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International Treaty Negotiations and Implementation of the UN Declaration on the Rights of Indigenous Peoples - A Case Study of the Columbia River Treaty Negotiations

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INTERNATIONAL TREATY NEGOTIATIONS AND IMPLEMENTATION OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES - A CASE STUDY OF THE COLUMBIA RIVER TREATY NEGOTIATIONS

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I. Introduction

The "Treaty between Canada and the United States of America relating to Cooperative Development of the Water Resources of the Columbia River Basin", better known as the Columbia River Treaty or "CRT", was ratified by Canada and the United States (the "US") in 1964. The purpose of the treaty was to establish cooperative measures for hydroelectric power generation and flood control on the transboundary Columbia River, for the mutual benefit of both countries. Measured by that standard, the treaty has been a success. Communities in both countries have been spared devastating floods, and hydroelectric power generation on the Columbia system has flourished.

Unfortunately, what was not considered in 1964 was the impact the implementation of the treaty would have on Indigenous peoples on both sides of the border. In keeping with the practice of the day, Indigenous peoples and Indigenous rights simply never factored into the negotiations.

Fast forward fifty-seven years, and much has changed in Canada. Recognition of Indigenous rights has been enshrined in our Constitution, reconciliation with Indigenous peoples is a social, legal and economic priority, and both Canada and the Province of British Columbia ("BC") have committed to fully implement the *UN Declaration on the Rights of Indigenous Peoples* (the "*UN Declaration*") within their respective jurisdictions. Indigenous peoples and Indigenous rights can no longer be ignored, as they were when the treaty was first negotiated.

This paper will explore how renewed international negotiations between Canada and the US, aimed at modernizing the CRT, have been adapted to reflect the transformed legal landscape

governing the Crown's duties to Indigenous peoples. It will first (briefly) describe the CRT and examine examples of Indigenous consultation related to international treaties. It will then introduce the agreement negotiated between three Indigenous Nations, BC and Canada to guide their engagement on the CRT, and discuss how that agreement is intended to enable implementation of elements of the *UN Declaration*.

There are two important caveats to state. The first is that the opinions expressed below are the author's, and are not presented on behalf of the Ktunaxa Nation Council or any of the Indigenous Nation or government participants to the CRT negotiations.[1] The second is that both the contents of the international negotiations between Canada and the US, and elements of the engagement between the Indigenous Nations, BC and Canada, are subject to confidentiality restrictions. This paper accordingly only discloses information that can be shared publicly.

A. A (Brief) Description of the CRT

1. Background to the Treaty

The Columbia River basin is a massive transboundary watershed spanning an estimated 670,000 km^2 area in both Canada and the US. While the bulk of the basin area is located in the US, the headwaters of the Columbia River are located in southeastern BC and contribute a substantial portion of the inflows into the Columbia River system as it flows south into the US.

In the spring of 1948 a large winter snowpack, coupled with heavy spring rains, swelled the Columbia River and caused devastating flooding in the community of Vanport, Oregon (near Portland). The community of Trail, BC also flooded, though with less severe consequences. At the same time the US, flush from its war time industrial boom, was looking to expand hydroelectric power in the Pacific Northwest. Canada and the US had already initiated studies of joint development of hydroelectric dams on the Columbia in 1944, and the destruction of Vanport gave these discussions renewed impetus. After a further eleven years of study and discussion, the two countries initiated formal treaty negotiations in 1960. With a speed that looks remarkable today, the treaty was finalized and signed by Prime Minister Diefenbaker and President Eisenhower on January 17, 1961. Implementation of the treaty had to wait a further three years as Canada and BC negotiated an agreement addressing how the treaty would be implemented in Canada. On September 16, 1964 the two countries exchanged instruments of ratification to bring the treaty into effect, and the CRT has been operational since that date.

2. Overview of the Treaty

BC publishes a helpful online resource here that provides a plain language overview of the CRT, as well as links to the full text of the treaty and related instruments here. What follows is a short summary of the treaty's primary components that omits much of the detail. Reference should be made to the above sources for further details.

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[1] The author is counsel to the Ktunaxa Nation Council in the CRT negotiations and other matters.

The purposes of the CRT are to establish "cooperative measures for hydroelectric power generation and flood control" so as to contribute to the "economic progress of both countries and to the welfare of their peoples". This is achieved through the following treaty provisions:

> **Articles II and III:** require Canada to provide 15.5 million acre feet of storage to "improve the flow of the Columbia River", through the construction of dams at the following locations: at Mica Creek on the Columbia River; at the outlet of the Arrow Lakes; and at one or more tributaries on the Kootenay River. The US is required to maintain and operate hydroelectric dams installed on the mainstem of the Columbia in the most effective manner to benefit from the "improvement" in river flow resulting from the Canadian dams.
>
> **Article IV:** Canada further agrees to operate the Canadian storage in accordance with hydroelectric and flood control operating plans as set out in Article IV and Annex A, which provides what is known as "assured flood control".[2] After the first sixty years of the treaty (i.e. after 2024), Canada's assured flood control obligations end and are replaced by what is referred to as "called upon" flood control. The treaty defines called upon flood control as an obligation by Canada (which Canada has delegated to BC) to operate, within the limits of existing facilities, Canadian storage "as the [US] entity requires to meet flood control needs for the duration of the flood control period for which the call is made".[3] The called upon flood control rights continue for as long as "the flows in the Columbia River in Canada continue to contribute to potential flood hazard in the [US]".
>
> **Articles V and VI:** in return for providing the power generation and flood control benefits to the US from the Canadian storage, Canada is entitled to receive two primary benefits: 1) 50% of the downstream power benefits due to the construction of the Canadian storage; and 2) payment of $64.4 million (plus additional payment if the US, at a future date, exercises its right to call for flood control measures in addition to those specified in Article IV). The downstream power benefits are calculated as the difference between the hydroelectric power capable of being generated at US facilities with and without the benefit of the Canadian storage.[4] In addition to the payments provided under the treaty, BC pre-sold the first thirty years of downstream power benefits to a consortium of US utilities for an up-front payment of $254.4 million. Finally, the treaty also provides for the US to pay compensation to Canada if it ever exercises its rights to "called upon" flood control, based on a formula defined through Article VI(4).

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[2] The US also has the right to exercise what is referred to as "on call" flood control that is in addition to assured flood control. On call flood control is intended to be exercised only during very high flow periods, and subject to specific criteria; to date, the US has never exercised its right to on call flood control.

[3] Exactly what called upon flood control entails is not clear, and Canada and the US take quite different views on how this part of Article IV should be interpreted. This uncertainty regarding what flood control looks like post-2024 is one of the key factors that lead to Canada and the US to initiate negotiations regarding the future of the CRT.

[4] This has become a bone of contention between the US and Canada. Since the CRT was negotiated, the US has adopted legislation (for e.g. the *Endangered Species Act*) which prevents the Columbia mainstem hydroelectric dams from being operated to optimize power production. The US therefore says it is paying Canada for power it does not in fact generate, due to its domestic regulatory constraints.

> **Article XII:** the US also acquired the right to construct a dam on the Kootenay River (which is also a transboundary river that flows from BC into the US, back into BC and then joins the Columbia River as it flow to the US), with Canada agreeing to make lands in BC available for flooding by the reservoir this dam would create. This reservoir is now known as the Koocanusa reservoir.

The implementation of these rights and obligations is delegated, through Articles XIV, to "entities" designated by the parties. In Canada, BC Hydro is the entity designated for all treaty implementation purposes, with one exception: BC is the entity designated for purposes of receiving the downstream power benefit, and has delegated that role to its Crown corporation Powerex.[5] The US has in turn designated the Bonneville Power Administration ("BPA") and the US Army Corp of Engineers as entities for its purposes.

Article XV also establishes a body called the Permanent Engineering Board ("PEB") of four representatives, equally divided between the parties. The role of the PEB, in general terms, is to monitor and report to the parties on the implementation of the treaty, maintain and report on records relevant to treaty operations, and assist in resolving any technical or operational issues that may arise between the entities. The PEB does not have authority to determine either hydroelectric or flood control operations. Those essential tasks are performed by the entities. This highlights a unique aspect of the CRT, which is that the treaty parties have a very limited role in treaty implementation. It is the designated entities - which in Canada means BC Hydro - that are responsible for the planning and operational decisions required to ensure compliance with each nation's respective obligations.

Finally, the treaty contains termination provisions. Pursuant to Article XIX, either party may terminate the treaty after sixty years, if it has delivered ten years written notice of its intention to terminate. This means that the earliest either party could give notice of intent to terminate is September 16, 2024. However, as noted above, termination of the treaty does not mean the end to Canada's flood control obligations. The US would still be able to exercise its rights to called upon flood control even if the treaty terminates, subject to the obligation to pay compensation to Canada.

3. Canada-BC Agreement

While Canada has the constitutional jurisdiction to negotiate international treaties, it lacks the constitutional power to unilaterally take up Provincial lands and resources that may be required to implement Canada's obligations under a treaty. The signing of the CRT in 1961 was therefore followed by a period of negotiation between Canada and BC, which concluded with the signing of the Canada-BC Agreement, dated July 8, 1963. This Agreement paved the way for Canada and the US to exchange instruments of ratification on September 16, 1964.

The Canada-BC Agreement is found at the link provided above. In simple terms, it allocated all of the rights, titles and interests to which Canada is entitled under the treaty - including the right to all payments to be provided by the US - to BC, in return for BC assuming the obligation to build the treaty dams and operate those dams in compliance with the treaty terms. It further provided that Canada would obtain BC's consent prior to exercising specified powers under the treaty,

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[5] The annual receipt by BC of 50% of the downstream power benefits is referred to as the "Canadian entitlement".

such as an exchange of notes regarding hydroelectric facility operating plans or agreeing to a variation of the downstream benefits.

The effect of the Canada-BC Agreement was therefore to remove Canada from virtually all aspects of domestic treaty implementation. That role is occupied by BC, which in turn delegated implementation of the treaty to BC Hydro (subject to BC retaining its role as entity for purposes of receiving the downstream benefits). The treaty has operated in that manner since 1964.

The payments received by BC under the CRT (both the lump sum assured flood control payments as well as the pre-sale of the first thirty years of the downstream benefits) financed not only the construction of the three CRT dams in southeastern BC, but also the development of hydroelectric power on the Peace River through the construction of the WAC Bennett dam. The CRT thus contributed to, if not directly enabled, the construction of the hydroelectric energy system that has supported decades of industrial, commercial and residential development across the Province. It was a game-changer of a treaty from the point of view of hydroelectric energy in BC.

4. Impacts of the CRT in Canada

A meaningful description of the impact of the construction of the Canadian CRT dams and reservoirs on the Indigenous peoples and non-Indigenous communities in BC is beyond the scope of this paper. However, any discussion of the CRT that does not acknowledge the tremendous damage it inflicted would be inadequate.

The construction of the Mica, Duncan and Hugh Keenlyside (Arrow) dams in BC and Libby (Koocanusa reservoir) dam in Montana flooded an estimated 1,000 km^2 of productive ecosystems and lands that had supported Indigenous peoples for thousands of years, including 600 km^2 of fertile land. An estimated 2,300 people were displaced, with homes and communities flooded out by rising reservoir levels. Indigenous harvesting and village sites were lost, trails and travel corridors were severed, spiritual sites were inundated and ancestral remains were desecrated. It is difficult to identify any other single act of the Crown that has had a greater negative impact on the territories and rights of the Indigenous Nations of the Canadian Columbia River basin, other than the implementation of the CRT.

These impacts are not simply something of the past. New impacts to archaeological and cultural sites occur every year as reservoirs are emptied and filled, and the Indigenous communities live every day with degraded ecosystems and the loss of the ability to exercise rights and pass on Indigenous cultural knowledge and traditions within impacted areas. The right of the Indigenous Nations to make effective future use of the flooded lands has also been effectively expropriated, as large swathes of Indigenous territories were converted to reservoirs without Indigenous consultation, much less consent.

This list could go on. The point is that the impacts to Indigenous peoples in BC from the CRT have been enormous. And of course, none of the compensation paid by the US under the CRT was ever directed to the Indigenous communities that have paid such a steep price for a treaty that generated so much for BC.

B. The CRT Modernization Negotiations

As 2024 approached, both Canada and the US initiated treaty review processes to assess options and determine priorities for the future of the CRT. In Canada, that work was led by BC, with participation by Canada through Natural Resources Canada ("NRCan"). BC's process began in 2011 and examined three possible scenarios: treaty terminate, treaty continue, or treaty amendment/modification. BC conducted technical studies to evaluate each scenario, and consulted with the public, local government, industry and power companies. BC also initiated direct Nation-to-Nation engagement on the future of the CRT with representative bodies of the Indigenous Nations of the Canadian Columbia River basin: the Ktunaxa Nation Council ("KNC") on behalf of the Ktunaxa Nation, the Okanagan Nation Alliance ("ONA") on behalf of the Sylix-Okanagan Nation, and the Shuswap Nation Tribal Council ("SNTC") on behalf of the Secwepemc Nation. Any further reference in this paper to the "Indigenous Nations" is to these three Nations unless otherwise indicated. The details of these processes, while interesting, are not the subject of this paper and will not be addressed. The US went through a similar process at its end.

The outcome of this process in Canada was a decision and set of guiding principles regarding the future of the CRT issued by BC in December 2013, found here. The decision was to "continue the Columbia River Treaty and seek improvements within the existing Treaty framework". This decision is supported by thirteen principles, which cover a wide-range of issues including:

- Impacts of the CRT to Canadian Columbia River basin residents need to be recognized and compensated for.
- Ecosystem values are important, and need to be considered in CRT planning and implementation.
- Ecosystem based improvements need to be explored, using mechanisms both inside and outside the treaty.
- Adaptation to climate change needs to be incorporated into Treaty planning and implementation.

These principles reflect input received by BC that the purposes of the CRT - which are focused on flood control and power production - need to be broadened to address environmental and ecosystem values.

The principles also address the restoration of salmon migration into the upper Columbia, as follows:

> "Salmon migration into the Columbia River in Canada was eliminated by the Grand Coulee Dam in 1938 (26 years prior to Treaty ratification), and is currently not a Treaty issue. British Columbia's perspective is that the management of anadromous salmon populations is the responsibility of the Government of Canada and that restoration of fish passage and habitat, if feasible, should be the responsibility of each country regarding their respective infrastructure."

The restoration of salmon runs to the upper Columbia is an issue of critical concern to the Indigenous Nations; however, as the above quote indicates, the connection between this issue and the CRT is somewhat complex. Upstream migration of Columbia River salmon runs was terminated in 1938 by the construction of the Grand Coulee dam in Washington state. This was a devastating loss to both US and Canadian Indigenous Nations in the upper Columbia basin. It

eliminated an essential traditional food source, and eroded a whole way of life and set of cultural, spiritual and social customs and values associated with the salmon fishery. In recent decades, both US and Canadian Indigenous Nations have worked very hard to seek the restoration of historic salmon runs through, among other things, changes to the Grand Coulee dam and other dams on the Columbia system.

While it is therefore correct to say that the CRT - which came twenty-six years after the Grand Coulee dam - was not directly responsible for the loss of salmon runs, the CRT has overlaid another set of dams and hydroelectric operations on the ecosystem that will be needed to support salmon populations in the future, if and when upstream migration passage is restored. From the perspective of the Indigenous Nations, restoring salmon runs is therefore linked to the CRT as the ability to achieve that long-sought goal will depend, in part, on changes to CRT-related dams and operations.

The US concluded a similar CRT review process with a joint report issued by the BPA and Army Corp of Engineers on December 13, 2013 (found here). Similar to the BC decision, the US report identified the goal of developing a modernized CRT framework that is modified to address ecosystem function, in addition to power generation and flood control. The US State Department reviewed the report and in 2016 decided to proceed with negotiations to develop a modernized CRT framework. Those negotiations were formally initiated by Global Affairs Canada ("GAC") and the State Department on May 29, 2018.

The composition of the Canadian negotiation team reflects the unique circumstances of the CRT. The chief negotiator is Sylvan Fabi, now Consul General in Denver, supported by GAC, NRCan, Environment and Climate Change Canada and the Department of Fisheries and Oceans. BC is represented by Kathy Eichenberger, Executive Director - CRT Review of the Ministry of Energy, Mines and Low Carbon Initiatives. Senior BC Hydro representatives also participate as members of the team. Since negotiations commenced in May 2018, there have been ten formal negotiation sessions between the US and Canada.

C. The Honour of the Crown and International Treaty Negotiations

1. The Legal Context

The leading case regarding how the Crown's duties pursuant to section 35 may apply to the conduct of international relations, including treaty negotiations, is *Hupacasath First Nation v. Canada*, 2015 FCA 4. The issue before the Federal Court of Appeal was whether the Minister of Foreign Affairs had a duty to consult the Hupacasath First Nation prior to signing and ratifying a foreign investment promotion and protection agreement with China. The Court first addressed two preliminary issues: 1) does the Federal Court have jurisdiction over the application brought by Hupacasath under the *Federal Courts Act*; and 2) did the Hupacasath application raise a justiciable issue? On the first point, the Court confirmed that the Federal Courts (in addition to Provincial Superior Courts) have jurisdiction over applications related to the "federal exercise of pure prerogative power".[6] On the second point, the Court rejected Canada's argument that the negotiation of international agreements is a political matter not properly subject to judicial

[6] Hupacasath, supra at para. 58.

review. The Court noted that Hupacasath was seeking to uphold legally enforceable rights, not question the political wisdom of the Crown in negotiating the agreement at issue. Assessing whether legal rights exist, and whether they have been infringed by government action, lies at the heart of the Court's role.[7]

The Court then turned to the central question of whether the Minister owed Hupacasath a duty to consult. On this point, it upheld the lower court's decision that Hupacasath had not satisfied the test for triggering a duty to consult, because there was insufficient evidence that Canada's ratification of the agreement would cause any appreciable risk of harm to Hupacasath's rights. The Court noted that the agreement did not require Canada to alter or diminish its domestic legal obligations, including its duties to Indigenous peoples. It also found the applicant's case that the agreement would have a "chilling effect" on Federal and Provincial treatment of resource companies that had Chinese investors, out of concern that Chinese investors would seek compensation through the investor protection provisions of the agreement, to be speculative and not supported by sufficient evidence. In the result, the Court found that Hupacasath had not satisfied one of the criterion required to trigger a duty to consult.[8]

Hupacasath clarifies that, when the Federal Crown negotiates and ratifies international agreements, it is not exempt from its constitutional and legal obligations to Indigenous peoples. In the appropriate circumstances, the Crown may be held to an enforceable duty to consult and, where appropriate, accommodate. As with all duty to consult cases, the onus is on the Indigenous Nation to show evidence of a causal connection between the agreement under negotiation, and some risk of adverse impact to the constitutionally protected rights of the affected Nation. If that evidence is present, *Hupacasath* indicates that there is no reason in principle or law to relieve the Crown of its duty to uphold the honour of the Crown through, among other things, meaningful consultation and accommodation.

2. Examples of Indigenous Engagement in International Agreements

Notwithstanding *Hupacasath*, there are precedents for Indigenous engagement in the negotiation and/or implementation of international agreements. Two examples are briefly addressed here.

a) Pacific Salmon Treaty

The Pacific Salmon Treaty ("PST") was signed by the US and Canada in 1985. It creates a framework for the joint management of migratory salmon stocks shared by both countries. The Pacific Salmon Commission oversees the implementation of the PST, and is supported by a number of panels and technical committees. Canadian Indigenous representatives participate directly in the PST processes and organizations. Two members of the Commission are Indigenous, and Indigenous representatives participate in various of the panels and technical committees. There is also a First Nations Caucus, which works with the First Nations Fisheries Council to support and resource Indigenous participation in PST processes. The panels and technical committees were involved in the renegotiation of various chapters of the PST, which lead to recommendations from the Commissioners to the parties in August 2018. In addition, the

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7 Hupacasath, supra at para. 69-70

8 *Hupacasath, supra* at paras. 90 - 121

Department of Fisheries and Oceans carries out direct consultations regarding the PST with Indigenous communities and representative bodies through a process co-developed with Indigenous Nations.[9]

The distinctions between the PST and the investment protection agreement at issue in *Hupacasath* are obvious. Salmon are central to BC Indigenous Nation rights, cultures and societies, and any management and stock allocation measures developed through the PST have a direct and significant effect on the availability of salmon to Indigenous peoples. The need for Canada to integrate Indigenous peoples into the negotiation and implementation of the PST is therefore quite clear.

b) Canada-US-Mexico Agreement

The Canada-US-Mexico Agreement ("CUSMA"), which was negotiated to replace NAFTA, came into force on July 1, 2020. Anyone who was alive and awake during the early part of the Trump administration will recall the tumultuous negotiation process. What is less well known, however, is the extent to which the CUSMA negotiations broke new ground in incorporating Indigenous views and interests.[10]

Indigenous interests were addressed, to varying degrees, in both the development of the Canadian negotiation position and the text of the agreement itself. Perry Bellegarde, National Chief of the Assembly of First Nations, was appointed to the NAFTA Council, a bi-partisan advisory body of thirteen appointees tasked with providing input to then Minister of International Trade Chrystia Freeland. National Chief Bellegarde described this role as an enabling significant influence on the outcome of the CUSMA negotiations.[11] Representation on the NAFTA Council was supplemented by broader meetings between Federal Ministers and Indigenous representative organizations to identify Indigenous priorities for a revamped tri-lateral trade deal. Indigenous interests were addressed, in part at least, through key treaty sections including the general exceptions clause, which affirms that the parties commitments in CUSMA do not override or detract from their respective domestic legal obligations to Indigenous peoples. The importance of the environment to Indigenous peoples is also noted in the environment chapter, and the power of states to give preference to Indigenous businesses in the purchase of goods and services was affirmed.

D. The CRT Negotiations Framework Agreement

The formal commencement of US-Canada negotiations to modernize the CRT in May 2018 moved Crown-Indigenous engagement on the CRT to a new phase. [12] The Indigenous Nations were intent

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9 Pacific Salmon Treaty Renewal - report to the FNFC General Assembly, Nov. 8 2018

10 This paper will not do justice to this issue, and for further reading see excellent papers here and here on the political and legal impetus to inclusion of Indigenous peoples in USMCA negotiations.

11 By including Indigenous peoples, the USCMA breaks new ground, Macleans Oct. 4, 2018

12 The phrase "modernize the CRT" reflects the objective of both Canada and the US, as reflected in the BC Decision and US entities review, to maintain the treaty but negotiate improvements to address their respective interests. The exact form of any future changes to the CRT remains to be determined. The text of the treaty may be amended, or supplemented by what is referred to as "an exchange of notes" between the parties. Other options may also be explored. This paper therefore uses the phrase "CRT framework", as the scope of

on participating in those negotiations to the fullest extent possible, to seek improvements to the treaty framework to address Indigenous rights and interests that were ignored during the initial treaty negotiations. Engaging with the Indigenous Nations on the CRT negotiations aligns with both BC's and Canada's commitments to reconciliation and implementation of the *UN Declaration*, while also reducing legal risk for both governments. Unlike in *Hupacasath*, there is a clear connection between the CRT and CRT dams in Canada, and the potential for adverse impacts to the rights of the Indigenous Nations who hold title and rights to the lands and waters affected by those dams. The case for an enforceable duty to consult was there to be argued, if necessary.

As a first step, the five governments discussed how the Crown-Indigenous engagement on the CRT modernization negotiations would occur. Despite some initial disagreements and bumps in the road, those discussions resulted in the signing of the "Canada - British Columbia - Columbia Basin Indigenous Nations Columbia River Treaty Negotiations Framework Agreement", dated for reference June 15, 2019 (the "NFA", included as an appendix to this paper). The NFA has guided Crown - Indigenous engagement since that date (and is currently being extended).

1. The NFA and the *UN Declaration*

This section addresses how the NFA was drafted to advance reconciliation by adopting a recognition-based engagement approach that is consistent with aspects of the *UN Declaration*.[13] The NFA is not perfect, and reflects the compromise and give-and-take inherent in any negotiations. The work happening under the NFA is also in progress, and neither the author nor any participating Indigenous Nation can, at this point in time, endorse the process as discharging the Crown's duties. Finally, some of the discussions under the NFA are on a without prejudice basis, and cannot be discussed in this paper.

a) Recognition of Indigenous rights

The Recitals to the NFA reflect an acknowledgment by BC and Canada that the Indigenous Nations hold rights, including title, within the upper Columbia River basin (as opposed to acknowledging the assertion of those rights). In addition, both governments acknowledge that those rights were not respected when the CRT was first negotiated. These articles are then balanced with other provisions, both within the Recitals and elsewhere in the NFA, that minimize the legal risk to the Crown of making those acknowledgments:

> WHEREAS:
>
> *A. The Indigenous Nations hold Aboriginal rights and title within their respective traditional territories, each of which include portions of the Columbia River Basin;*
>
> *…*
>
> *C. The Parties recognize and acknowledge that the CRT was negotiated without the participation or consent of the Indigenous Nations and without taking into*

instruments that may be used to implement negotiation outcomes is not limited to changes to the formal treaty text.

[13] There are 46 Articles of the *UN Declaration* covering a wide range of topics. This paper will only comment on key Articles that directly bear on the NFA.

> *account impacts to the title, rights, culture, economies and ways of life of the Indigenous Nations;*
>
> *D. The Parties further recognize and acknowledge that the Indigenous Nations assert that they have suffered, and continue to suffer, profound and long-lasting impacts from the CRT and the construction and operation of hydroelectric facilities governed by its terms;*
>
> *…*
>
> *H. The consultation process set out in this Agreement is based on the understanding that the nature, scope and geographic extent of the rights and title of the Indigenous Nations within the Columbia River basin have not been determined. The Parties acknowledge that the engagement in relation to the modernization of the CRT undertaken under the terms of this Agreement is not a rights recognition process*

The traditional consultation approach of first requiring Indigenous Nations to prove their rights on a *prima facie* basis, as well as the potential for impacts to those rights, is both time consuming and, for the Indigenous Nations, disrespectful. By adopting a recognition-based starting point, the NFA enables the parties to instead focus their engagement on the real issue, which is the modernization of the CRT. This approach also supports collaboration between the three Indigenous Nations by setting aside potentially problematic discussion of the scope and nature of their respective rights in the Columbia River basin. The ability of the three Indigenous Nations to work together through the NFA, while now conceding any of their respective rights of viewpoints, has proven to be a major benefit of the agreement.

b) Explicit intention to implement the UN Declaration

Another key element of the NFA is the explicit recognition of Canada's and BC's commitments to implement the UN Declaration. This is reflected in both the Recitals and the substantive terms of the agreement:

> *WHEREAS:*
>
> *E. Existing Aboriginal and treaty rights are recognized and affirmed in Section 35(1) of the Constitution Act, 1982. Both Canada and British Columbia (B.C.) have committed to a renewed path of reconciliation with Indigenous peoples. Canada and B.C. are committed to working, on a nation-to-nation basis, through discussion and engagement with the Indigenous groups in order to advance reconciliation and renew the relationship through cooperation and recognition of Indigenous rights. Canada and B.C. have fully endorsed the United Nations Declaration on the Rights of Indigenous Peoples (the "U.N. Declaration") without qualification and committed to implement the U.N. Declaration in partnership with Indigenous peoples, and in accordance with Canada's constitution;*
>
> *…*
>
> *I. The Parties agree that the meaningful participation of the Indigenous Nations in relation to CRT Negotiation processes is necessary to seek to obtain their free, prior and informed consent and to advance reconciliation, fulfill the constitutional and legal duties owed by Canada and B.C. to the Indigenous Nations, implement the U.N. Declaration and respect and uphold the laws, customs and governance authorities of the Indigenous Nations;*
>
> *…*

> 3.1 The Parties will implement this Negotiation Framework in accordance with the principles and commitments set out in this section.
>
> …
>
> 3.5 Canada has fully endorsed the U.N. Declaration without qualification, and committed to implement the U.N. Declaration and the Truth and Reconciliation Commission's Calls to Action in partnership with Indigenous peoples, and in accordance with Canada's constitution. The Province of B.C. has committed to fully adopting and implementing the U.N. Declaration and the Truth and Reconciliation Commission's Calls to Action, and is committed to bringing the principles of the U.N. Declaration into action. Through this Negotiation Framework, Canada and BC will work and cooperate with the Indigenous Nations to aim to advance those commitments and, in particular, seek to obtain the free, prior and informed consent of the Indigenous Nations in relation to the modernization of the CRT.

From the Indigenous Nations' perspective, it was important that the NFA reflect an engagement process that exceeds the standards developed through the *Haida* consultation model. By explicitly weaving the Crown commitments to implement, and act consistent with, the *UN Declaration* into the terms of the agreement, the NFA arguably signals that the Crown's efforts will go further than what would otherwise be required under *Haida*.

c) Free, prior and informed Indigenous consent

Articles 19 and 32(2) of the *UN Declaration* calls for states to consult with Indigenous peoples in order to obtain their free and informed consent prior to adopting legislative or administrative measures that affect them, or approving any projects or activities that affect Indigenous lands and resources, including water. This standard of free, prior and informed consent stands in contrast to the consultation standard articulated in *Haida*, which has been interpreted as requiring meaningful Indigenous input, not consent. The NFA clarifies that it is the *UN Declaration* standard of seeking free, prior and informed consent that will apply to any outcomes of the CRT modernization negotiations:

> 2.1 The purposes of this Negotiation Framework are to:
>
> (b) advance reconciliation and establish the means whereby Canada and B.C. will seek to obtain the free, prior and informed consent of the Indigenous Nations regarding the CRT Negotiations;
>
> …
>
> 3.5 Through this Negotiation Framework, Canada and BC will work and cooperate with the Indigenous Nations to aim to advance those commitments and, in particular, seek to obtain the free, prior and informed consent of the Indigenous Nations in relation to the modernization of the CRT.

From the Indigenous Nations' perspective, it is important that consent, if achieved, not be implied or assumed. It must be clearly identified, and preceded by internal Indigenous governance processes. The NFA addresses this issue by requiring that any points of agreement or consent be stated in writing:

> 4.6 The Parties share an interest in clearly identifying issues on which consensus has been achieved, and outcomes of the CRT Negotiations for which the consent of the Indigenous Nations have been obtained as well as the scope, nature and content of that consent. The Parties will ensure that a clear record of any

> decision or recommendation of the N.A.T. or Leadership Table, and of any issue upon which consensus or consent cannot be achieved, are prepared.

The NFA also gives the Leadership Table (a senior leadership forum discussed below) the responsibility for confirming any agreed to outcomes from the process:

> 4.2The Leadership Table will consist of one senior leadership representative from each Party. Each Party will also appoint an alternate who can act on its behalf in the absence of the senior leadership representative. Each Party will ensure that its representative is mandated to speak on its behalf and to make decisions on relevant matters consistent with each Party's governance processes. The Leadership Table will:
>
> ….
>
> (c) confirm key decisions, actions and outcomes mutually developed by the Parties;

This structure ensures that Indigenous leadership, rather than staff or negotiators, are directly engaged in reviewing and confirming negotiated outcomes, including any points on which Indigenous consent may have been obtained.

d) Recognition and exercise of Indigenous governance authority

There are multiple Articles of the *UN Declaration* that call on states to recognize and respect Indigenous governance institutions, processes and authorities (see, for e.g., Articles 5, 18, 19 and 20). The NFA reflects these principles in several ways. Recital I state a shared acknowledgment that meaningful participation in the CRT modernization negotiations is necessary to "respect and uphold the laws, customs and governance authorities of the Indigenous Nations". This statement of principle is then implemented through four primary mechanisms. First, Part 6 of the NFA establishes extensive information-sharing obligations for Canada and BC to support fully informed Indigenous participation. This includes information that would not ordinarily be shared beyond the Canadian negotiation team, such as analysis and reports that support the Canadian negotiation position and information on the US negotiation position and interests. As GAC deems much of this information highly sensitive, the Indigenous Nations have signed confidentiality agreements. Those confidentiality obligations are balanced by article 6.4, which lists information the Indigenous Nations can freely share. This ensures that the Indigenous Nations representatives to the negotiations can keep their respective leadership and membership updated and informed.

The second mechanism that supports the exercise of Indigenous governance authority is the Negotiation Advisory Team ("NAT") established under articles 4.2 and 4.4. The NAT is composed of three representatives of each party, plus legal counsel, and is the primary forum for engagement on the CRT negotiations. One of its main tasks is to "collaboratively develop consensus on the negotiation positions to guide and inform Canada's positions and negotiations with the U.S., including responses to positions and issues raised by the U.S.". The author participates in the NAT, and can attest to the depth and breadth of the issues it addresses.

Importantly, Indigenous Nation members of the NAT are also integrated into the Canadian negotiation team through article 4.5, which states:

> The Parties will establish an Observer Group within the Canadian delegation to the CRT Negotiations consisting of one representative of each Indigenous

> Nation (the "Observer Group"). Each Indigenous Nation will also appoint an alternate who can act in the absence of the primary representative. The purpose of the Observer Group is to: attend each session of the CRT negotiations between Canada and the United States; observe the negotiations and only participate if directed to do so by Canada's Chief Negotiator; and report back to the N.A.T. on the negotiations within the confines of the confidentiality agreement that each observer has entered into with Canada. The Parties agree to continue to discuss and seek to reach agreement on the inclusion of legal counsel for the Indigenous Nations in the Observer Group.

Article 4.5 was one of the most challenging articles to negotiate. Throughout the negotiation of the NFA, the Indigenous Nations strongly advocated that they needed direct access to the US-Canada negotiations. The Indigenous Nations did not want GAC to act as an intermediary through which information would be filtered, nor did they wish to have GAC or BC speak to Indigenous interests at the negotiation table. GAC was initially not receptive to this request; however, after intensive negotiations (including discussion at the Ministerial level), GAC agreed to establish the Indigenous Nations Observer Group, which sits as part of the Canadian negotiation team.

The Observer Group is a landmark achievement of the NFA. As far as this author is aware, it is the first time that Indigenous Nations have been given direct representation in Canadian bi-lateral treaty negotiations.[14] To be clear, the Indigenous Nations are not negotiating with the US. That role is reserved to Canada, represented by the Chief Negotiator. However, the Indigenous Nations have secured direct access to the negotiations, and a substantial role in developing the Canadian negotiation position. This is a precedent-setting achievement that enables the Indigenous Nations to directly represent their rights, title and governance authorities in the negotiation process.

The third mechanism that supports the implementation of Indigenous governance authority is the Leadership Table established under Article 4.2. The purpose of the Leadership Table is to provide senior oversight of the NAT. It is composed of senior leadership representatives of each party, which includes Assistant Deputy Ministers at the Federal and BC level. Article 4.2 requires that each representative be mandated to speak and make decisions on behalf of the party they represent, consistent with each party's internal governance processes. As noted above, the Leadership Table is the forum for confirming any agreements reached between the parties. It is also the forum for resolving any disagreements that can't be solved at the NAT. The representation of senior Indigenous leadership in this forum ensures that key decisions are made, or at least confirmed, at a level appropriate to the governance processes of each Indigenous Nation.

The fourth mechanism that supports the exercise of Indigenous governance processes is the commitment by both BC and Canada to provide stable funding to support meaningful Indigenous participation in the modernization negotiations. Schedule "B" commits both governments to provide two categories of funding: core funding, and additional funding to support specific projects developed through an annual treaty workplan. Core funding supports the Indigenous Nations' participation in the NFA structures and processes and, importantly, Indigenous Nations' internal engagement with membership, leadership and communities. Funding for legal counsel

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[14] Canadian Indigenous Nations have been represented at the UN during the negotiation of various agreements, including the *UN Declaration*.

is also included. Annual treaty workplan funding is negotiated every year, and supports studies, reports and analysis (such as ecosystem functioning modeling or developing objectives to protect cultural values) that feed into and support the CRT modernization negotiations.

Finally, it is worth noting that the Indigenous Nations' participation in the CRT modernization negotiations is supported by a collectively developed Indigenous negotiation mandate. This mandate was developed collaboratively by the Indigenous Nations working group, and approved by the governing body of each Nation. There is symbolic importance to the mandate, as it puts the Indigenous Nations on the same level with BC and Canada, which each have their own negotiation mandates. Of equal importance, the joint mandate defines a set of shared goals and objectives that have supported a very strong collaborative relationship between the three Nations.

e) Supplemental agreements

Articles 26(2), 28(1) and 32(3) of the UN Declaration affirm the rights of Indigenous peoples to compensation for the use of their traditional lands, including redress for traditional lands and resources that have been taken without consent. While the NFA does not fully implement these Articles, it does create a framework through which the parties can advance collective or bi-lateral negotiations directed towards those goals.

Article 2.1(c) of the NFA states as follows:

> The purposes of this Negotiation Framework are to … enable the Parties, whether collectively or through separate bilateral processes, to develop additional agreements related to the CRT including, but not limited to, past and ongoing impacts of the CRT to the Indigenous Nations and the domestic implementation of any outcomes of the CRT Negotiations

This purpose is built out by Articles 4.3(b) and 4.7. Article 4.3(b) tasks the NAT with developing a list of issues that the parties will seek to address through the NFA including, where necessary, separate bilateral negotiations pursuant to article 4.7. The content of NAT negotiations, including the content of the list developed under Article 4.3(b), is confidential and can't be further discussed.

E. Conclusion

Achieving full implementation of the *UN Declaration* will be a long journey with progress measured in increments, not leaps and bounds. Viewed in this light, the NFA represents a good step in the right direction. While far from perfect, its terms support a Crown-Indigenous relationship that is balanced, respectful and productive. Aspects of the agreement - such as the inclusion of the Indigenous Nations in the Canadian negotiation team - are specific to the international treaty negotiation context. While representing significant gains for Indigenous Nations, they may not translate directly beyond that context. However, other elements of the agreement - such as the adoption of free, prior and informed consent as the goal of the process, and the integration of Indigenous representatives into the development of government policies and positions - may have broader application and offer a precedent for integrating the *UN Declaration* into other areas of Crown-Indigenous engagement.

II. APPENDIX "A"

Canada - British Columbia - Columbia Basin Indigenous Nations

Columbia River Treaty Negotiations Framework Agreement

(Herein to referred to as the "Negotiation Framework")

BETWEEN:

The Ktunaxa Nation as represented by the Ktunaxa Nation Council

AND:

The Secwepemc Nation as represented by the Shuswap Nation Tribal Council

AND:

The Syilx Nation as represented by the Okanagan Nation Alliance

AND:

Canada as represented by the Department of Foreign Affairs, Trade and Development

AND:

British Columbia as represented by Ministry of Children and Family Development and the Minister Responsible for the Columbia River Treaty

Hereinafter referred to as the Parties

WHEREAS:

A. *The Indigenous Nations hold Aboriginal rights and title within their respective traditional territories, each of which include portions of the Columbia River Basin;*

B. *The 1964 Columbia River Treaty (CRT) is an international agreement between Canada and the United States of America (the U.S.) to coordinate flood control and optimize hydroelectric energy production on both sides of the border. Canada and the U.S. have begun a process to modernize the CRT;*

C. *The Parties recognize and acknowledge that the CRT was negotiated without the participation or consent of the Indigenous Nations and without taking into account impacts to the title, rights, culture, economies and ways of life of the Indigenous Nations;*

D. *The Parties further recognize and acknowledge that the Indigenous Nations assert that they have suffered, and continue to suffer, profound and long-lasting impacts from the CRT and the construction and operation of hydroelectric facilities governed by its terms;*

E. *Existing Aboriginal and treaty rights are recognized and affirmed in Section 35(1) of the Constitution Act, 1982. Both Canada and British Columbia (B.C.) have committed to a renewed path of reconciliation with Indigenous peoples. Canada and B.C. are committed to working, on a nation-to-nation basis, through discussion and engagement with the Indigenous groups in order to advance reconciliation and renew the relationship through cooperation and recognition of Indigenous rights. Canada and B.C. have fully endorsed the*

United Nations Declaration on the Rights of Indigenous Peoples (the "U.N. Declaration") without qualification and committed to implement the U.N. Declaration in partnership with Indigenous peoples, and in accordance with Canada's constitution;

F. *B.C.'s Crown corporation British Columbia Hydro and Power Authority ("B.C. Hydro") is the owner and operator of hydroelectric facilities in Canada, and charged with the implementation of the CRT under the 1963 Canada-B.C. Agreement, and both B.C. and B.C. Hydro are participants with Canada in the CRT Negotiations;*

G. *The Crown has a legal obligation to consult with and, where appropriate, accommodate Indigenous groups whenever the Crown contemplates conduct that may adversely affect section 35 Aboriginal rights and title;*

H. *The consultation process set out in this Agreement is based on the understanding that the nature, scope and geographic extent of the rights and title of the Indigenous Nations within the Columbia River basin have not been determined. The Parties acknowledge that the engagement in relation to the modernization of the CRT undertaken under the terms of this Agreement is not a rights recognition process;*

I. *The Parties agree that the meaningful participation of the Indigenous Nations in relation to CRT Negotiation processes is necessary to seek to obtain their free, prior and informed consent and to advance reconciliation, fulfill the constitutional and legal duties owed by Canada and B.C. to the Indigenous Nations, implement the U.N. Declaration and respect and uphold the laws, customs and governance authorities of the Indigenous Nations; and*

J. *Towards those ends, the Parties have entered into this Agreement to establish the principles, processes and commitments that will govern their engagement regarding the CRT negotiations.*

THE PARTIES AGREE AS FOLLOWS:

1.0 DEFINITIONS

"Indigenous Nations" means the Ktunaxa Nation, as represented by the Ktunaxa Nation Council, the Secwepemc Nation, as represented by the Shuswap Nation Tribal Council, and the Syilx Nation, as represented by the Okanagan Nation Alliance;

"CRT Negotiations" means the negotiations between Canada, with the participation of BC, BC Hydro and the Observer Group together forming the Canadian delegation, and the U.S. concerning the modernization of the CRT;

2.0 PURPOSES

2.1. The purposes of this Negotiation Framework are to:

a. establish the principles, processes and commitments that will govern engagement between the Parties on the CRT Negotiations;

b. advance reconciliation and establish the means whereby Canada and B.C. will seek to obtain the free, prior and informed consent of the Indigenous Nations regarding the CRT Negotiations; and

c. enable the Parties, whether collectively or through separate bilateral processes, to develop additional agreements related to the CRT including, but not limited to, past and ongoing impacts of the CRT to the Indigenous Nations and the domestic implementation of any outcomes of the CRT Negotiations.

3.0 PRINCIPLES

3.1 The Parties will implement this Negotiation Framework in accordance with the principles and commitments set out in this section.

3.2 The Parties commit to working together to:

a. engage collaboratively to seek to build consensus;

b. respect and support each other's governance processes and structures;

c. strive for clarity in communications and joint documents;

d. work efficiently and with due consideration for timelines; and

e. share all relevant information in a timely manner in accordance with the confidentiality requirements.

3.3 Canada has adopted the "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples", which are intended to achieve reconciliation with Indigenous peoples through a renewed nation-to-nation and government-to-government relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change. Canada is committed to implementing those principles through this Negotiation Framework.

3.4 B.C. has developed the "Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples", which affirm B.C.'s desire to achieve a government-to-government relationship based on respect, recognition and exercise of Aboriginal title and rights and to the reconciliation of Aboriginal and Crown titles and jurisdictions. B.C. is committed to implementing those principles through this Agreement.

3.5 Canada has fully endorsed the U.N. Declaration without qualification, and committed to implement the U.N. Declaration and the Truth and Reconciliation Commission's Calls to Action in partnership with Indigenous peoples, and in accordance with Canada's constitution. The Province of B.C. has committed to fully adopting and implementing the U.N. Declaration and the Truth and Reconciliation Commission's Calls to Action, and is committed to bringing the principles of the U.N. Declaration into action. Through this Negotiation Framework, Canada and BC will work and cooperate with the Indigenous Nations to aim to advance those commitments and, in particular, seek to obtain the free,

prior and informed consent of the Indigenous Nations in relation to the modernization of the CRT.

4.0 STRUCTURE

4.1 The Parties will establish a Leadership Table, Negotiation Advisory Team (the "N.A.T.") and Observer Group as set out below.

Leadership Table

4.2 The Leadership Table will consist of one senior leadership representative from each Party. Each Party will also appoint an alternate who can act on its behalf in the absence of the senior leadership representative. Each Party will ensure that its representative is mandated to speak on its behalf and to make decisions on relevant matters consistent with each Party's governance processes. The Leadership Table will:

a. provide guidance, as required, to the N.A.T.;

b. receive updates from the N.A.T. on and, where appropriate, provide input into the CRT Negotiations;

c. confirm key decisions, actions and outcomes mutually developed by the Parties; and

d. seek to resolve any outstanding issues between the Parties in accordance with sections 7.3 and 7.4.

N.A.T.

4.3 The N.A.T. will consist of no more than three representatives of each Party, with the option to include legal counsel as needed. Each Party will also appoint one or two alternates who can act on its behalf in the absence of the primary representatives. The N.A.T. will:

a. serve as the primary forum for the Parties to share information concerning the CRT Negotiations;

b. as a first order of business, collaboratively develop a list of issues that the Parties will seek to address through the processes established in this Agreement, including any separate agreements established through clause 4.7, and will address the need for confidentiality with respect to that list or any part of it;

c. be the initial forum for engagement regarding any proposed changes to Canada's negotiation objectives for the CRT Negotiations;

d. provide advice and seek to collaboratively develop consensus on the negotiation positions to guide and inform Canada's positions and negotiations with the U.S., including responses to positions and issues raised by the U.S.;

e. collaboratively identify the key issues that the Leadership Table needs to be informed of for purposes of the dispute resolution provisions in sections 4.2(d), 7.3 and 7.4;

f. ensure the Indigenous Nations are fully informed about the CRT Negotiations;

g. provide updates to each Party's respective leadership on the status of the CRT Negotiations and engagement with Canada pursuant to this Agreement; and

h. include in its meetings, as necessary and by consensus, technical experts, including from BC Hydro, to inform and support negotiations preparation sessions.

4.4 The N.A.T. will manage and control its own process consistent with the following:

a. when CRT Negotiations are active, the N.A.T. will meet no less than once per month;

b. the N.A.T. may meet in person or by electronic means;

c. the N.A.T. will ensure that joint minutes are taken of each meeting and, in particular, that any issue on which consensus has been reached, or any issue of disagreement, is clearly recorded;

d. where required, the N.A.T. may create technical working groups to prepare more detailed studies and analysis to support its work;

e. the N.A.T. will collaboratively develop and, as required, update a work plan that identifies objectives, timelines, deliverables and budgets to support its work; and

f. the N.A.T. will provide support to the CRT Negotiations as needed.

Observer Group

4.5 The Parties will establish an Observer Group within the Canadian delegation to the CRT Negotiations consisting of one representative of each Indigenous Nation (the "Observer Group"). Each Indigenous Nation will also appoint an alternate who can act in the absence of the primary representative. The purpose of the Observer Group is to: attend each session of the CRT negotiations between Canada and the United States; observe the negotiations and only participate if directed to do so by Canada's Chief Negotiator; and report back to the N.A.T. on the negotiations within the confines of the confidentiality agreement that each observer has entered into with Canada. The Parties agree to continue to discuss and seek to reach agreement on the inclusion of legal counsel for the Indigenous Nations in the Observer Group.

Meeting Record

4.6 The Parties share an interest in clearly identifying issues on which consensus has been achieved, and outcomes of the CRT Negotiations for which the consent of the Indigenous Nations have been obtained as well as the scope, nature and content of that consent. The Parties will ensure that a clear record of any decision or recommendation of the N.A.T. or

Leadership Table, and of any issue upon which consensus or consent cannot be achieved, are prepared.

Additional Agreements and Processes

4.7 The Parties recognize that separate bilateral agreements and processes between Canada, B.C. and each of the Indigenous Nations may be established to complement this Agreement, and commit to avoiding any duplication or overlap between this Agreement and any such agreements or processes.

5.0 FUNDING

5.1 The Parties acknowledge that, subject to the expenditures being authorized by law, Canada and B.C. commit to providing capacity funding to the Indigenous Nations to enable their meaningful participation in the processes established through this Negotiation Framework.

5.2 Subject to 5.1, the objectives respecting funding are set out in Schedule B to this Negotiation Framework.

6.0 INFORMATION SHARING

6.1 The Parties recognize and respect that the Indigenous Nations need to be able to provide input to those negotiations, update their communities and exercise their respective governance processes in a fully informed manner, while also maintaining the confidentiality of the content of the negotiations between Canada and the U.S.

6.2 The Leadership Table will be provided with access to the following types of information:

a. the overarching goals and objectives of the CRT negotiations prepared by the N.A.T.;

b. this Agreement and any updates and amendments;

c. updates by the N.A.T. on the implementation of this Agreement and on the progress of the CRT Negotiations; and

d. any other information that the Leadership Table may request that is not confidential or, where such information is confidential, Canada or B.C. has agreed to share such information and the Parties have signed a confidentiality agreement in relation to that information.

6.3 Subject to section 6.5, the N.A.T. will be provided with access to the following types of information:

a. Canada's and B.C.'s objectives and desired outcomes for a modernized CRT;

b. Options to be considered in advancing Canada's negotiating positions to achieve the desired outcomes;

c. Relevant and appropriate technical information in support of the development of negotiation options;

d. Information on U.S. interests and positions, including tribal interests and positions known publicly (i.e. not obtained in confidence);

e. Information on positions of U.S. negotiating team in order to advance Canada's response; and

f. Other information that the N.A.T. may request that is not confidential or, where such information is confidential, the Parties have signed a confidentiality agreement in relation to that information.

6.4 N.A.T. representatives may provide the following types of information to their respective Indigenous Nations so long as no information that is subject to a confidentiality agreement is included:

a. the general goals and objectives for the CRT Negotiations as developed by the N.A.T. and the Leadership Table;

b. general updates on the status of the CRT Negotiations and the implementation of this Agreement;

c. information on U.S. interests and positions, including U.S. tribal interests and positions, so long as that information is already public and confirmed as non-confidential by Canada.

d. background information relating to the science and knowledge informing the negotiations in a consumable manner and as appropriate;

e. information with respect to any impacts to Indigenous Nations rights and title related to the CRT;

f. a summary of how input from leadership and communities will inform the negotiations moving forward; and

g. any other information that the Parties determine may be shared without breaching confidentiality.

6.5 If requested by Canada or British Columbia, and subject to section 6.6, the Indigenous Nation members of the N.A.T. and the Leadership Table will sign confidentiality agreements substantially in the form attached as Schedule A to this Agreement. For greater clarity, if information that is subject to a confidentiality agreement is subsequently confirmed by Canada or British Columbia, as the case may be, to be non-confidential, that information is no longer subject to the terms of the confidentiality agreement.

6.6 Information may only be designated as confidential and subject to a confidentiality agreement if it includes information related to one or more of the following:

a. negotiating strategies, options and positions;

b. specific negotiating objectives and parameters;

c. any materials prepared for the purposes of the negotiation meetings;

d. unacceptable options;

e. potential trade-off areas;

f. potential zones of negotiated agreement;

g. supporting technical and financial information and data;

h. any other information that may affect Canada's negotiating advantage;

i. traditional knowledge or traditional use information provided by the Indigenous Nations; or

j. information that is exempt from disclosure or that may be withheld from disclosure under federal or provincial law.

6.7 The Indigenous Nations may designate information shared with Canada or British Columbia as confidential if it is ordinarily treated by the Indigenous Nations as confidential and, for such information:

a. Canada and British Columbia will not disclose the information to third parties, subject to applicable access to information legislation; and

b. Canada and British Columbia will provide the Indigenous Nations with notice of any request for disclosure of the information under applicable access to information legislation and an opportunity to express any views regarding disclosure of the information.

6.8 The Parties will jointly prepare an internal information sharing plan to manage the form, content and timing of information sharing that will address, among other things:

a. the dissemination of assigned and numbered paper copies of confidential information and ensuring security of documents;

b. the electronic dissemination and storage of non-confidential information;

c. a protocol for N.A.T. and Leadership Table meetings (chairing, minute taking, follow up action items, tracking etc.); and

d. a protocol for general public engagement and communication with the media.

7.0 DISPUTE RESOLUTION

7.1 The Parties are required to engage through this Negotiations Framework in good faith and, in the case of Canada and BC, act in accordance with the honour of the Crown. Good faith engagement requires the Parties to, among other things:

a. collaborate with the goal of reaching mutually acceptable positions on CRT modernization;

b. provide timely disclosure of information to enable examinations of relevant subject matter;

c. respond appropriately and in a timely manner to proposed negotiating positions;

d. give reasonable consideration to positions of the other Party; and

e. act consistently with the standard of good faith as articulated in the common law.

7.2 The Parties will use informal, collaborative efforts consistent with the purposes and principles of this Agreement to address disputes, prior to using dispute resolution processes set out below.

7.3 In the event of a dispute that cannot be resolved by the N.A.T., it will refer the matter to the Leadership Table for direction or decision within 30 days of the Leadership Table receiving the referral. The N.A.T. will provide the Leadership Table with a report setting out a description of the dispute, the positions and rationale taken by the Parties, potential options for resolution identified to date, and any suggested steps to resolve the dispute.

7.4 If the Leadership Table receives a dispute referred from the N.A.T., it will take the following steps to meet the 30-day deadline:

a. discuss the matter at the Leadership Table and seek to resolve the issue in a good faith and collaborative manner;

b. identify, if required, further steps that may be taken by the Leadership Table to resolve the dispute;

c. if resolution is reached, record the resolution and distribute it to the Parties; and

d. if resolution is not reached, ensure the respective views of the Parties are recorded in a joint document and distributed to the Parties.

7.5 The Parties will exhaust the process set out above prior to exercising any decision-making power, or pursuing any legal remedies, related to an issue in dispute. For greater clarity,

nothing in this section prevents a Party from seeking relief in a court of competent jurisdiction to prevent irreparable harm to a right or other legal interest.

7.6 For greater certainty, Canada will not consider proposed substantive language on a matter in the CRT Negotiations that is subject to an active dispute resolution between the Parties.

7.7 Subject to 7.6, none of the above may unduly delay or interfere with the timely occurrence of Canada-U.S. negotiation sessions.

8.0 GENERAL

8.1 The recitals and Schedules to this Agreement form integral parts of this Agreement.

8.2 No amendment or waiver of this Agreement or its Schedules will take effect unless consented to in writing by all of the Parties.

8.3 This Agreement will be in effect for a term of two (2) years from the date of signing and will be reviewed by the Parties annually. After two years, the Parties may agree to renew or extend the Agreement for an additional period of time with the opportunity by the Parties to review and revise the Agreement.

8.4 A Party may withdraw from this Agreement by providing thirty (30) days written notice to the other Parties. A Party must first exhaust the dispute resolution process prior to giving notice of withdrawal.

8.5 The Parties agree that this Negotiation Framework:

a. will be a vehicle through which consultations will be undertaken in relation to any legal or constitutional duty for Crown consultations in relation to the CRT negotiations and does not create any new or additional legal duties or obligations;

b. does not, and is not intended to, define or extinguish any Aboriginal or Treaty rights and is not evidence of the nature or extent of any Aboriginal or Treaty rights;

c. is made without prejudice to the positions taken by the Parties with respect to Aboriginal or Treaty rights or the duties owed by Canada and B.C. to the Indigenous Nations regarding the CRT Negotiations and to the positions any Party may take in present or future negotiations and legal proceedings;

d. is not a land claims agreement or Treaty within the meaning of sections 25 or 35 of the *Constitution Act, 1982*;

e. does not express, and will not be interpreted as expressing, the consent or agreement of the Indigenous Nations to any outcome of the CRT Negotiations;

f. does not affect any Aboriginal or Treaty rights of any Aboriginal group; and

g. does not and is not intended to contain any admission of fact or liability by any Party.

8.6 Any notice or communications required to be given under this Negotiation Framework will be sufficiently given or made for all purposes if by e-mail transmission, if delivered by courier, or if sent by first-class pre-paid registered mail within Canada, addressed as follows:

In the case of the Ktunaxa Nation:

Kathryn Teneese,

Chairperson,

Ktunaxa Nation Council

7825 Mission Rd.,

Cranbrook BC V1C 7E5

kteneese@ktunaxa.org, and cc'ed to

bgreen@ktunaxa.org

In the case of Secwepemc Nation:

Dale Tomma

Shuswap Nation Tribal Council

680 West Athabasca Street

Kamloops, BC, V2H 1C4

778-471-8200

crt@shuswapnation.org

In the case of Syilx Nation:

Pauline Terbasket,

Executive Director,

Okanagan Nation Alliance

101 – 3535 Old Okanagan Highway

250-707-0095

director@syilx.org

In the case of Canada:

Sylvain Fabi

Executive Director

U.S. Transboundary Affairs Division

Global Affairs Canada

125 Sussex Drive
Ottawa, Ontario, K1A 0G2
343-203-3533
Sylvain.Fabi@international.gc.ca
In the case of British Columbia:

Kathy Eichenberger
Executive Director
Columbia River Treaty
Electricity and Alternative Energy Division
Ministry of Energy, Mines and Petroleum Resources
1810 Blanshard Street
Victoria, British Columbia, V8W 9N1
250-953-3368
Kathy.Eichenberger@gov.bc.ca

Signed in the presence of:
For the Ktunaxa Nation:

_____

Kathryn Teneese,
Chairperson,
Ktunaxa Nation Council
For the Secwepemc Nation:

_____

Kukpi7 Wayne Christian

Tribal Chief

Shuswap Nation Tribal Council

For the Syilx Nation:

_____

Grand Chief Stewart Phillip

Chairman

Okanagan Nation Alliance

For Canada:

_____

Michael Grant

Assistant Deputy Minister

Americas Branch

Global Affairs Canada

For British Columbia:

_____

Les Maclaren

Assistant Deputy Minister

Electricity and alternative Energy Division

Ministry of Energy, Mines and Petroleum Resources

Schedule "A": Confidentiality Agreement

[omitted]

Schedule "B": Funding objectives for effective Indigenous Nations participation in the CRT Renewal Process

This document is subject to the provisions of Section 5 of the Canada-British Columbia-Columbia Basin Indigenous Nations Columbia River Treaty Negotiations Framework Agreement *("Negotiations Framework").*

This document is intended to inform discussions between the Parties respecting adequate funding to enable meaningful Indigenous Nations participation.

Canada and B.C. commit to providing capacity funding to the Indigenous Nations (INs) to enable their meaningful participation in the processes established under the Negotiations Framework.

Core funding. Equivalent amounts of funding will be provided to each of the Indigenous Nations for the following core functions and responsibilities:

- Ensuring that Nation members are adequately informed about the negotiations process, objectives, strategies and outcomes within agreed upon confidentiality limitations. This involves community and nation meetings and preparation and distribution of information/outreach materials;
- Obtaining input and recommendations from Indigenous Nations' members;
- Providing information to the Indigenous Nations' (consistent with the Confidentiality Agreement in Schedule A) through the course of negotiations to support directions to staff;
- Obtaining direction from band council members and ONA, KNC and SNTC officials;
- Participation in Indigenous Nations – Canada – BC staff/technical level meetings;
- Participation in Indigenous Nations – Canada – BC policy level meetings on Columbia River Treaty transboundary and domestic issues, and the development of options on CRT governance and benefits sharing;
- Staff review and analysis of proposed objectives, strategies, concept papers, treaty language, etc.;
- Ongoing independent legal advice;
- Participation on the Leadership Table;
- Participation on the Negotiation Advisory Team;
- Participation on the Observer Group; and

- Regular leadership level meetings between Indigenous Nations (individually and collectively), Canada and BC.

Additional negotiated funding for annual treaty renewal workplan implementation. It is anticipated that the CRT renewal process will involve substantial research and analysis needs, including for example: (i) development of ecosystem-based function goals, objectives, measures and scenarios; (ii) development of goals, objectives, measures and scenarios with respect to the protection of cultural heritage values and resources; (iii) development of options for ongoing implementation of a renewed treaty and governance options, both within and in addition to treaty implementation; and (iv) development and analysis of benefit-sharing options.

Annually, Indigenous Nations, Canada and BC will continue to develop a joint 'treaty renewal workplan'. This workplan should identify research and analysis tasks required to support the negotiations process and identify the parties which will lead or participate in each of the specified tasks, with timeframes and outcomes identified. This workplan would then support the development and negotiation of supplemental budgets to support the identified tasks.