much as possible in consultation processes with the province. This, they say, is the first step to gaining a strong position in participating in land use decision-making and economic development decisions.⁶⁸ Consultation, through agreements or through standard provincial policies, encourages a trustful working relationship between the government and First Nations.⁶⁹ This benefits First Nations and also encourages a strong investment climate which in turn benefits businesses in BC.

The report recommends that First Nations create a land use plan. They argue that it is an important addition to any consultation process with the province. A land use plan creates a clear, community endorsed vision that effectively communicates the goals and priorities of the individual First Nation.⁷⁰ This also provides provincial negotiators a clear statement of objectives and goals prior to entering into non-treaty negotiations.

Meyers Penny Norris, LLP offer suggestions for governments in approaching accommodation agreements. The report describes good accommodation as including

⁶⁷ Meyers Penny Norris, LLP, 20.

⁶⁸ Meyers Penny Norris, LLP, 8.

⁶⁹ Ibid.

⁷⁰ Meyers Penny Norris, LLP, 11.

many elements. These include minimizing infringement on aboriginal rights and title, balancing societal and First Nations interests, including First Nations in the decision-making and fair compensation for any remaining infringements.⁷¹

The report lists potential content inclusions that will make a good consultation and accommodation agreement. They can be loosely grouped into six broad categories.

1. Environment and mitigation
2. Training and employment
3. Aboriginal Enterprises
4. Financial Provisions
5. Dispute Resolution Mechanisms
6. Terms and Termination

If all of these are taken into consideration, both the province and the First Nation will find the agreement a beneficial and enduring exercise in consultation and accommodation.⁷²

3.3. Canadian Centre For Policy Alternatives' Critique on BC's Forest and Range Agreements

Ben Parfitt, writing for the Canadian Centre for Policy Alternatives, uses his report *True Partners: Chartering a New Deal for BC, First Nations and the Forests We Share* to critique the provincial government's resource revenue sharing approach in the Forest and Range agreements. He acknowledges that the BC's 2003 *Forest Revitalization Plan* is a good first effort at sharing forestry resource revenues with BC's First Nations, but that it has some significant policy deficiencies.⁷³

⁷¹ Meyers Penny Norris, LLP, 29.

⁷² Meyers Penny Norris, LLP, 39.

⁷³ It is important to note that this report was published in 2007 and since then there has been changes to the forestry and range agreements, most notably to the resource revenue sharing formula.

Referring to the province's approach to resolving aboriginal rights and title issues, Parfitt muses that "consistency is not a word that springs to mind."⁷⁴ He notes that in consultation and accommodation, the province has resisted moving to a rights-based compensation model. This ignores the reality of resource extraction's actual effects in First Nations' traditional territories.⁷⁵

In regards to non-treaty agreements as a whole, Parfitt believes that they are necessary to provide lasting benefits and assurance to First Nations in the absence of treaties. He argues that modern treaties as a policy tool, although vital to addressing past infringements of rights and title, are rare and unreliable.⁷⁶ While he writes that "speed is not a word one usually thinks of when characterizing the provinces' approach to accommodating First Nations' interests," he says that consultation and accommodation agreements enjoy a very quick and efficient pace, especially compared with the treaty process.⁷⁷

Parfitt takes particular issue with the cookie-cutter template approach to the forestry revenue sharing agreements, which he says ignores the on the ground realities of resource development.⁷⁸ The formula employed by the provincial government that determines its timber and cash offers in Forest and Range agreements is fundamentally flawed. The province bases its offers on the population of the First Nation and not on the actual level of resource extraction in their traditional territory. The formula offers approximately \$500 per capita per year and 30-54 cubic metres of timber. While this appears to treat all First Nations across the province equally, it does not take into account how logging activities affect First Nations traditional territories differently.⁷⁹

⁷⁴ Parfitt, 10.

⁷⁵ Parfitt, 10, 37.

⁷⁶ Parfitt, 9.

⁷⁷ Parfitt, 11.

⁷⁸ Parfitt, 8.

⁷⁹ Parfitt, 5.

Another critique of these Forest and Range Agreements that Parfitt offers is that First Nations who have strong human resources and negotiating capacity can secure a much more profitable agreement than those without.⁸⁰ He uses the example of the Gitanyow Hereditary Chiefs Agreement to highlight these issues. This agreement is similar to a standard Forest and Range Agreement. But it was borne out of a legal challenge so the Gitanyow had a much higher bargaining position. The Gitanyow secured a commitment from the province to engage in environmental restoration projects and the protection of culturally, archaeologically or historically significant areas. Part of the reasons for the higher standards of consultation and accommodation seen in this agreement, Parfitt maintains, come from the Gitanyow's history of participating in blockades and/or legal challenges if they believed their interests were not being met.⁸¹

In terms of non-treaty agreements, Parfitt recommends that the province move forward with policies that promote mutually agreed upon land use plans with First Nations. These land use plans should then be jointly implemented by a co-management body that sees First Nations as equal partners in lands and resource decisions. This approach demands a long-term commitment, and Parfitt critiques the five-year terms of Forest and Range Agreements as problematic to ensuring certainty over the long-term.⁸²

3.4. Legal Experts Woodward & Company Comment on Benefit Sharing in BC

Woodward & Company, a Victoria based law-firm specializing in aboriginal legal matters published a report regarding what they call Benefit Sharing Agreements in British Columbia. They use the term Benefit Sharing Agreements (BSAs) as a general phrase to describe a written agreement that is the outcome of a consultation process about a proposed resource extraction, project or development that has the potential to

⁸⁰ Parfitt, 40.

⁸¹ Parfitt, 37.

⁸² Parfitt, 28.

impact aboriginal rights or interests. Although this report largely concerns Impact Benefit Agreements which are bilateral agreements between private third party interests and individual First Nations, it offers some good suggestions on how to achieve good consultation and accommodation measures in accommodation agreements between the province and BC First Nations.

BSAs, the report states, are an effective policy tool that can achieve some certainty in the province and allow for resource development to proceed.⁸³ The report warns that these non-treaty agreements are not a cure all solution for all of the complex social, political, legal, cultural and historic conflicts and uncertainties in the province. They will not achieve reconciliation on their own. But, they believe that each fairly negotiated agreement is one step forward in creating good relationships and a respectful environment for addressing aboriginal rights and title.⁸⁴

The report states that shared decision-making is a key content piece in BSAs. They describe a spectrum of shared decision making ranging from the low end, consultation, to the high end, joint management. At the high end of the spectrum is joint management. Here, there is equality in power for both provincial officials and First Nation representatives. This model is based on consensus decisions that moves to voting procedures if no consensus is reached.

The report states that accommodation should include a financial or economic component. This can take a variety of forms, from cash transfers to payments based on a percentage of resource revenues that the province receives.⁸⁵ This should not be based on a per population formula, like that used in the BC Ministry of Forestry and Range's allocation. Instead, economic and financial accommodation should be based on an assessment of the strength of the right claimed and the degree of the infringement.⁸⁶

⁸³ Woodward & Co., I-3.

⁸⁴ Woodward & Co., viii.

⁸⁵ Woodward & Co., II-29, II-31

⁸⁶ Woodward & Co., II-32.

Other strategies for offering financial accommodation outside of direct resource revenue sharing are available to governments. These include funding consultation costs, capacity building funds, economic development funds, community development funds, agreement implementation funds, environmental monitoring funds and funds for restoration projects.⁸⁷

Of the above, funding for First Nation participation is a paramount consideration. Financial capacity and funding for First Nations must be included in accommodation agreements. Although the Courts have yet to insist that a positive duty exists for governments to provide funding for aboriginal engagement, if governments wish to achieve good, workable arrangements, funding and capacity issues must be addressed.⁸⁸

They recommend that First Nations improve their participation in the economy of BC through consultation accommodation agreements. These will help First Nations improve their knowledge, capacity and experience. Successful non-treaty agreements include capacity funding for First Nation participation, clear communications between the parties involved, clear objectives, monitoring and reporting of results, and dispute resolution provisions.

The report recommends that some standards for BSAs are implemented by the provincial government in the form of legislative and statutory frameworks. Likewise, they mention that the First Nations Leadership Council is also seeking minimum standards outlined in a policy or legislative framework.

The report provides a jurisdictional scan where they cite examples from Australia that inform the consultation and accommodation agreements in BC. In Australia, having a set of legislated requirements for all BSAs proved to be very beneficial. Legislation strengthened the bargaining power of indigenous groups and moved relationships over

⁸⁷ Woodward & Co., II-32.

⁸⁸ Woodward & Co., II-4.

lands and resources closer to co-management. Additionally, a legislated framework provided for more effective environmental management, which remains a common objective for both provincial governments and First Nations in BC.⁸⁹

⁸⁹ Woodward & Co., IV-3.

4. Interview Results

I conducted semi-structured interviews with representatives from four groups:

- BC Government Employees
- First Nations Leadership
- Academic and Legal Scholars
- Business and Industry Organizations

I chose a semi-structured approach to my interviews to allow for a fluid dialogue between myself and the subject. I based my semi-structured interviews around three main themes to help guide the conversation and unearth the subject's personal thoughts, knowledge and suggestions on the topic. Each theme has certain questions to begin the dialogue and help guide the conversation. The three themes were:

- BC's Accommodation Agreements
- The Duty to Consult and Accommodate
- Future Policy Frameworks Regarding Non-Treaty Agreements

For each of the four different groups, I drafted a different set of framing questions to help explore each of these three themes. This allowed for a slight variance in how to pose the question for the specific respondent.

4.1. Reoccurring Themes

Four main themes arose in the majority of the interviews. The relationship between accommodation agreements and the BC Treaty Process, resource revenue sharing, the windfall concept and capacity issues were all identified by a majority of participants in the interviews.

4.1.1. Relationship to Treaty Process

Interview respondents spoke about how consultation and accommodation agreements negotiated outside of the BC Treaty process have a variety of influences on the Treaty Process. Provincial representatives from MARR say that some First Nations have positive experiences with these agreements and are encouraged to continue working with the province through the treaty process. After such a long history of distrust between the parties, one provincial employee points out that these accommodation agreements allow for positive relationships to form. An example of this is the *Ktunaxa Strategic Engagement Agreement*, which has brought the sides much closer to completing their comprehensive land claim treaty.

On the other hand, some First Nations look at what they can achieve through non-treaty agreements and take a ‘why bother’ approach to the treaty process. The situation with the Haida Nation is an example of this effect. Here, non-treaty agreements afford the Haida Nation a variety of benefits outside of the treaty process without entering into a formalized tripartite treaty.

One provincial representative spoke of the improved pace of consultation and accommodation agreements when compared to treaties. First Nations members see the beneficial, tangible results of these agreements more immediately. And this, provincial representatives acknowledge, is one of the crucial advantages of non-treaty agreements. By negotiating smaller, more focused agreements, First Nations and the province improve their relationships and build trust moving towards reconciliation.

Building upon this idea, Maria Morellato, one of Canada’s primary aboriginal legal experts, says that these agreements are a necessary part of the treaty process. As she sees it, the reconciliation offered by these agreements operates as an interim placeholder until the Crown and First Nations achieve a full and final settlement. These agreements allow for important restrictions on the provincial government’s resource extraction permitting process while comprehensive treaty negotiations take place. Rick Conte from the Association of Mineral Exploration BC agrees with this point, saying that accommodation agreements are the most effective bridge between interests while parties wait for broad-brush treaties to be completed.

Still with a positive view, yet in a different relation to the treaty process, Minister of the Environment Terry Lake, MLA of Kamloops – North Thompson finds these non-treaty agreements to be a valuable asset. He says that particularly in his area of the interior, many First Nations are simply not interested in the tripartite treaty process and its land selection model. So the ability to build relationships with the province and negotiate agreements is important to securing some aspects of certainty outside of formal treaties.

Scott Fraser, MLA of Alberni – Pacific Rim and the NDP Critic for Aboriginal Affairs states that these agreements can in fact stall the treaty process. He says that ever since Sophie Pierre, the Commissioner of the BC Treaty Commission, announced that the process isn't working, the Premier has voiced her desire to focus on these one-off accommodation agreements. He worries that this may leave the treaty process out in the cold, with little government support.

Don Bain, Executive Director of the Union of British Columbia Indian Chiefs (UBCIC), has a similar view on the provincial strategy of promoting non-treaty agreements. He notes Minister of Aboriginal Relations and Reconciliation, Mary Polak's recent submission to the Canadian Senate Standing Committee on Aboriginal Affairs as an indication that the province is choosing accommodation agreements instead of comprehensive treaties. He also cites the declining MARR budget for Final Agreements in the treaty process as evidence that the political will for the BC Treaty Process has waned significantly and that the provincial government is choosing to pursue non-treaty agreements to earn short-term certainty.

4.1.2. *Resource Revenue Sharing*

Many interviewees acknowledged resource revenue sharing as a policy instrument that can enter into non-treaty agreements. Resource revenue sharing is a form of financial transfer from the provincial government to First Nations. The intent is to provide money to First Nations that is directly proportionate to the amount of resource extraction within their traditional territories. True resource revenue sharing requires the province pay a certain percentage of the revenues, rents or taxes generated from mining, forestry or other natural resource projects. However, as described in Ben

Parfitt's *Partners for Change*, the older generation of forestry and range agreements offered a form of resource revenue sharing based on a population formula.⁹⁰

BC MARR representatives spoke positively of resource revenue sharing, describing a few beneficial outcomes. First of all, like a clearly defined engagement framework, resource revenue sharing helps to involve First Nations, their needs and their priorities into the resource industry. Providing First Nations with a significant new revenue stream allows them to pursue socio-economic community enhancement objectives and lowers opposition to development. This helps the province by increasing the likelihood that projects will go forward, ensuring healthy economic benefits to all British Columbians.

Don Bain, Executive Director of the UBCIC, warns that resource revenue sharing is not as financially significant as it was originally conceived to be. He notes that the resource revenue shared with the First Nations is actually a percentage of the taxes received by the province, not their entire revenue generated by the mine itself. Additionally, First Nations can only receive benefits from new resource developments in the program, severely limiting the amount of eligible nations in the province.

Charles Porter, Assistant Deputy Minister (ADM) of Negotiations and Regional Operations for BC's Ministry of Aboriginal Relations and Reconciliation (MARR) acknowledges resource revenue sharing as an important policy tool. However, one of the major problems with the program is that many mining projects do not begin to produce revenues and pay money to the province until many years into a project. Rick Conte, of the Association of Mineral Exploration British Columbia, also warns that the financial payments of resource revenue sharing are expected too early by First Nations in the mining process. This means that First Nations will see the physical degradation of their traditional territories long before they begin to see any financial payments from the

⁹⁰ See Literature Review Section 3.3 for more details on the older generation forestry agreements and their particular form of resource revenue sharing.

province. This hurts the validity and appearance of the program and reduces the interest of other First Nations to take part.

Charles Porter and Zoe Younger, Vice President of Corporate Affairs for the Mining Association of BC, offer similar solutions that the province could consider to attend to this problem. First of all, the private sector could fill in the intermediate void. For the time between mine construction and mine profits, the mining company would provide initial community development programs like job training, education, daycare etc. These are all pragmatic options for the business community as it helps ensure a viable labour pool. In the end, Porter speaks of the potential for tripartite agreements surrounding mining developments wherein the private developer, First Nations and the province could come to an collaborative agreement based on sharing revenues and providing services.

4.1.3. *Windfall Concept*

Many key informants acknowledged the challenges presented by the windfall concept. The idea here is that First Nations in the province will not be treated equitably in consultation and accommodation agreements due to the geographic and economic realities of resource potential. While some aboriginal groups have traditional territories that may include a vast amount of natural resources, whether they are minerals, coal, forestry resources, fish and wildlife, some groups may have traditional territories with no opportunities for economically viable resource extraction. This creates an equity issue wherein the provincial government treats First Nations differently depending on the value of resources in their territories; the government does not afford aboriginal groups equal opportunities for accessing, negotiating and finalizing non-treaty agreements.

Charles Porter, of MARR, says that a First Nation who lives in an area of extraordinary riches will be a higher priority for provincial officials than a First Nation who does not enjoy this geographic position. Maria Morellato echoes this by saying that First Nations without a proximity to natural resources do not garner any attention from the provincial government, leaving them out of the non-treaty agreement discussions. Thus, the windfall concept is a major factor in determining the allocation of non-treaty agreement resources and this is a largely inescapable reality.

Scott Fraser, NDP Critic for Aboriginal Affairs, expands on this idea by arguing that the BC Government is effectively dividing the province's First Nations into have and have nots, whether intentionally or not. He says that reconciliation efforts cannot be based on wealth and resource distribution, as is the current practice. This will result in some nations becoming unfairly wealthier than others. Reconciliation should be about righting past wrongs and about invoking the concept of justice, Fraser says, and not on resource values.

The province, Fraser maintains, has effectively shut out the great majority of First Nations from the negotiating table and program delivery. By concentrating on the First Nations who enjoy the windfall of natural resources in their territory, the province leaves other First Nations to their own devices. This has resulted in an unfair process where aboriginal groups with limited capacity are forced to stand up to big multi-national corporations in order to see what they can get. This puts the First Nations at an extremely disadvantaged bargaining position from the outset, and they receive little help from the province.

4.1.4. Capacity Issues

Interviewees continually pointed to BC First Nations' lack of capacity as a major problem in the negotiating and implementing of consultation and accommodation agreements. A provincial representative from MARR acknowledges that some First Nations, with a highly developed and educated leadership council are in a better position to get a strong agreement.

Maria Morellato, an aboriginal law expert, points to capacity issues as one of the main problems in the province's relations with aboriginal people today. She says that having the human resources and financial capacity to do a proper strength of claim assessment can be taxing on some aboriginal groups. A strength of claim assessment uses biological, geographic, historical, archaeological, and ethnographic data, along with oral histories and mapping techniques to determine the strength of aboriginal rights and title claims in a First Nation's claimed traditional territory. Without this assessment, which requires a large amount of financial and human resources, they find it very difficult to have any negotiating power with the provincial government. Maria says that in order to

rectify this problem, the province must provide First Nations with more financial capacity prior to and during negotiations. She references the *Platinex* case in Ontario, where the court ordered the province to provide funding to the First Nation so that they could adequately participate in the consultation process. Despite this ruling in Ontario, the BC government has yet to make any substantial changes to their consultation funding allocations for First Nations.

A MARR employee pointed to lack of capacity as a sensitive subject in negotiating non-treaty agreements. Often, First Nations are eager to sign agreements which require an enormous amount of human resources capacity without fully acknowledging how much this will effect their small government structures. The provincial representative said that it is hard to explain to the First Nations that entering into complicated co-management or joint decision-making boards may strain their already limited resources without sounding patronizing or paternalistic.

4.2. Interview Highlights By Sector

4.2.1. Provincial Government Employees

Charles Porter, Assistant Deputy Minister responsible for Negotiations and Regional Operations of BC's Ministry for Aboriginal Relations and Reconciliation provided an excellent summary of BC's policies regarding non-treaty agreements as well as a beneficial insight into the motives and drivers of provincial policy.

Porter acknowledges that Strategic Engagement Agreements (SEAs) are a viable policy tool, but are not standardized. SEAs are an umbrella term for the wide variety of consultation and accommodation agreements signed by the province. These are not designed to be static agreements: many acknowledge the abilities to grow over time and add in more content. They can utilize resource revenue sharing content and become Economic and Community Development Agreements, like the SSN's agreement examined in the case studies, or they can also add Government-to-Government Forums and become reconciliation agreements, like we see with the Haida Reconciliation Protocol.

While Porter speaks very positively of the effect of SEAs and the benefits they bring both for aboriginal populations and British Columbians in general, he does acknowledge that there are some strict caveats to whether or not his ministry will pursue these agreements. Porter uses a strictly pragmatic, results oriented approach in determining criteria for whether or not to move forward on negotiating these agreements.

First of all, Porter says there must be some economic benefit to the province to pursuing an agreement. If there are no potential for economic opportunities in the traditional territory, negotiations will not take place. Secondly, he acknowledges the importance of other ministries' support in negotiating and implementing SEAs. This is because much of the implementation and on-the-ground work specified in these agreements will be taken over by other statutory decision-makers in the government. Thirdly, Porter says that he must have positive evidence that the First Nations in the area will be able to successfully work together in a collaborative way in order to achieve the measures set out in these agreements. If aboriginal groups have questions over leadership, representation and differing allegiances, the province will not attempt a deal and risk making it with the wrong group of representatives.

Porter provides reasons for these strict criteria. He says that the province only has so much negotiating capacity, funds and time to strike these deals. He does not want to waste his staff's time, or the taxpayers' money, negotiating a deal over years and years of stalled talks. He says that, unlike the treaty process, he demands a quick turn around time for negotiations. He says that the province is not pursuing absolute perfection in these non-treaty agreements; all have clauses that allow for program evaluation and modification over time. So the priority is for getting an agreement that works for both parties, although there may be concessions or omissions on either side.

I interviewed three provincial government employees who are all employed within MARR and who all have extensive experience with non-treaty agreements. MARR representatives identified two priorities for their staff in negotiating these agreements: predictability and ease of implementation.

When asked to provide a few must haves for consultation and accommodation agreements in the future, one MARR representative said that an efficient, clear

engagement framework is paramount. In terms of predictability, the inclusion of an engagement framework in non-treaty agreements provides a conventional outline of the process for both provincial and proponent representatives to move forward on resource extraction projects. By identifying what First Nations expect out of the consultation process, industry third parties are more aware of time frames and expectations on their end, leading to increased certainty in BC's resource sector.

Another MARR employee pointed to the importance of detailed dispute resolution processes outlined in the agreement. As well, a focus on monitoring and evaluation of the agreement was named by a provincial employee to ensure the effectiveness of these consultation and accommodation agreements.

One provincial representative identified implementation as a major challenge arising from the variation in non-treaty agreements. For regional operational staff, it is difficult to implement various processes outlined in these agreements in one area, if different territories have different rules. MARR employees pointed to the issue of overlapping agreements as a potential problem for implementation staff. One provincial representative said that having variety across regions is okay for implementation purposes, but variety within a geographic region can cause problems for staff that make the content of the agreements difficult to achieve. Another provincial employee stated that variability in these agreements is a good thing – as long as it is a result of negotiations. They maintained that consistency across agreements is important, but that this does not imply the need for identical non-treaty agreements.

4.2.2. *First Nations*

Don Bain is the Executive Director of the Union of BC Indian Chiefs (UBCIC). The UBCIC is an intertribal organization which now represents 104 out of BC's 203 First Nations. Bain believes that the BC Treaty Process is dead and that the provincial government accepts this. In its absence, the government utilizes consultation and accommodation agreements as policy options that guarantee short-term certainty. In his view, the province is using these agreements to continue their ultimate aim of reducing legal liabilities while allowing for operational stability for resource developments in BC.

Bain was highly critical of the forestry and range agreements, in all their various forms over the years, as completely ignoring the realities of aboriginal rights and title. These agreements are based on a per population formula, which Bain states was formulated out of thin air by senior government bureaucrats. Allotting accommodation for forestry work in a traditional territory through a cookie-cutter approach ignores what the courts have been consistently saying– that consultation and accommodation must be proportional to the perspective infringement on rights or title.

Bain says that despite the inherent problems with forestry and range agreements, First Nations in BC often sign them. This is rooted in a fundamental lack of First Nations capacity. When faced with a financial inability to assert their title in either costly negotiations or litigation, smaller First Nations in BC often accept these deals with the province. As Bain explains, First Nation's rights and title are not going anywhere and a relatively short five-year deal can provide necessary economic inputs into their communities.

Gujaw, President of the Council of the Haida Nation responded on the value of accommodation agreements for the Haida people. He stated that the relatively predictable land selection model of the BC Treaty Process is undesirable. By trading their aboriginal title for 5-10% of the land on Haida Gwaii, the Haida Nation effectively surrender traditional lands where their people have lived since time immemorial. The Haida will not do so.

Gujaw points to the environmental protected area clauses in their non-treaty agreements that allow the Haida to retain and practice their aboriginal rights as well as jointly manage the lands along with province. This is a positive starting point for reconciliation. The *Gwaii Haanas Agreement* (1993), signed nearly twenty years ago is a leading example of this. Signed with Parks Canada, this is a significant milestone in the negotiation of non-treaty agreements. It was one of the first times that the Crown and a First Nation established a joint decision-making framework concerning protected areas. Although Gujaw is only one leading voice, representing one nation, his opinion is extremely valuable.

4.2.3. *Aboriginal Legal Experts*

Maria Morellato is a practicing lawyer with a long history in aboriginal legal issues and various kinds of negotiations and litigation. Maria believes that the lack of uniformity in these non-treaty agreements is not an issue because it is necessary to avoid a one-size-fits-all situation. Positives of this variance include the First Nation's ability to articulate their particular interests, secure accommodation measures and build their own desirable relationship with the provincial government. In this way, they can protect their own priorities through an individually designed agreement.

Bonnie Docherty, of the International Human Rights Clinic at Harvard University and co-author of the report "Bearing the Burden: The Effects of Mining on First Nations in British Columbia," spoke of the importance of land use plans for First Nations. During the course of her research in BC, she found that land use plans are really critical on multiple levels, for First Nations, for the provincial government and for industry, in providing clarity in moving forward. She says that since the BC Government does not formally recognize these plans, many First Nations have no incentive to create these complex documents. She suggests giving legal weight and authority to jointly agreed plans would create a much more inclusive environment in BC.

Docherty's report, "Bearing the Burden" offers many suggestions for improving aboriginal consultation and accommodation in BC – through both agreements and broad policies. When asked, she said that the preferable avenue for evincing changes in BC is through legislation. In bringing about reforms, legislation is the preferable measure because it is binding, it carries a certain weight and it is the hardest to change. But, Docherty maintains, any reform, even at the policy level would be a positive step. The key elements of reform that she proposes are a clearly defined consultation process that begins early on in the process and a grounding in the UN Declaration on the Rights of Indigenous Peoples.

4.2.4. *Politicians*

I interviewed two politicians, one from each of the main parties in BC's politics. Each has a portfolio that involves working with aboriginal non-treaty agreements so both interviews were very informative. Being from two different political persuasions, one was

very critical of the approach of the Liberal government, and the other one was much more positive in his assessment.

Terry Lake, BC's Minister of the Environment is also the Liberal MLA of Kamloops – North Thompson. The New Gold New Afton mine project falls within Lake's geographic constituency. He believes the relationship that has developed between the Stk'emlupsemc of the Secwepemc Nation (SSN), the New Gold mining company and the province is a good one. The SSN receive benefits such as a new revenue source and training and employment opportunities. The non-aboriginal constituents get the economic benefits of a nearby mine project, for example, new jobs closer to home and economic spin offs.

Lake says that the Economic and Community Development Agreement (ECDA) between the province and the SSN have provided his constituents with a necessary balance between First Nations interests and the need for economic development in the form of mining. He believes that this is important not only in his constituency but in all of British Columbia. He maintains that a balance must be achieved that allows for responsible, sustainable resource development even in the face of legal uncertainties regarding aboriginal consultation. Lake believes that this sort of framework could be used as model or template moving forward. Based on its successes so far, he says that this mutually beneficial relationship gives all sides of the equation confidence in moving forward.

Scott Fraser is the MLA of Alberni – Pacific Rim and the NDP Critic for Aboriginal Affairs. Fraser has a long history of involvement in aboriginal issues in BC and his take on these accommodation agreements is quite different from Terry Lake's. Although we cannot reduce all the differences to a simple conflict between Liberal and NDP values, it is interesting to note the disparity and highlight the differences. During the interview, Fraser elaborated on themes of the UN Declaration of the Rights of Indigenous Peoples and the Liberal's strategy in addressing non-treaty accommodation agreements.

Scott Fraser believes that any provincial government policy regarding aboriginal relations in BC should use the UN Declaration on the Rights of Indigenous People (UN DRIP) as its formulating guideline. Although not law, it should be understood by

provincial decision-makers as a collective value statement that defines existing relationships on aboriginal traditional territories. He underscores the importance of governments obtaining “free, prior and informed consent,” prior to any resource developments on indigenous traditional lands.

Fraser takes a critical view on the current provincial government approach to non-treaty agreements. Specifically, he says that the variety in them is problematic and leads to an inequality amongst First Nations. He says that one-off agreements in particular, designed for specific situations, lack a binding consistency to ensure equality and fairness. These agreements are done in a vacuum and are corrupted by the need to push resource development, leading to problems in the future. This fast and easy approach of the provincial government is not fair or consistent with the First Nations in BC. When asked about potential standards that the government could implement in regards to these agreements, Fraser again pointed to the UN DRIP as a starting point for developing basic policies.

He argues that the province is employing a “divide-and-conquer” strategy with accommodation agreements. This involves only negotiating with the eager First Nations and dividing up territory into provincially controlled lands, ready for resource development. This involves pitting aboriginal groups against each other in the struggle to get shares of resource revenues and even divides First Nations amongst themselves.

5. Research Findings

The case studies cover three types of non-treaty agreements: comprehensive land and resource management agreements, project-specific agreements and forest and range agreements. The six agreements I examined are as listed below.

1. Haida Nation Kunst'aa guu - Kunst'aayah Reconciliation Protocol
2. Taku River Tlingit Whóoshtin yan too.aat - Land and Resource Management and Shared Decision-Making Agreement
3. Tahltan Nation Government-to-Government and Northwest Transmission Line Negotiation Framework Agreement
4. Stk'emlúpsenc of the Secwepemc Nation Economic and Community Development Agreement
5. Ktunaxa Nation Forest Revenue Sharing Agreement
6. Penticton Indian Band of the Okanagan Nation Interim Agreement on Forest and Range Opportunities

To evaluate the relative strength of the consultation and accommodation measures contained in different agreements I use three broad categories to assess these case studies. I derive these three categories from background research and literature reviews. Assurance of certainty, contributions to relationship building between the parties, and support for economic development by the First Nations are the three main positive factors in a good consultation and accommodation agreements. I assess each of the case studies on how well each agreement satisfies these three criteria. After the individual assessments, I compare and contrast the agreements to come to conclusions about the variability in consultation and accommodation agreements in BC.

I use a high, medium, and low scale to assess each of the consultation and accommodation categories in each of the agreements. This is to standardize the evaluation and allow for some comparison. A high rating means that the agreement includes the best consultation and accommodation content possible in the particular category. A medium rating means that the agreement has some important content but is lacking other significant measures. A low rating means that the agreement is lacking in consultation and accommodation measures within that particular category. This is a subjective scale that is meant to provide a qualitative, informative comparison of the case studies. It is not intended to be a definitive statement on the pros and cons of such agreements.

5.1. Haida Nation Kunst'aa guu – Kunst-aayah Reconciliation Protocol

The *Haida Nation Kunst'aa guu - Kunst'aayah Reconciliation Protocol* is a comprehensive land and resource agreement. It offers the aboriginal communities on Haida Gwaii a substantial voice in determining if, when, how and by whom the resources in their traditional territories are extracted. The Haida Reconciliation Protocol focuses on forest tenuring practices, carbon offset programs and land use management plans relating to sustainable forestry. This comprehensive land use agreement scores highly in all three requirements of a good consultation and accommodation agreement: relationship building, certainty and economic provisions.

The Haida Reconciliation Protocol approaches relationship building in the form of shared decision-making over all land and resource use issues. This means that the Haida Gwaii Management Council (HGMC), the co-management body, is made up of equal amounts Haida members and provincial representatives. Built on a consensus model, the HGMC is responsible for implementing and amending the Strategic Land Use Plan that the parties agreed to in 2007. It is also the primary venue for consultation in regards to provincial Crown actions.

Another move towards relationship building in the Reconciliation Protocol is the commitment on both sides to improve the socio-economic wellness of the Haida people.

The agreement calls for a joint approach by both parties that focuses on the health and wellness of children and families on Haida Gwaii. Both parties agree that economic development is closely related to the social and environmental well-being of the communities. These content options earn this agreement a high score in the relationship-building category.

In terms of certainty, the Reconciliation Protocol offers long-term economic certainty due to the indefinite expiration and solid legal framework. By not applying an expiration date to the document, there is no fear that in five years the deal will lapse. This allows provincial officials, private industry and the Haida people the opportunity to plan for economic development in the long term, as they can all be assured of the stability of the agreement.

Unique to non-treaty agreements across the province, the Haida Reconciliation Protocol is accompanied by a commitment to place it within the province's statutory framework. The BC Minister of Aboriginal Relations and Reconciliation agreed to recommend a legislative basis for the shared decision-making components of the agreement to the BC legislature.⁹¹ The Haida Nation reciprocally agreed to recommend to their House of Assembly a similar piece of legislation. This is a powerful step in the implementation and validity of the HGMC co-management body. Developing a statutory framework for the HGMC allows it all the power and authority needed to make all of its relevant decisions. This helps to ensure long-term certainty over economic potential on Haida Gwaii and earns the agreement a high rating for certainty.

The Reconciliation Protocol has significant economic provisions. These include a \$10,000,000 payment for forest tenure acquisition as well as an annual payment of \$600,000 per year in order to implement the agreement. Additionally, the agreement includes a signing payment of \$200,000. In terms of resource revenue sharing, the Reconciliation Protocol commits the provincial government to sharing revenues from any

⁹¹ See Province of British Columbia, *Bill 18-2010 Haida Gwaii Reconciliation Act*.
<http://www.leg.bc.ca/39th2nd/1st_read/gov18-1.htm>

new major natural resource projects in the future. Combined, these economic measures help to strengthen the consultation and accommodation measures since the agreement allows the Haida to use the monetary funds to participate in structures like the HGMC. This agreement scores highly in economic measures.

The Haida Reconciliation Protocol has very good consultation and accommodation measures that provide for the inclusion of the Haida people into decision-making on their traditional territories. It includes some very important consultation and accommodation content that provides the Haida with more input in the development of their traditional territories than virtually any other First Nation in the province. The content includes well-developed, clearly outlined relationship-building measures like co-management bodies and attention to socio-economic issues. It also provides for long-term economic stability through its predictable framework and lack of an expiration date. The grounding of the agreement in statutory provincial legislation also signals all stakeholders that this agreement is here to stay, for the long-term. Economically, the agreement includes necessary funding for implementation of the measures outlined above. It also provides the necessary funds to purchase an important woodlot within their territory. The Haida Reconciliation Protocol overall scores highly in all consultation and accommodation categories.

5.2. Taku River Tlingit Whóoshtin yan too.aat - Land and Resource Management and Shared Decision-Making Agreement

The Taku River Tlingit Whóoshtin yan too.aat - Land and Resource Management and Shared Decision-Making Agreement is a comprehensive land use agreement that allows for the Taku River Tlingit (TRT) to have a definitive say in resource developments and land use in their traditional territories . Because of their geographic and economic realities, the Taku River Tlingit have an agreement that addresses land use planning, protected areas, commercial recreation opportunities and potential mining developments in TRT traditional territories.

The TRT agreement has high rated relationship building mechanisms that allow for both parties to collaboratively and respectively work together. There are three separate levels for shared decision-making: a Government-to-Government (G2G) Forum, an Engagement Framework and Joint Initiatives. The creation of a G2G Forum is a highly formalized arena for collaborative, strategic level land use decision-making. It consists of equal representation from both provincial officials and TRT representatives. In the G2G Forum, the parties work together to implement the jointly developed land use plan for the area, create joint and technical working groups to attend to specific matters and make formal recommendations to statutory decision-makers. This allows for high level, strategic consultation measures to take place between the provincial Crown and the TRT.

Although the TRT also has a co-management body in the form of the G2G Forum, it also explicitly outlines consultation approaches in its Engagement Model. Similar engagement models are employed by the BC Government in other non-treaty agreements. These standardize the consultation process and create clear guidelines for any potential government decisions within a certain First Nations asserted traditional territory. The TRT Engagement Model is comprehensive and wide-ranging. It includes four different levels of engagement, defines each level and provides relevant consultation activities for each level. This helps to standardize the relationship between the two parties and develop a common line of communication. Because of this content, the TRT agreement scores a high rating in the relationship building-category.

The ongoing nature of the agreement and omission of a formalized expiration date provides for economic certainty over lands in the long-term. Together, the explicit land use plan and Engagement Framework provide sector-specific details on what sort of particular actions will require what levels of consultation and accommodation. This is an excellent approach to consultation that provides a clear framework that all government, industry and First Nation participants can understand and follow. This predictability and longevity are two of the main determinants in creating the kind of economic certainty that the provincial government is seeking. This results in a high ranking for certainty measures in the document,

In terms of financial or economic accommodation, the TRT agreement does provide for some important funding mechanisms. Over a three year initial period, the BC Government will pay the TRT \$600,000 in total to implement the terms of the agreement. This is to ensure their effective participation in the G2G Forum and consultation measures.⁹² Additionally, the provincial government commits to developing resource revenue sharing agreements for any future major resource development projects in TRT territories. Implementation and resource revenue funding content gives the agreement a high score in economic consultation and accommodation provisions.

The Taku River Tlingit agreement, like other broadly based comprehensive land use agreements, highly satisfies the three factors that go into a good consultation and accommodation agreement. The G2G Forum, supplemented by two other avenues of joint-decision making allows for a continual TRT voice in land use planning and consultation at the strategic level. The Engagement Model not only helps build relationships between the two parties, it also provides for economic certainty around land use for all British Columbians in the form of a clearly outlined framework for consultation measures. This predictability, and the long-term nature of the agreement mean that there will be very little economic uncertainty regarding potential land use developments in the area. And in terms of economic or financial provisions, the provincial government provides important implementation funding to ensure that the TRT can fully participate in the G2G Forum and in the Engagement Framework, helping to ensure their long-term success.

⁹² Another important consideration in the economic category is the philanthropic addition to the Taku River Tlingit's implementation budget. TIDES Canada, a non-profit charitable organization responsible for the conservation effort in the Great Bear Rainforest among other things, committed \$5 million towards the TRT implementation of their land use agreement. The money is to be used to ensure that the G2G joint decision-making forum has all the necessary resources to ensure the social, cultural, environmental and economic health of the Taku River Tlingit traditional territories.

5.3. Tahltan Nation Government-to-Government and Northwest Transmission Line Negotiation Framework Agreement

The Tahltan Nation Government-to-Government and Northwest Transmission Line Negotiation Framework Agreement is a project-specific agreement. Here, the provincial government and the Tahltan Nation of north-western BC agree to work together and share in benefits from the extension of the British Columbia Hydro Northwest Transmission Line (NTL). In terms of consultation and accommodation, it has highly rated relationship-building provisions, medium certainty provisions and low economic provisions.

It is important to note that the Tahltan agreement is a framework agreement. It is not binding and the final agreement is still in negotiations. With this in mind, I approach this case study as informative and not definitive. I use its content as a placeholder for what the agreement will eventually include. In place of a finalized agreement, it informs the discussion on what these agreements can and strive to include.

In the relationship-building category, the Tahltan Framework agreement includes effective measures to involve the First Nations in the planning, construction, operation, and maintenance phases of the NTL project. This relationship is based on recognizing and respecting the authority of both sides as legitimate governments. The Tahltan agreement includes the development of a Government-to-Government (G2G) Forum. Like other G2G Forums, it consists of equal representation from the province and from the Tahltan Nation. Its stated objectives are increasing certainty over the land base, effectively managing lands and resources, structuring consultation and accommodation approaches, improving Tahltan governance capacity, managing socio-cultural impacts of development in the community, and improving the economic strength of the entire north-western corner of British Columbia. To achieve these goals, the G2G Forum works together through collaborative decision-making and joint-monitoring of the project at hand.

There exists also a commitment from both sides to enhance the socio-economic well-being of the aboriginal groups and ensure a healthy community. The Tahltan agreement stresses managing socio-cultural changes that infrastructure development inevitably brings. The Tahltan agreement acknowledges that the development of the NTL will bring about an influx of people into the area and will generate revenues for the region. This increase in social and economic activity will result in many social and cultural changes for the Tahltan community. The agreement iterates the need for a collaborative approach between BC and the Tahltan to manage and work with community developments. This content works to give the Tahltan Framework Agreement a high rating for relationship-building consultation and accommodation measures.

The Tahltan Framework agreement provides a moderate amount of economic certainty for the territories in question. The agreement includes a large scope of topics, from energy plans to developments of fish and wildlife management structures. This provides some certainty, in the forms of predictability over land management and jurisdiction, for a wide variety of issues that goes beyond the scope of just the NTL project. The Tahltan agreement does not specifically outline any engagement or consultation framework within the agreement. Instead, it includes developing a clear engagement framework as one of the many objectives of the G2G Forum, but until this is completed, the agreement lacks long term predictability for all parties.

The Tahltan agreement has minimal mention of financial or economic accommodation stemming from the NTL development, giving it a low score in this category. It does mention the potential for resource revenue sharing for new major project developments in the territory. It does not stipulate any implementation funding although it does mention the need for financial resources required for Tahltan participation in the agreement. Instead, the agreement acknowledges that a separate agreement will be signed in the future between BC Hydro and the Tahltan. This will be an Impact Benefit Agreement without provincial government involvement. Like other agreements between First Nations and third parties, it will remain confidential as to the actual values accrued to the aboriginal communities.

Because of the framework nature of the Tahltan agreement, it is difficult to make any definitive conclusions about the actual rating of consultation measures that will

appear in the final agreement. However, based on the goals of the framework agreement, it is clear that it will have high scoring relationship building and medium scoring certainty provisions to help make it a robust consultation and accommodation agreement that gives the Tahltan a major and enduring role in land use planning decisions. A G2G Forum, commitment to socio-economic well-being, wide ranging scope and the potential for an engagement framework are all positive signs. As well, in economic terms, the commitment to share provincial resource revenues is another good measure. The lack of mention of implementation funding is a concern, although the agreement does refer to a private Impact Benefit Agreement with BC Hydro. This will include alternative sources of funding, but it is a confidential document so the outcome is unknown.

5.4. Stk'emplúsemc of the Secwepemc Nation Economic and Community Development Agreement

The Stk'emplúsemc of the Secwepemc Nation Economic and Community Development Agreement addresses the New Afton Mine project just west of Kamloops, British Columbia. This is a project-specific agreement that covers the mine's entire twelve year life span. Intensive mining in this project will have significant, acute environmental affects for the traditional territories of the Stk'emplúsemc of the Secwepemc Nation (SSN). In terms of strength of consultation and accommodation measures, the agreement has high scoring relationship-building content, medium certainty provisions and medium economic contributions.

The Stk'emplúsemc Economic and Community Development Agreement (ECDA) agreement encompasses relationship-building aspects that effectively bring the provincial government and the SSN together through shared goals. The agreement acknowledges that the relationship between the parties must be based upon a government-to-government approach that recognizes the authority of the others. A shared decision-making body is an extension of this relationship. In the spirit of joint decision-making, the Stk'emplúsemc ECDA creates a Mine and Minerals Joint Resource Committee. This committee has a more limited mandate than a territory wide shared decision-making body like a G2G Forum. But, like a G2G Forum, is also grounded in

shared decision-making and a strong framework for consultation and accommodation. The Mines and Minerals Joint Resource Committee also stresses information sharing as important to the communication between the two parties.

Another strong aspect of relationship building is the commitment to improve socio-economic conditions. The two participating First Nation bands of the SSN intend on using the resource revenues guaranteed by the mine project to fulfill their goal of closing the socio-economic gap between aboriginals and non-aboriginals. They agree to create a community plan to outline their specific objectives and participate in yearly reporting practices to show how they are using the funds to achieve progress. Because of these content measures, the agreement scores highly in the relationship-building category.

The SSN ECDA has a low amount of certainty. It is limited to one specific natural resource in question, and is only valid for the duration of the mine. This reduces the certainty aspect of the agreement in that the terms only apply to the mining sector and not to other lands and resource uses. However, there are some positive approaches to ensuring some certainty, even if it is limited to just the project at hand. The Stk'emlúpsenc ECDA has a clearly defined Engagement Framework for any consultations necessary to the mining project. This explicitly outlines the requirements and approaches to consultation which provincial officials or third parties must undertake prior to any proposed activity relating to the mine. As with other engagement frameworks, this provides a solid grounding in approaching a mutually agreed upon consultation framework that satisfies both the First Nations desire to be involved in decision-making and satisfies the province's legal obligations to consult. This predictability is important, but its limitation to one specific resource in one specific project is limiting in terms of ensuring good consultation and accommodation across entire traditional territories.

The Stk'emlúpsenc ECDA scores a medium rating in economic provisions for consultation and accommodation. One way it ensures proper economic accommodation is in the form of resource revenue sharing payments. It includes financial payments and explicitly states how the provincial government will formulate and assess the relevant amounts. This agreement even goes so far as to outline the banking procedures for the

financial transfers. It lacks, however, implementation funding for the SSN to participate in the joint-management body, which limits the economic measures in this agreement and allows it a medium score.

The SSN ECDA moderately encourages good consultation and accommodation between the Crown and the two First Nations. It has good relationship building mechanisms to help the parties work together to manage the mine, problems that may arise with it, and socio-economic issues. It has low certainty provisions in the long-term, but does offer predictability for the lifetime of the project through a clearly outlined Engagement Framework. It lacks long-term commitments and wide ranging scope that do not guarantee economic certainty for other stakeholders in BC. The resource revenue sharing is very important and is a good example of strong consultation and accommodation measures.

5.5. Ktunaxa Nation Forest Revenue Sharing Agreement

The Ktunaxa Nation Forest Revenue Sharing Agreement (FRSA) was signed in 2011 between the BC government and the four Indian bands that make up the Ktunaxa Nation: St. Mary's, Tobacco Plains, Lower Kootenay and ?Akisq'nuk. The agreement provides for consultation and accommodation measures in relation to forestry activities within the Ktunaxa traditional territories by offering both a cash and timber component to the aboriginal communities. The Ktunaxa FRSA comes from a template used for all forest revenue sharing agreements in the province. This program has evolved from older Forest and Range Opportunity Agreements. This newer initiative improves upon previous problems of population based funding formulas.⁹³

The Ktunaxa Nation has signed other non-treaty agreements with the province that help to improve the consultation and accommodation measures within their

⁹³ See Literature Review Section 3.3 for a detailed analysis of the Canadian Centre for Policy Alternative's critique of the previous generation of forest and range agreements.

particular FRSA. Because of this deviation from the standard FRSA template, the Ktunaxa FRSA has high scores in the relationship-building category, low certainty and medium economic content scores.

In terms of relationship building, the Ktunaxa FRSA has highly ranked content measures, but most of this is because of the reliance on a separate Strategic Engagement Agreement (SEA) for consultation and accommodation measures. Ktunaxa Nation Council entered into a comprehensive SEA with the British Columbia Government that concerns high-level land and resource management and planning. This SEA creates a joint-management body for lands and resources that meets regularly to discuss issues. The FRSA refers to this throughout the agreement, but does not build upon or expand the existing relationship-building strategies between the two parties. The FRSA lacks the detailed Engagement Model that many other agreements have and it limits First Nation input in the consultation process to operational and administrative matters. This restricts the potential for relationship building of the forest and range agreements by creating a mostly paper-based correspondence relationship.

The Ktunaxa agreement, again relying on referral to its SEA, includes a well-developed, clearly outlined dispute resolution process. If any of the parties have issue with the FRSA, the issue gets referred to a Senior Forum. This jointly developed body is a co-management forum that seeks resolution through consensus. It is an established process that meets regularly. Clear dispute resolution guidelines help to keep relations between the two parties respectful and productive.

Importantly in terms of relationship building, the Ktunaxa FRSA has an expanded description of the socio-economic objectives that both parties intend to pursue. The Ktunaxa agreement lists intended outcomes as an improved government-to-government relationship, closing aboriginal and non-aboriginal socio-economic gaps, and supporting capacity for Ktunaxa self-governance. The agreement then lists Ktunaxa community priorities that the funds from the agreement will support. These include education, cultural revitalization, housing, infrastructure, health, economic development, land stewardship, and governance capacity. All of this content combines to give the Ktunaxa FRSA a high score in the relationship-building category.

In terms of economic certainty and the predictability and clarity this entails, the Ktunaxa FRSA receives a low score. The Ktunaxa FRSA is classified as interim and lasts between 3-5 years. This does not ensure long-term future certainty for the province, private industry and developers or the First Nations whose traditional territory the agreement concerns. Additionally, it has a very limited scope in terms of content and refers solely to forestry. Without acknowledging other resources and with such a limited lifespan, it lacks both scope and predictability.

The Ktunaxa FRSA includes some economic aspects of consultation and accommodation. The Ktunaxa agreement has a very specific formulation for resource revenues. It states that 4% of all forestry resource revenues obtained by the province within Ktunaxa traditional territory will go to the Ktunaxa communities through the Ktunaxa Nation Council Society. This is because the FRSA program intended to fix the template, population-based formula of the previous FRO agreements and directly tie compensation to the amount of forestry activity. However, there is no funding for Ktunaxa member involvement in consultation and accommodation, nor any implementation funding. This results in a medium score for economic accommodation content.

The Ktunaxa FRSA is a unique situation arising from the template approach for this type of sector specific agreement. Because the Ktunaxa have a Strategic Engagement Agreement with the province that provides highly-rated consultation and accommodation measures in the relationship-building categories, such as joint decision-making forums and dispute resolution processes, their FRSA enjoys these strong measures. When it comes to certainty, however, the Ktunaxa FRSA is not a predictable, wide-scoping agreement. In terms of economic consultation and accommodation, it provides true resource revenue sharing as a percentage of provincial profits will be paid to the Ktunaxa. But lacking implementation or involvement funding, the Ktunaxa FRSA does not fully satisfy good consultation and accommodation measures.

5.6. Penticton Indian Band of the Okanagan Nation Interim Agreement on Forest and Range Opportunities

The Penticton Indian Band (PIB) signed the Forest and Range Opportunity (FRO) agreement in March 2009. The FRO originates from a cookie-cutter template that duplicates agreements signed by other First Nations across the province. In exchange for financial payments and timber allocations, the PIB agree not to challenge the province's forestry activities within their traditional territory. There are some consultation and accommodation measures addressed. This format has been replaced by the Forest Revenue Sharing Agreement (as examined in the previous case study). The PIB are still restricted to the agreement they signed in 2009 under the old format. Here, the relationship-building aspects of consultation and accommodation score as medium, they provide low measures of certainty and they offer low economic accommodation.

The Penticton FRO has some relationship-building measures. However, the standardized template approach employed by FRO does not give rise to a full and complete consultation and accommodation relationship-building measures. It lacks the detailed Engagement Model that are contained in many other non-treaty agreements. This restricts the potential for relationship building between the provincial government and the PIB by creating a mostly paper-based correspondence relationship.

The consultation process in the Penticton FRO is specifically outlined and refers to any administrative or operational decisions made by the Ministry of Forests, or its licensees, that may potentially affect Penticton Indian Band's aboriginal rights and title. It has a clearly outlined framework for how ministry officials should approach consulting with PIB in regards to these forestry decisions. This limits provincial consultation only to operational and administrative areas of forestry, and does not provide for PIB input on strategic or high-level planning decisions, limiting the strength of consultation measures.

Additionally, the Penticton FRO does not guarantee certainty in an effective way. Their legal status is currently under debate, after the 2005 BC Supreme Court *Huu-ay-aht decision*. Here, the Court ruled against the standardized template of FROs because they do not adequately take into account the unique variability of different First Nations

in BC. Additionally, the PIB FRO is classified as interim and only lasts for up to five years. This does not ensure long-term future certainty for the province, private industry, developers or the First Nations whose traditional territory the agreement covers.

They have some economic provisions in a form of resource revenue sharing, but the original population-based formula deviates from true resource revenue sharing. The Penticton FRO is much more vague and states that the economic benefits in the agreement are not to be considered a share of resource revenues. Instead, they are an economic accommodation, the value of which was calculated by the BC government and accepted by the Penticton Indian Band. This is based on per population formula and is non-negotiable for any First Nation entering into these agreements. The provincial government addressed these problems in the newer generation FRSA's.

The Penticton FRO, like all other FROs originating from the same template, lacks consultation and accommodation measures that provide for meaningful and valuable input from the PIB. The agreements greatest strengths lie in its relationship building measures, but those are limited to the narrow scope of operational and administrative decision-making. Additionally, its limited timeframe does not ensure predictability and its focus solely on forestry does not provide a consistent consultation and accommodation framework for the PIB's traditional territories. This results in low economic certainty. The reliance upon a population-based formula for financially accommodating the First Nations in FROs does not signal strong economic accommodation measures, and has since been replaced.

5.7. Research Findings: Conclusion

Table 1: Rating Consultation and Accommodation Content in Non-Treaty Agreements

	Relationship-Building	Certainty	Economic Provisions
Haida Nation	High	High	High
Taku River Tlingit	High	High	High
Tahltan Nation	High	Medium	Low
Stk'emlúpsenc	High	Medium	Medium
Ktunanxa Nation	High	Low	Medium
Penticton Indian Band	Medium	Low	Low

This research shows that there is a vast discrepancy in consultation and accommodation measures included in BC's consultation and accommodation agreements with aboriginal communities. The differences extend to agreements of the same kind, such as the differences seen between the Haida Reconciliation Protocol and the Taku River Tlingit agreement, both of which are comprehensive land use agreements. The agreements differ in their topic areas with the Haida agreement focusing more on forestry while the TRT agreement centres more on commercial recreation and mining potential; each acknowledges the economic realities presented by their geographic location. Yet these differences do not effect the value rankings of the consultation and accommodation content. This highlights how variety in non-treaty agreements is a valuable asset. Flexibility to orient agreements to the particular geographic, social, economic, cultural and historical particularities of First Nations is very important in crafting a good consultation and accommodation agreement.

The matrix above also illustrates that variety is not necessarily a good thing. From the Haida agreement through to the Penticton FRO, there is a large discrepancy in rankings of consultation and accommodation measures. Part of this discrepancy

between agreements is due to the patchwork approach of accommodation agreements employed by the provincial government and First Nations. That is, most of the participating First Nations in these case studies do not have just one agreement regarding accommodation with the senior levels of government. In fact, the Haida Nation has signed roughly fourteen agreements with local, regional, provincial and federal governments encompassing everything from sports fisheries, to land use planning to marine park protection, since 1992. It is no coincidence that this experience in negotiating agreements and working with different levels of government assisted the Haida in negotiating a Reconciliation Agreement with some of the strongest measures of consultation and accommodation, including something very close to complete co-jurisdiction over Haida Gwaii.

Charles Porter, Assistant Deputy Minister of Negotiations and Regional Operations for MARR acknowledges that the Haida Reconciliation Protocol was borne out of a unique set of circumstances. A long relationship with the provincial government preceded the Haida's negotiation of the Reconciliation Protocol. This included extreme conflict, in the form of blockades and court challenges, but also included collaborative efforts in the form of land use planning agreements and protected areas designation. The agreement, he admits, sets a poor precedent for the rest of First Nations in BC, who seek to achieve the same statutory decision-making powers. Thus, although I have included it in my set of case studies, provincial representatives maintain that comparing this agreement with others is not applicable.

In contrast with the Haida Nation's long list of agreements and complex and valuable economic measures is the Penticton Indian Band's agreement on Forest and Range Opportunities. Standing virtually alone as their only interaction with the provincial government, and with no other non-treaty agreements to refer to, this agreement signifies the lowest grade of consultation and accommodation. The consultation required by the province is limited to operational and administrative decisions that will be sent via notifications to the PIB. There is no government-to-government or shared decision-making forum to give voice to PIB concerns and the dispute resolution process is very limited compared with other agreements. These two examples show the marked disparity among BC's accommodation agreements and the issues of inequality that this situation creates.

This variety in strength of consultation and accommodation agreements indicates a lack of consistency in the province's approach to negotiating, developing, implementing and sustaining these agreements. Across different agreements and within the same types of agreements, different First Nations are achieving different levels of consultation and accommodation in these agreements.

The provincial government's hodgepodge approach to negotiating is exemplified here. Yes, going into each non-treaty negotiating system is unique, but without a clear picture of expectations or standards on either side of the table, the result is an unequal distribution of consultation and accommodation measures. Non-treaty agreements are beneficial because of their flexibility, but this variety and inequity displayed above is unacceptable for both its lack of predictable economic certainty for the province and its unequal distribution of benefits to BC's First Nations.

6. Analysis

Content, or substance, of consultation and accommodation is widely varied. As evidenced by the research throughout this report, these non-treaty agreements have little standardization across themselves. Although flexibility and variation is a good thing in terms of First Nations in BC – as evidenced by the strong support of this in the interview data – the lack of minimum inclusions has the potential to create vast inequalities amongst BC's First Nations.

The research shows that variety in non-treaty agreements is both a blessing and a curse. Too much variability leads to uncertainty and inequalities while not enough flexibility leads to rigid cookie-cutter, template approaches that do not adequately acknowledge the vast differences amongst BC's First Nations. This variety slows down negotiations of these agreements because neither side has a solid starting place. Variety in non-treaty agreements also heightens the risk of encouraging litigation because it treats different First Nations differently, favouring the nations with more concentrated resources in their territories. Any policy changes to provincial non-treaty negotiations must walk a fine line between an unpredictable lack of standards and being overly prescriptive and too rigid.

In order to rectify the problems here, the provincial government should adopt a set of minimum standards to include in consultation and accommodation agreements. These inclusions would help to standardize negotiations and bring equality to the process. Provincial staff, particularly negotiators, First Nations, the public and private industry will all benefit from the clarity and predictability afforded by a minimum framework.

The development of a minimum class of content for future non-treaty agreements will not only simplify the process, bringing some predictability to a very unclear, haphazardly approached situation, it will also ensure that First Nations in BC are treated equitably at the negotiating table. Equal treatment means that every First Nation will

receive minimum considerations in the above areas. There will be less of a reliance on experienced negotiating, financial and human resources capacity to secure good consultation and accommodation measures from the provincial government.

It is important to note that the implementation of minimum standards is not a move towards formula-based approaches or cookie-cutter agreements. Ensuring minimum content inclusions allows for the variability of First Nations' situations in BC while also permitting aboriginal communities in BC to have equitable footing in entering into these negotiations with the province. Minimums provide a baseline that negotiators can build and expand upon. As no two First Nations are the same, no two agreements will be alike. However, with the implementation of standardized minimums, no First Nations will be left out and the province will not be at a risk for litigation challenges to their current consultation and accommodation agreement policies.

A baseline framework of good consultation and accommodation measures will not affect the important variability and flexibility of these policy tools. All of the options are flexible, can change over time and can adapt to different political, geographical and economic situations in British Columbia. This allows the minimum standards approach to fall in line with recent court decisions such as *Wil'litswx v. BC* (2008) and *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.* (2005) that demand the province acknowledge the unique characteristics of First Nations in designing consultation and accommodation measures.

For these reasons, the policy analysis in this report is broken into two different sections. First of all, I determine which content options should form a set of minimums. I evaluate the options upon a set of criteria and pick the highest scoring options to create a 'basket' of relevant, important base inclusions for non-treaty agreements. In the next section, I look at four different options for implementing these minimum standards. These implementation strategies are again evaluated against a set of criteria that takes into account provincial objectives, First Nations equity and the BC public's priorities.

6.1. Minimum Content Determination

6.1.1. *Options and Measurement Criteria*

In order to prepare a definitive list of content that every accommodation agreement should include, I have used all the research above – literature reviews, case studies and key informant interviews – to compile a list of potential inclusions. These vary from the common to the rarities. I then use the same research methods to compile a list of criteria to evaluate these content options against. The criteria take the form of a set of questions, all of which can be answered with a yes or a no. The wording is such that a yes answer is a positive and means that the option has positive values to the non-treaty agreements. An answer of no, or an ‘x’, indicates that the option lacks those positive qualities. Next I use this analysis to recommend a set of baseline minimum standards that BC should implement in moving forward with their accommodation agreements.

The list of potential options that could be included in non-treaty agreements are as follows. For explanatory definitions of each of the terms, refer to Appendix A.

- Engagement Framework
- Self-Government Recognition
- Employment and Education
- Business Participation
- Environmental Management
- Government-to-Government Forum
- Monitoring and Evaluation of the Agreement
- Implementation Funding
- Resource Revenue Sharing
- Co-Management Bodies
- Dispute Resolution
- Economic Accommodation
- Carbon Offset Programs
- Land Use Plans
- Socio-Economic Objectives
- Free, Prior and Informed Consent

The list of determining criteria and an explanatory question follows below. Certain important criteria, although relevant to this analysis, were omitted. Relationship-building and long-term reconciliation, while crucial to the effectiveness of these agreements, would be achieved by all of the above options. And, as it is not relevant to include criteria

which does not discriminate amongst the options, I have excluded those criteria from the discussion.

Certainty: Does this option provide for economic certainty over land rights and provide for some measures of predictability?

Legal: Will this option help the Crown satisfy their legal duty to consult?

Cost: Will the provincial government be able to execute this option without a significant contribution of new, incremental financial outputs? This is defined as over \$100,000 per year.

Reconciliation: Does this option work towards providing long-term reconciliation between assertions of Crown sovereignty and Aboriginal title in BC?

Efficiency: Will this option allow for the business practices of BC to continue in an effective and efficient manner?

Implementation: Will this option be easy for regional provincial staff to implement? Will they be able to begin this new program without the need for a vastly different administrative system and program directives?

Capacity: Will First Nations be able to develop and implement this option without the need for increased financial and human resources capacity?

Socio-Economics: Will this option help to close the socio-economic gaps between Aboriginal and Non-Aboriginal communities in BC?

Flexibility: Does this option have the ability to be altered over time for changing circumstances?

Geographic Realities: Will this option be able to be pursued by all First Nations in BC, regardless of their geographic realities and the availability of resources in their territories?

6.1.2. Analysis of Content Options

Using a 'check' and 'ex' matrix, I have evaluated the options as follows.

Table 2: Check/Ex Evaluation of Possible Content Measures

	Certainty	Legal	Cost	Reconciliation	Efficiency	Implementation	Capacity	Socio-Economics	Flexibility	Geography
Engagement Framework	✓	✓	✓	✓	✓	✓	✗	✗	✗	✓
Self-Government Recognition	✗	✓	✓	✓	✗	✗	✗	✗	✓	✓
Employment and Education	✗	✗	✓	✗	✗	✓	✓	✓	✓	✗
Business Participation	✓	✓	✓	✓	✗	✓	✗	✓	✓	✗
Environmental Management	✗	✓	✓	✓	✗	✗	✗	✗	✓	✓
Government to Government Forum	✓	✓	✓	✓	✓	✗	✗	✗	✓	✓
Monitoring and Evaluation	✗	✗	✓	✓	✗	✗	✓	✗	✓	✓
Implementation Funding	✓	✓	✗	✗	✓	✓	✓	✓	✓	✓
Resource Revenue Sharing	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗
Co-Management Bodies	✓	✓	✓	✓	✗	✗	✗	✓	✓	✗
Dispute Resolution	✓	✓	✓	✓	✗	✗	✓	✗	✓	✓
Economic Accommodation	✓	✓	✗	✓	✓	✓	✓	✓	✓	✗
Carbon Offsets	✗	✗	✓	✗	✗	✗	✗	✓	✓	✗
Land Use Plans	✓	✓	✓	✓	✓	✗	✗	✗	✓	✓
Socio Economic Objectives	✗	✗	✓	✗	✓	✓	✓	✓	✓	✓
Free Prior and Informed Consent	✓	✓	✓	✓	✗	✗	✗	✓	✗	✓

When assessing these options, I chose a minimum score of 7/10 to move forward to become a must-have content piece in a consultation and accommodation agreement. With this scoring framework in mind, the following content basket that will best satisfy provincial objectives while also ensuring First Nations equality are as follows:

- Resource Revenue Sharing
- Economic Accommodation
- Implementation Funding
- Engagement Framework
- Business Participation
- Government to Government Forum
- Dispute Resolution
- Land Use Plans
- Socio-Economic Objectives

The province should implement minimum standards for each of these options for any accommodation agreements moving forward. In the economic categories, resource revenue sharing, economic accommodation and implementation funding all satisfy enough criteria to make it into the recommended basket. These are very important in order to overcome First Nations' lack of financial resources and capacity. As well, adequate funding mechanisms are necessary to ensure that First Nations will be able to participate in the agreement and live up to its terms. These content inclusions will cost the province a sizeable amount, but they are crucial to the validity and longevity of non-treaty agreements. Resource revenue sharing and economic accommodation are dependent on geographical resource distribution realities, so these may have to be entered into the minimums as "where possible" or "according to resource realities" clauses.

Engagement Frameworks, G2G Forums and dispute resolution are three more essential parts of a consultation and accommodation agreement. These promote viable working relationships between both sides and allow for a spirit of trust and respect between the province and First Nations. These may cause some challenges for provincial staff at the operational and implementation level. Also, these require adequate First Nations capacity to work effectively. Despite these drawbacks, they offer many positives for good consultation and accommodation measures that involve the First Nations in territorial decision-making.

Encouraging business participation of First Nations through joint ventures, equity stakes and contracting opportunities rates highly. Although the province cannot specifically attend to this, it can work with the private sector and resource developers to build funding and services for these programs. A commitment to tripartite action plans should be acknowledged in non-treaty agreements.

The development of land use plans that are endorsed by the particular community is also very important to any accommodation agreement concerning lands and resources. This allows for clarity amongst all concerned parties and provides a vehicle for government and First Nation representatives to work together to reach a common understanding. Likewise, the statement of socio-economic objectives in non-treaty agreements also rates very highly. Like land use plans, these relate common goals and objectives of aboriginal communities and allow the province and the First Nations to collaborate. However, this should be approached with caution. The province must not be overly prescriptive with outlining and shaping the First Nations' socio-economic objectives. Don Bain, of the UBCIC, stated that this behaviour by provincial representatives runs the risk of being paternalistic and offensive to First Nations, who should be given the right to decide for themselves how money is used.

6.2. Implementation Determination

With the basket of content option standards above, I now turn to the implementation issue of such minimum standards in non-treaty agreements. There are four options for how to implement this basket of baseline standards. The first option is the status quo, meaning no implementation mechanisms. Issuing a new policy statement for the Ministry of Aboriginal Relations and Reconciliation (MARR) is the second option for implementing a base standard of minimums. This would be a government policy for MARR negotiating staff to work with when approaching non-treaty agreements. The third option for the province is to enact specific legislation regarding consultation and accommodation agreements. The last policy option is to implement broad based recognition legislation across that includes minimum standards for consultation and accommodation agreements. Much like the failed attempt of Gordon Campbell's

Recognition and Reconciliation Act 2009, this would acknowledge aboriginal title claims as valid across British Columbia.

6.2.1. *Implementation Criteria*

I will assess each of the four options against a set of criteria. Relevant criteria to include are political feasibility, legal feasibility (the freedom from risk of litigation), cost to the provincial government, negotiating timeline, assurance of economic certainty, stakeholder acceptance, public acceptance, First Nations acceptance, and equity across BC First Nations. I have not included cost in the analysis because no one option would cost the provincial government significantly more. All options, excluding the status quo, require staff resources having to develop and draft the options, but do not require significant revenue expenditures.

I also omitted First Nations acceptance from the list of criteria because I was unfortunately not able to secure many First Nation personnel interviews during my research. Without definitive opinions, I do not believe generalizing or hypothesizing on their views about implementation is the fair or correct thing to do. Instead, I have decided to measure the options against level of involvement from First Nations required. This will measure the level of consultation required by each option in order to design and implement it. Since political feasibility will be captured by stakeholder acceptance and public acceptance, I omitted it as well. All of the descriptions of the criteria and their measurements scales can be found in Appendix B.

6.2.2. *Analysis of Implementation Options*

With the above criteria and measures I have evaluated the four options with the following scores.

Table 3: Multi-Criteria Evaluation of Implementation Options

	Status Quo	Policy Statement	Specific Legislation	Recognition Legislation
Certainty	Low	Low	High	High
Legal Feasibility	Low	Low	High	Medium
Public Acceptance	High	High	Medium	Low
Stakeholder Acceptance	Low	Medium	High	Medium
First Nation Involvement	Low	Medium	Medium	High
Equity	Low	Medium	High	High

The status quo scored very low in most categories. It scored high in public acceptance because the public is relatively unaware of the current approach and it is not a pertinent, public issue in British Columbia today. Staying with the status quo will not draw significant media attention and thus will minimize high profile political conflict making it a politically acceptable option. The status quo would be the easiest and least costly option, as well, with the province just maintaining their current haphazard, piecemeal system of one-off accommodation agreements. Unfortunately, it does leave the problem at a significant risk for litigation. It also treats the First Nations in BC unequally. This approach is not currently acceptable because of its uncertainty, unpredictability, unequal treatment of BC First Nations and the resulting risks of litigation. Based on the analysis, I do not recommend this option.

A non-binding policy statement scored in the medium range. Like the status quo, it would have high public acceptance due to the fact that there would be no opposition garnered by a policy direction like this. Certainty and legal feasibility would be low, because it would not ensure long-term predictability for the province and this could lead to legal challenges and litigation. Any new policy statement regarding consultation and accommodation would require some consultation with First Nations. This would most likely involve a large representative bodies like the First Nations Leadership Council so it scored a medium in First Nations Involvement. It would help to equalize the bargaining position of First Nations in BC, but would lack statutory regulations to dissuade MARR from only engaging the resource-rich First Nations. Thus, it scored a medium on the

equity criteria. A policy statement would be more flexible than other legislated options but its variability may result in the same issues we see today. Based on the analysis, I do not recommend this option.

Broad based legislation creates a framework for moving forward with the acknowledgement of aboriginal title without strength of claim assessments.⁹⁴ The 2009 attempt did not make it past the dialogue phase, as First Nations organizations in BC did not entirely support it. Termed as a ‘game-changer’ it would be a significant step and would become very politically charged. Stakeholders, such as business and industry organizations would want input on the legislation, and the public would want a significant amount of information beyond just a discussion paper. However, despite this extensive work in the drafting phase, it would provide long-term stability and assurance to the aboriginal rights and title issues in BC.

Broad-based recognition legislating recognizing aboriginal title across BC achieves high ratings for certainty and equity. It would require extensive First Nations collaboration at all levels of governance. This option would require significant public consultation mechanisms as well, as in the 2009 proposal, when six public forums were held across the province. Public acceptance would be low. This is a comparison measurement, when compared to the other options. If the 2009 attempt was any example, there will be a great deal of opposition for all kinds of public individuals and organizations. Stakeholder acceptance would be medium, with some industry organizations applauding the move towards finalized certainty and predictability and others against the acknowledgement of title. Finally, legal feasibility scores a medium. Charles Porter, Assistant Deputy Minister of MARR argues that there remains the question of whether British Columbia can, according to the constitutional division of powers, acknowledge aboriginal title in the province without the involvement of the

⁹⁴ A strength of claim assessment uses biological, geographic, historical, archaeological, and ethnographic data, along with oral histories and mapping techniques to determine the strength of aboriginal rights and title claims in a First Nation’s claimed traditional territory. See Section 5.1.4 for a discussion on why these can be challenging for First Nations.

federal government. These questions may lead to lengthy litigation. Based on the analysis, I do not recommend this option.

Specific legislation enacted by the provincial government regarding non-treaty agreement scores the most favourably out of all the options. It would provide high levels of certainty for the province and would be feasible for the legislature to effect. Public acceptance would be medium, since there may be some media attention to the implementation of minimums in these agreements, and this may cause some dissent amongst the public. Stakeholder acceptance would be high because business and resource developers would benefit from the standardization and predictability of such reliable legislation. The province would require input from First Nations leadership organizations, such as the Union of BC Indian Chiefs, BC Assembly of First Nations, the First Nations Summit and the First Nations Leadership Council. But, they would not need to extend the process to individual communities, due to the legislation's more specific nature. It would legislate equal treatment of First Nations at the negotiating process, thus earning a high score of equity.

By legislating a statutory minimum for non-treaty agreements, the standards would be well-enforced and well-publicized. The public, government employees, First Nations and industry officials would all be well aware of the minimum standards in consultation and accommodation agreements. Limited to minimum standards, there would still be variability and flexibility allowed for in negotiations. Crafting this legislation would take a significant amount of time before it could be implemented. However, as this legislation is specific to the non-treaty agreements, and not broadly applicable to other areas of First Nations rights and title claims, it would not ignite significant political or media attention and public opinions. Based on the analysis, I recommend this option.

6.3. Challenges in Implementing Minimum Standards

Three distinct challenges will arise in implementing a minimum basket of standards. First of all, there is the challenge of garnering First Nations support for the policies. In BC, there are 203 First Nations, numerous national governments, tribal councils and leadership organizations. Expecting 100% approval from all of these

representative groups is unrealistic. No one policy will satisfy each of these groups equally. By bringing Aboriginal leadership figures into the discussion and drafting of these minimum standards though, and extending the consultation process, the province will be better positioned to make these policy changes with some level of First Nations support.

Second of all, the windfall concept is an inescapable reality that will play a large role in determining relationships between the province and First Nations in BC. The geographic realities of resource distribution cannot be changed or altered through policy work; an economy cannot be built out of nothing. So although these minimum standards aim to level the playing field and bring some equality to First Nations across BC, in today's economy, the First Nations with substantial natural resources in their traditional territories will benefit more from consultation and accommodation agreements.

Lastly, any aboriginal policy measure in BC will be challenged by the absence of public acceptance. There exists a fundamental lack of public knowledge surrounding aboriginal matters, including history, culture and legal status, in our province. This goes far beyond this specific policy surrounding non-treaty agreements. In order to advance the reconciliation process, whether through treaties, non-treaty agreements or any other kinds of policies, the province needs to find a way to inform the public on the nature of aboriginal rights and title, the importance of the historical situation and the need for progressive, inclusive policy strategies. Until the general public understands the situation, it remains difficult to advance the necessary policies to bring about reconciliation.

Although significant challenges exist, that is no reason for the province to shy away from implementing the recommended policies. Many of these problems will continue to exist far into the future, but by taking informed steps in a positive direction, the province can pragmatically begin to address reconciliation through fair, equal and economically certain non-treaty agreements..

7. Concluding Recommendations

The problems associated with the BC government's approach to non-treaty agreements stem from an unpredictable variety that does not ensure certainty for investors, nor equity for First Nations. The province is taking positive steps, through the New Relationship, to find ways of reconciling assertions of Crown sovereignty and Aboriginal title in BC. In order to address these specific problems, there needs to be a standardized, base-level content minimum for consultation and accommodation agreements. This will not become a cookie-cutter approach with template agreements, but rather a minimum approach to negotiate around, that provides certainty, clarity and equality. The minimums that emerged from the criteria analysis are as follows:

- Resource Revenue Sharing
- Economic Accommodation
- Implementation Funding
- Engagement Framework
- Business Participation
- Government to Government Forum
- Dispute Resolution
- Land Use Plans
- Socio-Economic Objectives

In the face of many different policy tools that the government has at its disposal to implement these options, the multi-criteria analysis tool provided me the best, although an admittedly subjective, assessment of the options. According to the second criteria measurement exercise, I recommend that the province opt for specific legislation regarding consultation and accommodation agreements in order to implement the preceding list of minimum standards. Specific legislation emerged as the paramount option when assessed against the multiple criteria in the previous section. Although this will too have its challenges, the benefits of clarity, certainty, stakeholder acceptance and First Nations input into the process are extremely valuable.

A minimum basket of content measures defined within a statutory, legislated framework in British Columbia is the best policy option moving forward. Not all First

Nations will be engaged in this process, due to their own choosing or perhaps due to their practical realities. But, if they so choose too, they can be assured that they will be treated the same, regardless of negotiating, financial or human resource capacities. The provincial government will benefit from this by having a clear and definitive statutory-based framework within which to operate. Also, by working towards equal treatment, that is not based on per population, cookie-cutter formulas but on a basic set of minimum standards with which to work into negotiations, the province will reduce risks of costly, lengthy legal challenges. The business community, including resource developers and investors, will benefit from this legislation by having a clear and certain direction and improved certainty over lands and resources in the province, helping to clear up some of the confusions.

This will be a positive step in the right direction. None of these implementation options are perfect and none will ultimately bring a definitive end to all the aboriginal rights and title issues in British Columbia. Chief Kim Baird of the Tswassen First Nation, speaking to a class of SFU students about her experience in the treaty process, “you cannot let the perfect deal get in the way of a good deal.” It is with this pragmatic approach to taking incremental steps in the right direction that the province should approach a set of minimum standards for consultation and accommodation agreements. There will never be a perfect approach, but with the right values in mind, we can all move forward together down the right path.

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Appendices

Appendix A – Content Definitions

Content Option	Definition
Engagement Framework	Clearly outlined set of processes and procedures relating to consultation. This includes a matrix that determines the level of consultation in relation to the area and level of potential disturbance.
Self-Government Recognition	The provincial government agrees to acknowledge the First Nations right to be a self-governing First Nation in the preamble of the document and the decision-making power this entails.
Employment and Education	This can include job quotas for First Nations, job training, employment opportunities and educational strategies such as scholarships and courses offered.
Business Participation	This can range from equity stakes, to joint ventures, to employment contracts offered to First Nations, either by a third party or facilitated by the province.
Environmental Management	This includes a legitimate voice in the ongoing management of the environment, from ensuring standards to enforcing provincial regulations.
Government-to-Government Forum	This is a body that comprises of equal numbers of First Nations and provincial representatives that meets regularly to discuss issues related to the agreement. It is based on consensus decision-making and relationship building.
Monitoring and Evaluation of the Agreement	This means that the agreement includes clauses that allow for the agreement to have program evaluation in place, with set dates for progress reports.

Implementation Funding	This includes any financial resources guaranteed in the agreement to go to the First Nations in order for them to carry out the terms of the agreement.
Resource Revenue Sharing	This is the provincial granting of resource revenues or rents earned from private resource developers.
Co-Management Bodies	Co-management bodies are comprised of equal numbers of provincial and First Nations representatives and are responsible for the statutory decision-making over lands and resources.
Dispute Resolution	This includes any significant framework that allows for decision-making to be explicitly detailed in the agreement.
Economic Accommodation	This is financial compensation to the First Nations in order to accommodate any infringements on their claimed rights and title.
Carbon Offset Programs	This allows the province to purchase carbon credits created when a First Nation protects a large area of forests.
Land Use Plans	These are comprehensive plans that cover a wide area that First Nations and the province agree upon. They detail which areas are available for what kinds of resource development and which areas are to be protected.
Socio-Economic Objectives	These can include any number of priorities that a First Nation identifies in order to improve their communities. A list of objectives can guide the use of funding in the agreements.
Free, Prior and Informed Consent	This is the basis of the UN Declaration of the Rights of Indigenous Peoples. It maintains that any resource development on traditional territories must be done with this from the First Nations. Including this clause in an agreement would help give rise to the UN DRIP in BC.

Appendix B – Implementation Criteria

Criteria	Description	Measurement
Certainty	Will this provide long-term predictability for the province? Will this be able to stand up over time? Will this be permanent and not dependent on the political will of the majority party?	High, Medium, Low
Legal Feasibility	Will this stand up to legal court challenges? Will this have grounding in constitutional law? Will this legally uphold the honour of the Crown?	High, Medium, Low
Public Acceptance	Will the BC public be in favor of this? Will this cause a major backlash against the province?	High, Medium, Low
Stakeholder Acceptance	Will interest groups like business, private industry and investors approve of this? Will they support the province and continue working here?	High, Medium, Low
Level of Involvement Of First Nations Needed	Will the province need to extensively consult with First Nations before implementing this option? Will the province have to go beyond the First Nations Leadership councils and organizations and into community consultations?	High, Medium, Low