



# Treaties and self-determination: Case studies from international jurisdictions

*Treaty Series*

Research Note  
No. 8, June 2018

Alice Petrie  
Research & Inquiries Unit  
Parliamentary Library & Information Service

Department of Parliamentary Services  
Parliament of Victoria



## Acknowledgments

The author would like to thank Michael Graham, Igor Dosen, Marianne Aroozoo, Debra Reeves, Caley Otter, Jon Breukel and Bella Lesman for their help in the preparation of this paper.

*Other research products in the Treaty Series at the time of publication include:*

Bill Brief: Advancing the Treaty Process with Aboriginal Victorians Bill 2018

Quick Guide: Treaty discussions in Australia: an overview

ISSN 2204-4779 (Print) 2204-4787 (Online)

Research Note: No. 8, June 2018

© 2018 Parliamentary Library & Information Service, Parliament of Victoria



Research Notes – Quick Guides are produced by the Parliamentary Library’s Research & Inquiries service. They provide brief information on issues of interest to Members of the Victorian Parliament. This research publication is current as at the time of printing. It should not be considered a complete guide to the particular subject. While it is intended that all information provided is accurate, it does not represent professional legal opinion. Any views expressed are those of the author(s).

Some hyperlinks may only be accessible on the Parliament of Victoria's intranet. All links are current and available as at the time of publication.

# Contents

---

- Introduction..... 1
- British colonial treaties..... 3
  - Canada ..... 3
    - Historic treaties ..... 4
    - Modern treaties ..... 5
    - British Columbia ..... 6
    - Self-governance..... 9
  - New Zealand ..... 9
    - Treaty ..... 9
    - Parliamentary representation ..... 10
- USA..... 11
  - Treaties..... 11
  - Self-governance..... 11
- Other countries ..... 13
  - Norway..... 13
  - Finland..... 14
  - Sweden..... 14
- References..... 16



# Introduction

---

The Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Advancing the Treaty Bill) was introduced on 7 March 2018 in the Legislative Assembly, and passed both Houses of Parliament on 21 June 2018.<sup>1</sup> It aims to:

...advance the treaty process between Aboriginal Victorians and the State by providing for the recognition of the Aboriginal Representative Body, enshrining the guiding principles for the treaty process and requiring the Aboriginal Representative Body and the State to work together to establish elements necessary to support future treaty negotiations and for other purposes.<sup>2</sup>

In May 2018, the Victorian Government dedicated \$116 million in its 2018-19 Budget to 'support self-determination, celebrate culture and improve the lives of Aboriginal Victorians across the state'.<sup>3</sup> The Victorian Government has stated that it is 'committed to self-determination as the guiding principle in Aboriginal Affairs', including in relation to treaty, transferral of decision-making capabilities to Aboriginal Community Controlled Organisations and increasing cultural heritage management and protection.<sup>4</sup>

With the introduction of the Advancing the Treaty Bill and Victorian Government commitments towards ensuring self-determination for Indigenous peoples in Victoria, it is timely to consider how other international jurisdictions have approached treaty, and also the self-determination of Indigenous peoples more generally.

There is no single definition for self-determination, and it may mean different things to different groups of people. Indeed, members of Aboriginal communities in Victoria have emphasised the importance of being able to define what self-determination means to them, rather than having other concepts imposed upon them.<sup>5</sup> Under international law, however, the right to self-determination provides that peoples are able to 'freely determine their political status and freely pursue their economic, social and cultural development'.<sup>6</sup> In relation to Indigenous peoples, the right requires that states 'give access to and ... ensure representation of such groups in the democratic process, particularly in relation to decision-making on issues affecting traditional land and economic activities'.<sup>7</sup> The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) further guarantees

---

<sup>1</sup> [Advancing the Treaty Process with Aboriginal Victorians Bill 2018](#).

<sup>2</sup> [Advancing the Treaty Process with Aboriginal Victorians Bill 2018](#), long title.

<sup>3</sup> N. Hutchins, Minister for Aboriginal Affairs (2018) '[Massive boost for self-determination](#)', Victorian State Government, media release, 1 May.

<sup>4</sup> Aboriginal Victoria (date unknown) '[Self-determination](#)', Victorian State Government, accessed online 25 June 2018.

<sup>5</sup> L. Behrendt & A. Vivian (2010) *Occasional Paper: Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion*, Victorian Equal Opportunity and Human Rights Commission, Victorian State Government, p. 3.

<sup>6</sup> *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, 999 UNTS 171; [1980] ATS 23 (entered into force 23 March 1976), art 1; *International Covenant on Economic, Social and Cultural Rights* (ICESCR), opened for signature 16 December 1966, 993 UNTS 3; [1976] ATS 5 (entered into force 3 January 1976), art 1.

<sup>7</sup> Parliamentary Joint Committee on Human Rights (2015) *Guide to Human Rights*, Canberra, Parliament of Australia, p. 49.

the right to autonomy or self-government in internal affairs, and financing for these autonomous functions.<sup>8</sup>

There are many practical means or methods by which self-determination can be realised, including through treaty-making processes.

A treaty, specifically one between a government and an Indigenous group, is a particular type of agreement. Legal scholars have asserted that it must contain certain elements:

- recognition of the Indigenous group as a ‘distinct political community’, rather than a minority group within the existing state;
- negotiation of the terms of the agreement that are fair and undertaken in good faith; and
- inclusion of responsibilities and obligations for both parties, to bind them in an ongoing relationship.<sup>9</sup>

The possible content or outcomes of a treaty are diverse, and depend entirely on the specific circumstances of the parties involved. However, the recognition of the Indigenous group as a distinct entity implies that some level of self-determination will be granted to the Indigenous group.<sup>10</sup>

This Quick Guide provides case studies of international jurisdictions that have historic treaties or modern treaty-making processes, self-governance arrangements, and other mechanisms aimed at realising self-determination for Indigenous peoples. The modern treaty processes in Canada are particularly relevant as they provide an example of how treaty-making can work in contemporary practice. However, the historic treaties of New Zealand and the United States of America (USA) are also useful to consider, principally in relation to their modern relevance and significance. This paper will further highlight other mechanisms aimed at achieving self-determination in Sweden, Norway and Finland, such as the establishment of Indigenous parliaments.

As the treaty process in Victoria is in its developmental stages, this publication is not intended to be comparative. Rather, it provides an overview of the nature and scope of treaties and other forms of self-determination in jurisdictions with similar historical, socio-cultural and political contexts to our own.

This paper is the third in a series of research products by the Parliamentary Library related to treaty and treaty-making processes.

---

<sup>8</sup> [United Nations Declaration on the Rights of Indigenous Peoples](#), adopted by the UN General Assembly at its 61<sup>st</sup> session, 2 October 2007, A/RES/61/295, art 4. While a landmark and highly symbolic document, UNDRIP is, however, not legally binding (unlike the ICCPR and ICESCR, which Australia is obliged to respect, protect and fulfil). Australia endorsed UNDRIP in 2009. The right to self-determination is not currently a part of Victoria’s [Charter of Human Rights and Responsibilities Act 2006](#). However, the Act required a review to take place to consider the inclusion of this right, which occurred in 2010. This review provided a number of options as to how self-determination might be included. See Behrendt & Vivian (2010) op. cit.

<sup>9</sup> See H. Hobbs and G. Williams (2018) ‘[Australia’s First Treaty](#)’, Australian Public Law website, 16 April; and S. Brennan et. al. (2005) *Treaty*, Sydney, The Federation Press, p.3. For further discussion of treaty and the Advancing the Treaty Bill, see the second publication in this Treaty series: M. Graham & A. Petrie (2018) ‘[Bill Brief: Advancing the Treaty Process with Aboriginal Victorians Bill 2018](#)’, *Research Note*, no. 5, Melbourne, Victorian Parliamentary Library.

<sup>10</sup> H. Hobbs and G. Williams (2018) op. cit.

## British colonial treaties

---

British and other colonial powers have made a number of treaties or treaty-like agreements with Indigenous peoples, including in New Zealand, Canada and the USA. These agreements contained varying rights and terms, but all recognised the existence of the Indigenous peoples on their lands prior to the arrival of the colonising forces and the Crown's assertion of sovereignty.<sup>11</sup> The significance of these historic treaties and agreements, to a certain extent, lies in the guidance and establishment of principles that they provide to the ongoing relationship between Indigenous and non-Indigenous peoples in their respective jurisdictions.

There are significant historical, cultural and political differences between Australia, New Zealand, Canada and the USA. However, these nations are similar in that they are all western, settler-colonial liberal democracies, with inherited English law and institutions.<sup>12</sup> As a result, these countries face similar issues regarding the self-determination of—and reconciliation with—Indigenous peoples within the broader existing state structures.

The interpretation of historic treaties and treaty-like agreements in these jurisdictions has changed over time in conjunction with government action, court decisions and subsequent legislative developments. They are, in many ways, living documents. The agreement of these historic treaties has also foreshadowed other broad consequences and outcomes. Often, the political position of Indigenous groups has deteriorated from the time of the original treaties, in terms of their power dynamic with settler groups or the state. In some jurisdictions, however, historic treaties have now attained a renewed significance in reconfiguring that dynamic. In others, the practice of treaty-making has resumed as a modern means of redefining and restructuring the relationship between the state and Indigenous groups.

Some academics have observed that Australia's position in not having negotiated any treaties to date can be to our benefit in future treaty-making processes. They consider that this allows a unique opportunity in being able to assess the successes and difficulties of those negotiated in other jurisdictions (while taking into consideration the individuality of the Australian context).<sup>13</sup>

## Canada

There are two kinds of treaties in Canada: historic treaties and modern treaties. As noted, the Canadian experience is significant in that treaty-making continues and has developed alongside historic treaty commitments. Modern treaties in Canada reflect contemporary international practice, principles and legal values, such as those reflected in the UNDRIP. They are, as such, particularly relevant to the treaty debate in Australia.

Section 35(1) of Canada's *Constitution Act 1982* 'recognises and affirms' all existing treaty rights of the 'aboriginal peoples of Canada', which for the purposes of this Act includes the Indian, Inuit and Métis peoples.<sup>14</sup> The Canadian Government has acknowledged that self-government rights provided for under treaties and other agreements are also considered 'existing rights' for Constitutional purposes.<sup>15</sup>

---

<sup>11</sup> Aboriginal Victoria (date unknown) '[Treaty fact sheet](#)', Victorian Government, accessed online 25 June 2018.

<sup>12</sup> See, K. Gover (2017) '[Indigenous Rights and Governance in Canada, Australia, and New Zealand](#)', *Oxford Bibliographies Online*, accessed online 25 June 2018.

<sup>13</sup> Brennan et. al. (2005) op. cit., p. 82.

<sup>14</sup> *Constitution Act 1982*, s. 35(1). This recognition includes both historic and modern treaties.

<sup>15</sup> Behrendt & Vivian (2010) op. cit., p. 10.

Both provincial and federal governments in Canada have a further obligation to consult with Indigenous groups regarding conduct that may adversely affect those groups or their potential or established treaty rights.<sup>16</sup>

Outside the treaty space, the Canadian Government and First Nations have established other methods of cooperation, including permanent bilateral mechanisms in the form of partnership committees and the signing of memorandums of understanding.<sup>17</sup> A number of discussion tables have also been created across the country to facilitate dialogue on the advancement of Indigenous rights and self-determination. At these tables, the parties can discuss new ideas and methods of reaching agreements in order to achieve greater Indigenous self-determination. At the time of publication, approximately 60 discussion tables had been formed.<sup>18</sup>

First Nations are represented by the Assembly of First Nations, which is a ‘national delegated forum’ that has roles and functions to determine collective and co-operative policy or policy positions, to advance the aspirations of First Nations groups, and to seek, utilise and distribute resources for the benefit of all First Nations.<sup>19</sup>

### *Historic treaties*

Treaties between European colonial forces and First Nations peoples in Canada date back to the early 1600s; however, when British colonialists emerged as the dominant power, King George III issued the Royal Proclamation of 1763 that affirmed the legitimacy of certain First Nations territories, and the exclusive power of the Crown to purchase First Nations land. This Proclamation provided the basis for further treating with First Nations peoples. Both prior to and following Canadian confederation in 1867, the Crown negotiated myriad treaties with First Nations groups (including the 11 ‘numbered treaties’) with aims of securing large areas of land, advancing European settlement, and pursuing resource development. These treaties were negotiated between the Crown and individual First Nations and so the terms differ in each. However, provisions generally included the transfer of First Nations land to the Crown in exchange for certain rights and benefits, such as hunting and fishing, reserves, educational assistance, and financial payments.<sup>20</sup> Following confederation, the provinces held certain responsibility for the fulfilment of treaty obligations and were the beneficiary of any land ceded by First Nations groups.<sup>21</sup> The terms of these treaties were often not honoured, or subject to interpretative dispute.<sup>22</sup>

---

<sup>16</sup> Indigenous and Northern Affairs Canada (2016) ‘[Government of Canada and the duty to consult](#)’, Government of Canada, accessed online 25 June 2018. Note: due to a government departmental restructure, Indigenous and Northern Affairs Canada has been dissolved. As a result, this website will be moved in the future to either the new Crown-Indigenous Relations and Northern Affairs Canada home page or the new Indigenous Services Canada home page.

<sup>17</sup> Crown-Indigenous Relations and Northern Affairs Canada (2017) ‘[Creating new mechanisms](#)’, Government of Canada, accessed online 25 June 2018.

<sup>18</sup> Crown-Indigenous Relations and Northern Affairs Canada (2018) ‘[Exploring new ways of working together](#)’, Government of Canada, accessed online 25 June 2018.

<sup>19</sup> Assembly of First Nations (2003) *Charter of the Assembly of First Nations*, first adopted in 1985 with subsequent amendments adopted up to 2003, art 3.

<sup>20</sup> Crown-Indigenous Relations and Northern Affairs Canada (2018) ‘[Treaties and agreements](#)’, Government of Canada, accessed online 25 June 2018.

<sup>21</sup> Brennan et. al. (2005) op. cit., p. 89.

<sup>22</sup> Torys LLP (2016) *Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples*, 12 July, Canada.

A claims process (named ‘specific claims’)<sup>23</sup> was introduced in 1973 to address allegations surrounding breaches by the state of the terms of historic treaties through negotiation (rather than litigated processes), and to provide for a final resolution of the grievance.<sup>24</sup> Following unsuccessful negotiations, First Nations peoples can refer their claim to the Specific Claims Tribunal.<sup>25</sup> Criticisms of this system include resourcing restraints and long wait periods for the finalisation of unresolved claims; a lack of transparency in public reporting; and the difficulties imposed on First Nations in establishing evidence for claims relating to historic events.<sup>26</sup>

### *Modern treaties*

Canada continues to negotiate individual land claims and other settlements with First Nations groups. These are known as ‘comprehensive claims’, or modern treaties. The negotiation of these claims has occurred since 1973, when the federal government recognised that Aboriginal rights and title continued to exist over land not addressed by historic treaties or other legislation.<sup>27</sup> The content of settlement can include:

- transfers of land ownership;
- land, water, heritage, environment and wildlife management;
- financial compensation;
- a self-governance agreement;
- an economic development strategy; and
- sharing of resource revenue.

The Canadian Government has signed 26 comprehensive land claims and four self-government agreements since 1973.<sup>28</sup>

There are six steps for the finalisation of a comprehensive claim agreement:

- Submission of Claim;
- Acceptance;
- Framework agreement (agreement on issues to be discussed and on deadlines for reaching an Agreement in Principle);
- Agreement in Principle (negotiation of issues set out in the framework agreement);
- Final agreement and ratification; and
- Implementation (once the comprehensive land claim or self-government agreement is signed and ratified, the parties move to implement their respective responsibilities according to the agreed implementation plan).

A ‘whole-of-government approach’ to the implementation of modern treaties was established in 2015. As part of this initiative, the Canadian Government has issued a *Statement of Principles on the Federal*

---

<sup>23</sup> See Indigenous and Northern Affairs Canada (2015) ‘[Specific Claims](#)’, Government of Canada, accessed online 25 June 2018. See footnote 16 regarding the dissolution of Indigenous and Northern Affairs Canada.

<sup>24</sup> Once finalised, a claim cannot be re-opened. Behrendt & Vivian (2010) op. cit., p. 10.

<sup>25</sup> The Tribunal was established in 2008 by the [Specific Claims Tribunal Act](#). This followed a 2007 Canadian Government announcement of the [Specific Claims Action Plan](#), which aimed to fast-track the resolution of outstanding claims.

<sup>26</sup> See Standing Senate Committee on Aboriginal Peoples (2006) [Negotiation or confrontation: it's Canada's choice—Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process](#), December, Canadian Senate, Canada.

<sup>27</sup> Crown-Indigenous Relations and Northern Affairs Canada (2018) ‘[Treaties and agreements](#)’, op. cit.

<sup>28</sup> Indigenous and Northern Affairs Canada (2015) ‘[Comprehensive Claims](#)’, Government of Canada, accessed online 25 June 2018. See footnote 16 regarding the dissolution of Indigenous and Northern Affairs Canada.

*Approach to Modern Treaty Implementation*, which provides guidance on the approach to treaty implementation for government departments,<sup>29</sup> as well as a *Cabinet Directive on the Federal Approach to Modern Treaty Implementation*.<sup>30</sup>

### *British Columbia*

The province of British Columbia has established an alternate treaty process to the comprehensive claims system discussed above.<sup>31</sup> Like Victoria, British Columbia is complicated in many areas by high levels of colonial settlement. The BC Treaty Commission Agreement established the BC Treaty Commission in 1992,<sup>32</sup> which independently facilitates negotiation processes. This agreement was made between three parties:

- the Prime Minister of Canada and the Minister of Indian Affairs and Northern Development;
- the Premier of British Columbia and the Minister of Aboriginal Affairs; and
- the First Nations Summit.

The First Nations Summit acts as a forum in British Columbia for First Nations on issues relating to treaty negotiations and other areas of common concern. It acts to represent the interests of, and provide support to, First Nations who engage with the treaty negotiation process. It fulfils leadership and advocacy roles on a broad number of issues raised by Indigenous groups. However, it does not participate as a negotiating party on behalf of a First Nation. There are approximately 150 First Nations that participate in the First Nations Summit assemblies.<sup>33</sup>

The 1991 Report of the British Columbia Claims Task Force sets out further detail regarding the scope and process of treaty-making in British Columbia.<sup>34</sup> Treaties are negotiated by a First Nation, representatives of the provincial government and representatives of the federal government (see Figure 1).

---

<sup>29</sup> Indigenous and Northern Affairs Canada (2015) '[Statement of Principles on the Federal Approach to Modern Treaty Implementation](#)', Government of Canada, accessed online 25 June 2018. See footnote 16 regarding the dissolution of Indigenous and Northern Affairs Canada.

<sup>30</sup> Indigenous and Northern Affairs Canada (2015) '[Cabinet Directive on the Federal Approach to Modern Treaty Implementation](#)', Government of Canada, accessed online 25 June 2018. See footnote 16 regarding the dissolution of Indigenous and Northern Affairs Canada.

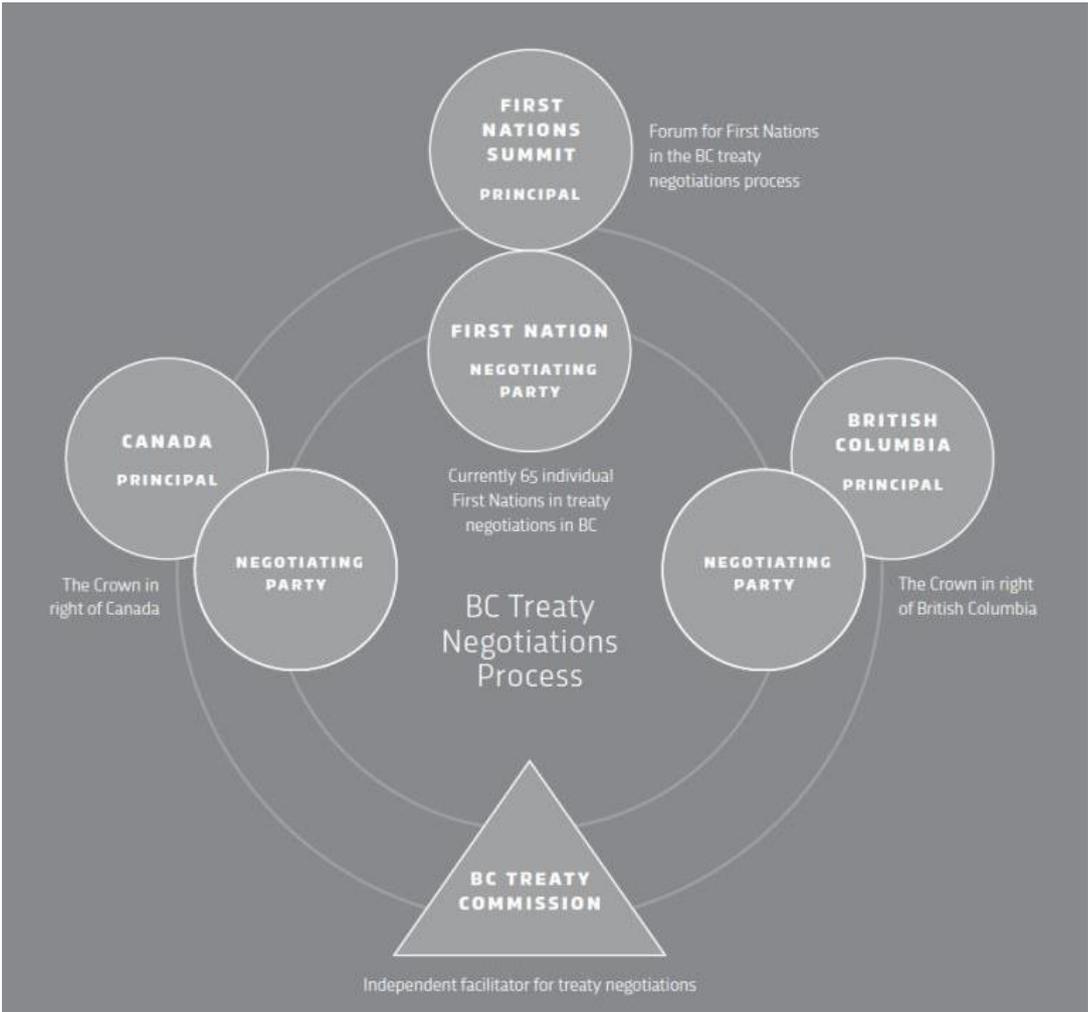
<sup>31</sup> See the [British Columbia Treaty Commission website](#).

<sup>32</sup> [BC Treaty Commission Agreement 1992](#), agreement between the First Nations Summit, Canada and British Columbia.

<sup>33</sup> See the First Nations Summit's website at: <http://fns.bc.ca/>.

<sup>34</sup> British Columbia Claims Task Force (1991) [Report of the British Columbia Claims Task Force](#), June 28.

**Figure 1. Structure of negotiating parties in British Columbia**



Source: BC Treaty Commission (2018) ‘Roles and Responsibilities diagram of the Principals and the Parties’, BCTC website, accessed online 25 June 2018.

A First Nation, for the purposes of treaty negotiations, is a ‘self-defined governing body, established and mandated by its people within its traditional territory in BC to enter into treaty negotiations with Canada and British Columbia.’<sup>35</sup> The First Nation appoints a negotiating team and a Chief Negotiator, and confirms that these negotiators have a ‘comprehensive and clear mandate from [their] constituents to negotiate a treaty, and a timely and effective process to develop and modify [their] mandate throughout the negotiation’.<sup>36</sup> The ways in which these appointments are made differ from nation to nation. The statement of intent (lodged at the initiation of each treaty process) provides some detail on which persons were appointed to each negotiating team, and how these decisions were made.<sup>37</sup> Decisions can occur, for example, by referendum; authorisation by individual house groups; resolution of the relevant Band Council; petition of members and resolution of the First Nation group; or agreement at a general assembly based on a majority of eligible voters.

<sup>35</sup> BC Treaty Commission (2018) ‘Negotiations update’, BCTC website, accessed online 25 June 2018.

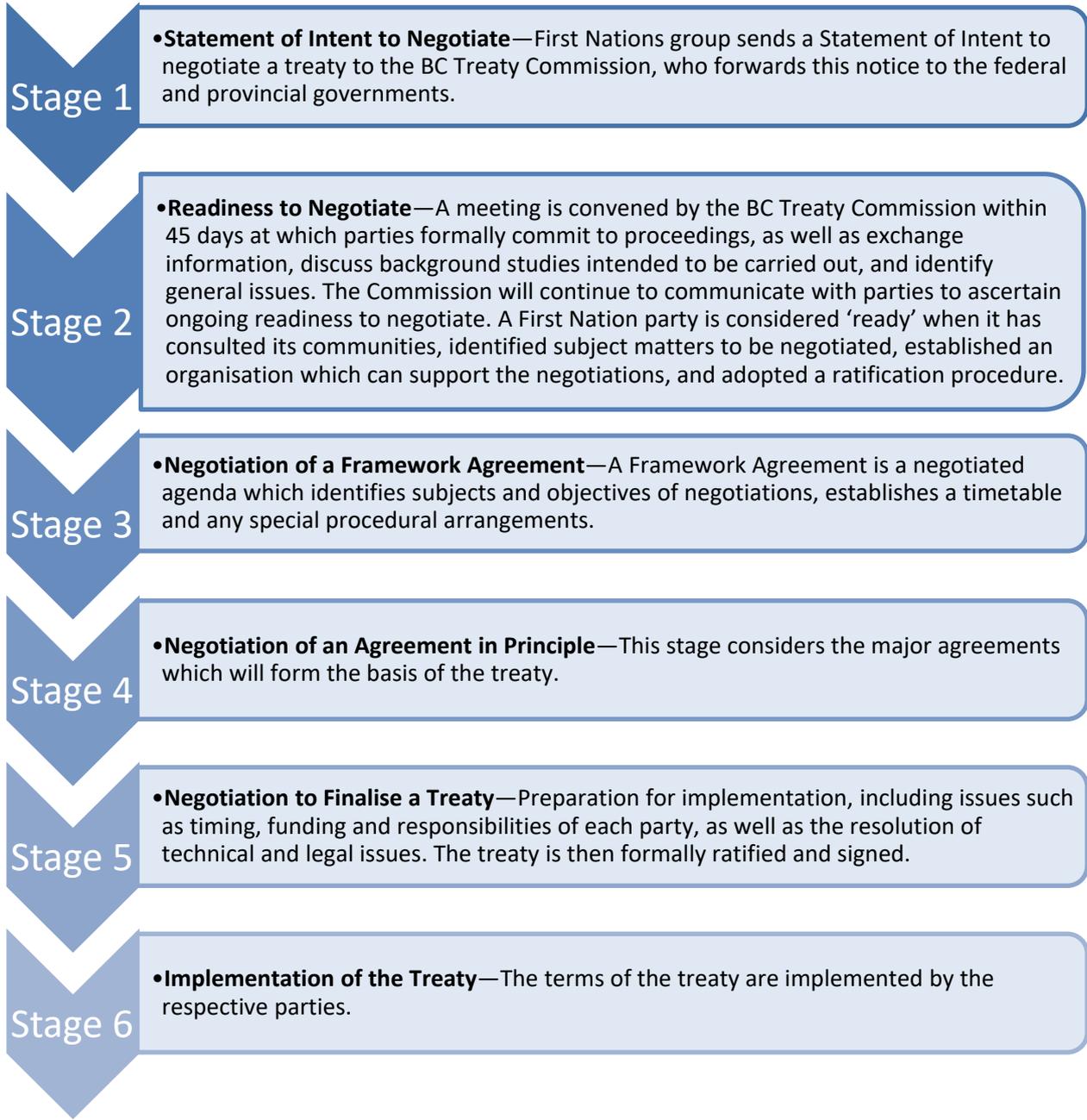
<sup>36</sup> BC Treaty Commission (2018) ‘Principals and Parties’, BCTC website, accessed online 25 June 2018.

<sup>37</sup> See, for example, the [Statement of Intent by the Maa-Nulth Nations](#) as at 26 September 2003; the [Statement of Intent by the Allied Tribes of Lax Kw’alaams](#), as at 18 March 2005; and the [Statement of Intent by the McLeod Lake Indian Band](#), as at 4 February 2004.

The First Nation is also required to adopt a ratification procedure for the future approval of agreements, and to address ‘overlapping and shared territory issues with neighbouring First Nations’.<sup>38</sup> These decisions are to be decided by the First Nations themselves to ensure trust in the treaty process.

The treaty process involves six stages (see Figure 2).

Figure 2. Stages of treaty negotiation in British Columbia



Source: BC Treaty Commission (2018) ‘Six stages’, BCTC website, accessed online 25 June 2018.

<sup>38</sup> BC Treaty Commission (2018) ‘Principals and Parties’, op. cit.

Parties are free to raise any issues deemed significant within the negotiation process, without restriction. One core feature of the BC treaty negotiations, however, is the provision of certain self-governance to the First Nation group.

The *Guide to First Nations Ratification* prepared by the BC Treaty Commission provides information for First Nations groups on engaging community in ratification, including matters regarding group membership and approval processes.<sup>39</sup> It also emphasises the importance of ensuring that community engagement begins early in the process. One of the principles of the BC treaty process is that treaties must be a result of ‘free, fair and informed consent’ of First Nation citizens in accordance with the UNDRIP.

In terms of funding for treaty processes, the BC Treaty Commission provides financial allocations to First Nations negotiating parties—much of which is in the form of loans. The BC Treaty Commission provides an allocation that includes at least a 20% grant (which does not require repayment), and up to 80% as a loan (which does require repayment).<sup>40</sup> The requisite financial repayment obligations of First Nations groups over the course of the negotiation process can, as such, be extensive. Analysis undertaken by Deloitte has found, however, that ‘First Nations benefit from engaging in the treaty negotiations process in both financial and socio-economic factors’.<sup>41</sup>

According to the BC Treaty Commission’s most recent annual report, 52.5% of First Nations groups in British Columbia are either participating in, or have completed, modern treaty negotiations.<sup>42</sup> Seven treaties have been agreed (and are being implemented) through the BC process, and seven First Nations are in Stage 5 final agreement negotiations.

### *Self-governance*

Canada has also established a self-government agreement process (in addition to self-governance arrangements that have been provided through modern treaty processes) to provide authority to First Nations to legislate and govern in regard to certain internal community matters.<sup>43</sup> Agreements can address the structure and law-making powers of First Nations governments; financial arrangements and accountability; and responsibilities to constituents. As aspirations towards the content of agreements and their application within the broader community are inherently diverse and complex, the negotiation and agreement process varies significantly between groups.

## New Zealand

### *Treaty*

Te Tiriti o Waitangi, the Treaty of Waitangi,<sup>44</sup> was agreed over a number of years starting in 1840, between the British Crown and approximately 540 Māori rangatira (chiefs). The agreement was made in both Māori and English, and there is significant divergence in relation to interpretations of the English and Māori texts. Crucially, Māori maintain that absolute sovereignty was not ceded in this

---

<sup>39</sup> BC Treaty Commission (2017) *Guide to First Nations Ratification: Building our future*, first edition, February.

<sup>40</sup> BC Treaty Commission (2018) ‘Funding’, BCTC website, accessed online 25 June 2018.

<sup>41</sup> Based on a limited set of domains and data. See Deloitte (2016) *Socio-economic Benefits of Modern Treaties in BC*, October, p. 18.

<sup>42</sup> BC Treaty Commission (2017) *Annual Report 2017*, BCTC, p. 39.

<sup>43</sup> See Crown-Indigenous Relations and Northern Affairs Canada (2018) ‘Self-Government’, Government of Canada, accessed online 25 June 2018.

<sup>44</sup> See NZHistory (2017) ‘Read the Treaty’, New Zealand Ministry for Culture and Heritage, accessed online 25 June 2018.

Treaty, and that the Treaty was interpreted as providing for ‘parallel paths of power under a single nation state’.<sup>45</sup>

The Colonial Office in England later stated that the Treaty also applied to Māori tribes whose chiefs had not been a signatory, and British sovereignty was proclaimed over New Zealand on 21 May 1840.<sup>46</sup> Importantly, the sovereign political entities which originally treated with the Crown were hapū (clan-based groups). Since that time, the relationship between Crown and Māori has evolved to one in which negotiations usually occur between the Crown and iwi (larger tribes, which were not sovereign political entities in 1840).<sup>47</sup>

The Treaty does not contain a set of legally enforceable rights, but rather, provides a basis for dealings of good faith between Māori peoples and the Crown.<sup>48</sup> It includes a number of core concepts or principles, which must be considered in the development of draft legislation, and which help to guide judicial interpretation of legislation. While there are no enshrined rights, these core concepts can be seen as a mechanism by which Māori tribes are able to assert rights underpinning self-determination.

In 1975, in response to reports of breaches of the terms of the treaty, and inconsistency of the Treaty principles with Crown legislation, a claims process was established in the form of the Waitangi Tribunal.<sup>49</sup> The Tribunal inquires into and reports on claims submitted to it, and scrutinises and reports to the New Zealand Parliament on the compatibility of proposed legislation with the treaty principles. The Tribunal can make recommendations as to the forms or nature of compensation.<sup>50</sup> Importantly, the exclusive right to determine meanings of the Treaty, particularly in terms of divergences of views between the texts, rests with the Waitangi Tribunal.

In 2014, the Waitangi Tribunal determined that sovereignty was not ceded by Māori during the signing of the Treaty.<sup>51</sup>

### *Parliamentary representation*

New Zealand also has a system of reserved Māori parliamentary seating, which has existed (in varying forms) since 1867 and is allocated in the form of an alternative electoral roll.<sup>52</sup> As such, New Zealand is divided into areas which are covered by both a general and a Māori electorate. These seats are proportionally allocated to the sole House of Representatives according to the New Zealand population, and currently number seven seats. Parliamentary candidates of Māori descent can elect

---

<sup>45</sup> Behrendt & Vivian (2010) op. cit., p. 10.

<sup>46</sup> NZHistory (2017) ‘[The Treaty in brief](#)’, New Zealand Ministry for Culture and Heritage, accessed online 25 June 2018.

<sup>47</sup> In speaking to treaty in New Zealand and within the context of his own whakapapa (genealogy, identity and ancestry), Moana Jackson talks about the difference between iwi (tribe) and hapū (clans or descent groups): see, M. Jackson (2017) *Interview from He Tohu*, video interview, starting at 07:00, accessed online 25 June 2018.

<sup>48</sup> Māori law continued to be exercised subsequent to the signing of Te Tiriti o Waitangi. K. Gover (2012) ‘[A matter of trust – what we can learn from the Treaty of Waitangi](#)’, *The Conversation*, 6 February.

<sup>49</sup> Claims of breaches dated back to shortly after the signing of Te Tiriti o Waitangi. See the Waitangi Tribunal’s website at: <https://www.waitangitribunal.govt.nz/>.

<sup>50</sup> This predominantly results in the return of public or Crown land to iwi (tribes), or financial reimbursement for loss of lands or resources. However, claims to the Tribunal can relate to broad aspects of the Treaty principles, and in one such successful claim in 1985 (the Te Reo Māori claim) it was asserted that te reo was a taonga (treasure) that the Crown was required to protect. The Tribunal found in favour of the claimants, and the result was the establishment of Māori as a national language. See NZHistory (date unknown) ‘[Te Wiki o Te Reo Māori - Māori Language Week: History of the Māori language](#)’, New Zealand Ministry for Culture and Heritage, accessed online 12 April 2018.

<sup>51</sup> Waitangi Tribunal (2014) ‘[Report on Stage 1 of the Te Paparahi o Te Raki Inquiry Released](#)’, NZ Government.

<sup>52</sup> First established by the [Māori Representation Act 1867](#).

to run on the general electoral roll or the Māori electoral roll, and Māori voters are able to choose to be on either roll. There has been considerable research, review, support and criticism on the system of reserving seats for Māori. The 1986 Royal Commission into the New Zealand electoral system, for example, concluded that the historical basis by which the system was originally established was flawed in its aim of fostering Māori cooperation, rather than assuring effective political representation.<sup>53</sup>

## USA

### *Treaties*

British colonising forces signed a number of individual treaties with Native American tribes on a nation-to-nation basis. Between 1778 and the end of the treaty-making period in 1871, the US Senate ratified 370 separate treaties.<sup>54</sup> The initial treaties largely concerned military and trade, and later, land transfers. The courts and Congress did not, however, allow for international recognition of Native American tribes, who were categorised as ‘dependent nations’ with recognition of only certain limited sovereign rights. While technically legally binding, the contents of these treaties have historically been largely disregarded by the state.<sup>55</sup>

A number of treaties which had been negotiated but not ratified during that period remained unratified; however, the US Court of Claims has determined that a number of these have legal effect. Importantly, after this time, the US Government continued to recognise (to an extent) the sovereignty of tribes and their rights to self-governance.<sup>56</sup> The federal government continues to negotiate settlements and agreements with tribes in the form of executive orders, congressional acts, and judicial decisions.

In interpreting the existing treaties, US courts apply a number of principles, which have developed as a result of litigation in the US Supreme Court. These include that the rights of tribes protected by treaty are inherent to them as peoples, and have not been created, granted or extended by any other party. Further, anything that has not been expressly conceded in a treaty or other agreement, and which has not been extinguished by another act of Congress, is reserved to a Native American nation. Where cessions have been made, the nature of these is interpreted narrowly and anything unclear or ambiguous is generally resolved in favour of the Native American nation concerned.<sup>57</sup>

The federal trust responsibility has derived from the early treaty relationship between the US Government and tribes, which includes the obligation ‘to protect self-governance, tribal lands, assets, resources, and treaty rights, and to carry out the directions of federal statutes and court cases’.<sup>58</sup>

### *Self-governance*

American Indian and Alaska Native tribes have certain self-governance arrangements as ‘domestic independent nations’, in the form of tribal governments. There are currently 567 tribal governments recognised by the federal US government that have specific legislative, judicial and regulatory rights

---

<sup>53</sup> NZ Royal Commission on the Electoral system (1986) *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, Wellington, 11 December, pp. 112–3.

<sup>54</sup> C. Dow & J. Gardiner-Garden (1998) ‘*Indigenous Affairs in Australia, New Zealand, Canada, United States of America, Norway and Sweden*’, *Background Paper 15 1997–98*, Australian Parliamentary Library, accessed online 13 April 2018.

<sup>55</sup> Brennan et. al. (2005) op. cit., p. 83.

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*, p. 84.

<sup>58</sup> National Congress of American Indians (date unknown) ‘*Tribal Nations and the United States: An Introduction*’, p. 21.

and powers.<sup>59</sup> These include the ability to make and enact civil and criminal laws; determine citizenship; establish courts; tax citizens; build and maintain basic infrastructure and services such as roads, telecommunications, public buildings and sewerage; and regulate areas such as health, education, environment and business.

Tribal governments can receive funding from the Bureau of Indian Affairs, which also holds lands and resources in trust for American Indian and Alaska Natives.<sup>60</sup> This relationship operates between the federal and tribal governments. The federal government is required to act in accordance with strict fiduciary standards regarding its obligations to tribal governments. State government law typically does not apply to reservations.

In recent years, there has been a renewed focus on diversifying the economic development of tribal lands. Particular initiatives have included, for example: tribal governments pursuing new or more extensive commercial ventures; reinvesting revenue into community services; and decreasing reliance on the exploitation of natural resources.<sup>61</sup> Harvard University's Project on American Indian Economic Development has conducted significant research into self-sustained and determined social and economic development of Native American tribes. Among its key research findings, the Project has found that:

When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.<sup>62</sup>

The Project has further emphasised the importance of the establishment of capable institutions of governance that are culturally appropriate and have strong and effective leadership.<sup>63</sup>

Tribal governments are represented by the National Congress of American Indians, a representative congress that examines issues impacting tribal sovereignty and policy, and provides policy advice and advocacy to the federal government.<sup>64</sup>

---

<sup>59</sup> See US Bureau of Indian Affairs (2018) *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 30 January, FR Document 2018-01907.

<sup>60</sup> See the US Bureau of Indian Affairs' website at: <https://www.bia.gov/>.

<sup>61</sup> Brennan et. al. (2005) op. cit., p. 84.

<sup>62</sup> Harvard Project on American Indian Economic Development (2015) 'About Us', HPAIED, Harvard University, accessed online 25 June 2018.

<sup>63</sup> *ibid.*

<sup>64</sup> See the National Congress of American Indians' website at: <http://www.ncai.org/>.

## Other countries

---

This section briefly highlights examples of alternative practice to treaties that are broadly aimed at the realisation of self-determination for Indigenous peoples. These measures include Indigenous parliaments, constitutional recognition of rights, compensatory schemes for past acts and other funding mechanisms.

### Norway

Norway established a Sámi Parliament (Sameting) under the *Sámi Act 1987* to provide self-governance arrangements for their Indigenous Sámi peoples and promote Sámi interests in broader policy.<sup>65</sup> The first elections for the Sameting were held in September 1989, and the first official parliament was opened on 9 October 1989 in Karasjok. The Sameting promotes political initiatives and manages legislation and policies regarding Sámi internal affairs. However, it has limited decision-making capability, and its role in facilitating Sámi self-governance is thus restricted.<sup>66</sup>

Parliamentary elections are held every four years to elect 39 members, using a proportional representative system with seven multi-member electoral divisions. In order to be added to the electoral roll, persons must identify as Sámi, and either:

- have Sámi as a home language;
- have or have had parents, grandparents or great-grandparents who have/had Sámi as a home language; or
- are the child of someone who is or was on the Sameting's electoral register.<sup>67</sup>

The Norwegian Parliament (Storting) is required to consult with the Sámi people, generally through the Sameting, on all policy and legislative proposals that directly affect Sámi interests. The consultation agreement that sets out the nature of this consultation process does not provide the Sameting with veto powers, and final authority is vested in the Storting. However, any disagreement of the Sameting must be stated during debate in the Storting on the relevant proposal.

In 1988, the Storting approved a constitutional amendment recognising certain Sámi rights (but not symbolic recognition of the Sámi as a people). Section 108 sets out: 'The authorities of the state shall create conditions enabling the Sámi people to preserve and develop its language, culture and way of life.'<sup>68</sup> In 2005, the Storting passed the *Finnmark Act* (Finnmarksloven) which transferred approximately 95 per cent of the total land area of the Finnmark county in Norway to the local inhabitants. This law aimed to facilitate natural resource management in a manner beneficial to the residents of Finnmark, and support Sámi culture, reindeer husbandry, land use, nutrition and social life.<sup>69</sup>

---

<sup>65</sup> *Sámi Act 1987* (Lov om Sametinget og andre samiske rettsforhold (sameloven)).

<sup>66</sup> See the Sameting's website at: <https://www.sametinget.no/>.

<sup>67</sup> Valg Direktoratet (Norwegian Directorate of Elections) (2017) 'How to be entered on the electoral register', accessed online 25 June 2018.

<sup>68</sup> *Constitution of Norway*, official English translation, section 108.

<sup>69</sup> *Finnmark Act 2005* (Finnmarksloven), item 1.

Norway has also introduced a compensatory scheme for historic acts, such as the loss of traditional grazing areas.<sup>70</sup>

## Finland

In 1973, Finland became the first Nordic country to establish a Sámi representative body (the Sámi Delegation), and revision of its form took place in 1996 to form the Sámi Parliament (Sámediggi).<sup>71</sup> It is technically an independent legal body, but functions administratively through the Finnish Ministry of Justice. Through the Parliament, the Sámi are ensured 'cultural autonomy within their homeland in matters concerning their language and culture',<sup>72</sup> on which the Parliament may present policy proposals and issue statements to the Finnish Government. Finnish authorities are required to consult with the Sámi Parliament on matters which may directly affect the status of the Sámi people, and which concern community planning, natural resource management, applications for mineral extraction licenses, legislative or administrative change to occupations specific to Sámi culture, education and language development, or any other matters affecting Sámi language and culture.<sup>73</sup> The Sámi Parliament has an advisory role in this capacity, and does not have a veto power for activities that are unable to be successfully negotiated.

Finland recognised the Sámi people in its Constitution by amendment in 1995. Article 17 recognises their status as an Indigenous people, and the right to use, maintain and develop their own language and culture. Article 121 stipulates that in their native region, Sámi people have linguistic and cultural self-governance.<sup>74</sup>

Finland offers financial assistance to schools in traditional Sámi areas that teach students in the Sámi language.<sup>75</sup>

## Sweden

Sweden similarly established a Sámi Parliament (Sámediggi) through the Sametingslag (1992: 1433) (Sámi Parliament Act).<sup>76</sup> The first election for the Sámediggi was held on 16 May 1993, and it opened for its first official session on 26 August 1993. Parliamentary elections are held every four years to elect a current total of 31 members.<sup>77</sup> However, despite being named a 'parliament', in form it is largely a government agency. The scope of the Sámediggi is limited, with many of its functions being administrative in terms of the implementation and regulation of Swedish legislation and policy. The nature of these two distinct roles (one as a popularly elected representative body and one as an

---

<sup>70</sup> See E. Trudel, L. Heinämäki & P. Kastner (2016) 'Despite gains, Europe's indigenous people still struggle for recognition', *The Conversation*, 18 May; and S. Olsson & D. Lewis (1995) 'Welfare rules and indigenous rights: the Sami people and the Nordic welfare states', in J. Dixon & R. Scheurell (eds) *Social Welfare with Indigenous Peoples*, London, Routledge, p. 167.

<sup>71</sup> See the Sámediggi's website at: <https://www.samediggi.fi/>.

<sup>72</sup> *Act on the Sámi Parliament (974/1995)*, section 1. An official English translation of this legislation was not publicly available at the time of publication, and the link is to an unofficial translation provided by the Finnish Ministry of Justice.

<sup>73</sup> *Act on the Sámi Parliament (974/1995)*, section 9(1).

<sup>74</sup> *Constitution Act of Finland (731/1999)* (Suomen perustuslaki).

<sup>75</sup> *Act on the Financing of Education and Culture (1705/2009)*. However, this does not include schools outside Sámi homeland areas, where a majority of Sámi children live. See J. Hohmann & M. Weller (2018) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford University Press, p. 385.

<sup>76</sup> *Sámi Parliament Act 1992* (Sametingslag (1992: 1433)).

<sup>77</sup> See the Sámediggi's website at: <https://www.sametinget.se/>.

administrative arm of the Swedish Government) creates a dichotomy that does not assure practical self-determination for Sámi peoples in Sweden.<sup>78</sup>

Further, national political parties do not interact with the Sámediggi and its elections. Sámi political parties are therefore the only parties contesting elections. This varies from the established system in Norway, and indicates a further entrenched divide between the Sámediggi and the national political system.<sup>79</sup>

Sweden's constitution was amended in 2010 to recognise the Sámi people.<sup>80</sup>

---

<sup>78</sup> Sametinget (2018) '[Background: The State and the Sámi Parliament](#)', accessed online 25 June 2018.

<sup>79</sup> N. Bazilchuk (2015) '[The Sámi in Norway have more influence on politics than the Swedish Sámi](#)', *ScienceNordic*, February 9.

<sup>80</sup> Trudel, Heinämäki & Kastner (2016) op. cit.

## References

---

- Aboriginal Victoria (date unknown) '[Self-determination](#)', Victorian Government, accessed online 25 June 2018
- Aboriginal Victoria (date unknown) '[Treaty fact sheet](#)', Victorian Government, accessed online 25 June 2018
- Assembly of First Nations (2003) *Charter of the Assembly of First Nations*, first adopted in 1985 with subsequent amendments adopted up to 2003
- Bazilchuk, N. (2015) '[The Sámi in Norway have more influence on politics than the Swedish Sámi](#)', *ScienceNordic*, February 9
- Behrendt, L. & A. Vivian (2010) *Occasional Paper: Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion*, Victorian Equal Opportunity and Human Rights Commission, prepared by Jumbunna Indigenous House of Learning, University of Technology, Sydney
- BC Treaty Commission (2018) '[Funding](#)', BCTC website, accessed online 25 June 2018
- BC Treaty Commission (2018) '[Negotiations update](#)', BCTC website, accessed online 25 June 2018
- BC Treaty Commission (2018) '[Principals and Parties](#)', BCTC website, accessed online 25 June 2018
- BC Treaty Commission (2017) *Annual Report 2017*, BCTC
- BC Treaty Commission (2017) *Guide to First Nations Ratification: Building our future*, first edition, February
- BC Treaty Commission (2018) *Roles and Responsibilities diagram of the Principals and the Parties*, accessed online 25 June 2018
- [BC Treaty Commission Agreement 1992](#), agreement between the First Nations Summit, Canada and British Columbia
- Brennan, S., L. Behrendt, L. Strelein & G. Williams (2005) *Treaty*, Sydney, The Federation Press
- British Columbia Claims Task Force (1991) *Report of the British Columbia Claims Task Force*, June 28
- Crown-Indigenous Relations and Northern Affairs Canada (2017) '[Creating new mechanisms](#)', Government of Canada, accessed online 25 June 2018
- Crown-Indigenous Relations and Northern Affairs Canada (2018) '[Exploring new ways of working together](#)', Government of Canada, accessed online 25 June 2018
- Crown-Indigenous Relations and Northern Affairs Canada (2018) '[Self-Government](#)', Government of Canada, accessed online 25 June 2018
- Crown-Indigenous Relations and Northern Affairs Canada (2018) '[Treaties and agreements](#)', Government of Canada, accessed online 25 June 2018
- Deloitte (2016) *Socio-economic Benefits of Modern Treaties in BC*, October
- Dow, C. & J. Gardiner-Garden (1998) '[Indigenous Affairs in Australia, New Zealand, Canada, United States of America, Norway and Sweden](#)', *Background Paper 15 1997-98*, Australian Parliamentary Library, accessed online 13 April 2018
- Gover, K. (2012) '[A matter of trust – what we can learn from the Treaty of Waitangi](#)', *The Conversation*, 6 February
- Gover, K. (2017) '[Indigenous Rights and Governance in Canada, Australia, and New Zealand](#)', *Oxford Bibliographies Online*, accessed online 25 June 2018
- Harvard Project on American Indian Economic Development (2015) '[About Us](#)', HPAIED, Harvard University, accessed online 25 June 2018
- Hobbs, H. and G. Williams (2018) '[Australia's First Treaty](#)', Australian Public Law website, 16 April
- Hohmann, J. & M. Weller (2018) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford University Press
- Hutchins, N., Minister for Aboriginal Affairs (2018) '[Massive boost for self-determination](#)', Victorian State Government, media release, 1 May

Indigenous and Northern Affairs Canada (2015) '[Cabinet Directive on the Federal Approach to Modern Treaty Implementation](#)', Government of Canada, accessed online 25 June 2018

Indigenous and Northern Affairs Canada (2015) '[Comprehensive Claims](#)', Government of Canada, accessed online 25 June 2018

Indigenous and Northern Affairs Canada (2016) '[Government of Canada and the duty to consult](#)', Government of Canada, accessed online 25 June 2018

Indigenous and Northern Affairs Canada (2015) '[Specific Claims](#)', Government of Canada, accessed online 25 June 2018

Indigenous and Northern Affairs Canada (2015) '[Statement of Principles on the Federal Approach to Modern Treaty Implementation](#)', Government of Canada, accessed online 25 June 2018

[International Covenant on Civil and Political Rights \(ICCPR\)](#), opened for signature 16 December 1966, 999 UNTS 171; [1980] ATS 23 (entered into force 23 March 1976)

[International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#), opened for signature 16 December 1966, 993 UNTS 3; [1976] ATS 5 (entered into force 3 January 1976)

Jackson, M. (2017) [Interview from He Tohu](#), video interview, starting at 07:00, accessed online 25 June 2018

National Congress of American Indians (date unknown) '[Tribal Nations and the United States: An Introduction](#)'

NZ Royal Commission on the Electoral system (1986) [Report of the Royal Commission on the Electoral System: Towards a Better Democracy](#), Wellington, 11 December

NZHistory (2017) '[Read the Treaty](#)', New Zealand Ministry for Culture and Heritage, accessed online 25 June 2018

NZHistory (date unknown) '[Te Wiki o Te Reo Māori - Māori Language Week: History of the Māori language](#)', New Zealand Ministry for Culture and Heritage, accessed online 25 June 2018

NZHistory (2017) '[The Treaty in brief](#)', New Zealand Ministry for Culture and Heritage, accessed online 25 June 2018

Olsson, S. & D. Lewis (1995) 'Welfare rules and indigenous rights: the Sami people and the Nordic welfare states, in J. Dixon & R. Scheurell (eds) *Social Welfare with Indigenous Peoples*, London, Routledge, pp. 141-85

Parliamentary Joint Committee on Human Rights (2015) [Guide to Human Rights](#), Canberra, Parliament of Australia

Sametinget (2018) '[Background: The State and the Sámi Parliament](#)', accessed online 25 June 2018

Standing Senate Committee on Aboriginal Peoples (2006) [Negotiation or confrontation: it's Canada's choice—Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process](#), December, Canadian Senate, Canada

Torlys LLP (2016) [Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples](#), 12 July, Canada

Trudel, E., L. Heinämäki & P. Kastner (2016) '[Despite gains, Europe's indigenous people still struggle for recognition](#)', *The Conversation*, 18 May

[United Nations Declaration on the Rights of Indigenous Peoples](#), adopted by the UN General Assembly at its 61<sup>st</sup> session, 2 October 2007, A/RES/61/295

US Bureau of Indian Affairs (2018) [Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs](#), 30 January, FR Document 2018-01907

Valg Direktoratet (Norwegian Directorate of Elections) (2017) '[How to be entered on the electoral register](#)', accessed online 25 June 2018

Waitangi Tribunal (2014) '[Report on Stage 1 of the Te Paparahi o Te Raki Inquiry Released](#)', NZ Government

# Research & Inquiries Service

---

Research Notes are produced by the Parliamentary Library's Research & Inquiries service. They provide analysis on selected components of new Bills and topical issues in response to, and in anticipation of, the needs of Members of the Victorian Parliament.

This research publication is current as at the time of printing. It should not be considered a complete guide to the particular subject or legislation covered. While it is intended that all information provided is accurate, it does not represent professional legal opinion. Any views expressed are those of the author(s).

Some hyperlinks may only be accessible on the Parliament of Victoria's intranet. All links are current and available as at the time of publication.

## Author

### **Alice Petrie**

Research & Inquiries Officer  
Victorian Parliamentary Library & Information Service  
Department of Parliamentary Services

### **Enquiries:**

Jon Breukel  
Coordinator, Research & Inquiries  
Victorian Parliamentary Library & Information Service  
Parliament House  
Spring Street, Melbourne  
Telephone (03) 9651 8633  
Email: [research@parliament.vic.gov.au](mailto:research@parliament.vic.gov.au)