Decolonizing Decision-Making: Approaches and Considerations

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Note: the term First Nation is an informal way to refer to the unit of government set up by the *Indian Act*. In this paper, we will be using that term to refer to both that unit of government and the groups of people who that unit represents.

INTRODUCTION

The consistent political advocacy of First Nations leaders and grassroots members, the recent political climate and approach of Crown governments, combined with the legal uncertainty upon which BC's authority rests,[1] have all led to an opportunity to begin decolonizing decision-making and reasserting jurisdiction by First Nations.

This short paper will lay out some factors that First Nations[2] may consider in making decisions about reasserting jurisdiction and decolonizing decision-making. To this end, we will:

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[1] As the trial judge in *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.* put it, "Some argue, in my view correctly, that the whole construct is simply a legal fiction to justify the *de facto* seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada" https://www.canlii.org/en/bc/bcsc/doc/2022/2022bcsc15/2022bcsc15.html?autocompleteStr=2022%20BCSC%2015&autocompletePos=1

[2] *Note about actors in current negotiations: In current treaty/reconciliation negotiations in British Columbia, First Nations/Band Councils are the negotiating unit most often recognized by Crown governments. There are exceptions, such as the recognition of the Office of the Wet'suwet'en as a legitimate Indigenous governing body. However, in most cases Band Councils are conducting negotiations on behalf of their members. In our experience working in governance for First Nations, the legitimacy of this position taken by Band Councils has often been questioned. The reality is that the Crown was initially responsible for recognizing the authority of Band Councils — having set them up through the Indian Act — as the appropriate representative authority for these negotiations, which arguably further cements the Crown's authority, considering First Nations are creatures of the Indian Act. Many First Nations communities get around this problem through already having elected traditional leaders into band council positions; others do so by incorporating, either formally or informally, elders, hereditary leaders, or other respected community members into negotiations in order to bolster the legitimacy of the band council leadership in these processes. However, the fundamental question of why band councils hold these positions continues to plague communities engaged in government-to-government negotiations. Fortunately the process of developing self-government agreements can resolve this problem, even if they are often initiated by a body (the band council) with questionable structural claims to legitimate authority among many first nations citizens.

1. Discuss the motivation for pursuing self-government agreements;
2. Consider how the political and philosophical legitimacy of elected and traditional decision-makers may figure into the governance approach taken;
3. Lay out the different options being taken by a variety of First Nations who have made or are pursuing self-government agreements with Crown governments;
4. Consider how to balance what the Nation would like to include in their governance model with the scale necessary for successful implementation of self-government agreements through administration and service delivery.
5. Lay out the position that Resonant Strategic takes as a consulting firm involved in these processes.

Note that considerations of membership, citizenship, and belonging are essential to determining how to pursue self-government agreements and develop constitutions. We will discuss those concepts in a future paper.

1. WHY PURSUE SELF-GOVERNMENT?

The answer to the question of "why pursue self-government?" may be an obvious one to many: a First Nation is pursuing self-government to be able to make decisions on their own terms, using their own systems. They may want to restructure the Band council decision-making system that has been put in place through the *Indian Act* to better reflect traditional systems. They may want to remove the elected system entirely and return to the traditional decision-making system that served them since time immemorial, in the process breaking down the boundaries of the Indian Band. Without a doubt, First Nations are pursuing self-government to reclaim jurisdictional authority over lands, waters, and people that have been disrupted by colonialism.

For the purposes of this paper, self-government[3] is defined as negotiations with Crown governments through which a First Nation regains jurisdiction (the ability to make and enforce laws) over their own territories and people.[4] Such negotiations occurring outside the modern treaty process in British Columbia are referred to as reconciliation negotiations, since the central point of them is to "reconcile" Crown and Aboriginal title.

[3] Also note that we are using the federal government's own terminology (self-government), even though the history of self-government processes has left the term with bad associations for many First Nations people.
[4] The question of how such laws may govern the actions of non-Indigenous people is not within the scope of this paper.

The first part of that definition poses a question itself: why not pursue "self-government" through unilateral declarations of sovereignty? On purely moral grounds, First Nations should be able to do this. However, the reality of continuing colonial power dynamics makes unilateral declarations of sovereignty likely to fail in the face of Crown violence. While the Tsilhqot'in have been successful in asserting their title through court, their approach took decades of legal proceedings and still requires negotiations with the Crown to determine which decisions apply where, and who pays for what.

The most fundamental outcome of a self-government agreement – and therefore one of the most important answers to the question of "why" pursue self-government – is a transparent set of rules for making decisions, along with a division of responsibilities between the various overlapping governments. Crown governments are pursuing the goal of "certainty" in their negotiations, i.e. a resolution to the economic and political uncertainty posed by their illegal and immoral claims of sovereignty over most of British Columbia. A transparent set of rules for decision-making for each party (a constitution) is central to political certainty. It allows all parties in the jurisdictional mix to be confident in the legitimacy of each other's decisions.

Further to satisfying the Crown's interest in certainty, a self-government agreement needs to provide an answer to the question of which system can be recognized by the Crown as authorizing a First Nation's citizens' decisions. The Crown doesn't want to recognize one political system's authority to make decisions and then have another political system from outside the negotiations claim the actual authority over decisions. We have seen this issue arise in the conflict between the Office of the Wet'suwet'en, representing hereditary chiefs, and the Wet'suwet'en First Nation, led by an elected chief and council. Therefore, a self-government agreement and accompanying constitution would need to answer this difficult question of who is making what decisions and how. This is an essential part of reasserting jurisdiction put in place by the Crown.

The Crown in the BC Treaty Process has previously required elected systems.[5] This changed through many rounds of negotiations. The Crown still requires that First Nations governance systems have a transparent "chain of authority" and a means of removing leaders. We have experienced the benefits of this transparency through First Nations members disputing the legitimacy or authority of their leaders As we will see below, there are multiple ways of addressing these requirements.

Beyond considering the requirement to develop and negotiated a self-government agreement as a limit to decision-making, we see this as an opportunity for First Nations to seriously consider how they want to make decisions going forward. These considerations acknowledge the disruption to traditional decision-

[5] Albert C. Peeling, 2004, "Traditional Governance and Constitution Making among the Gitanyow," First Nations Governance Centre. https://fngovernance.org/wp-content/uploads/2020/06/Constitution_Making_Among_the_Gitanyow.pdf

making through the various iterations of the *Indian Act* that prohibited many activities essential to First Nations governance systems (the Potlatch, Sundance, etc.), as well as the potential for colonial systems (elected band councils) to have gained some legitimacy in the view of many First Nations people.

While we are discussing self-government agreements and constitutions in the context of negotiated agreements between First Nations and the Crown, First Nations are constantly using their traditional systems in ways that are not recognized by the Crown but continue to have influence on decision-making and legitimacy. For instance, it is not uncommon for elected representatives to have positions within a traditional system. Some First Nations have memoranda of understanding between their elected and hereditary systems (for instance, Gitga'at First Nation, for whom we work). It is also not uncommon for First Nations to develop and begin to use their independently developed constitutions prior to them being recognized by the Crown (for instance, the Haida have been using their constitution since 2003, even though the decision-making process was only recognized by the Crown in 2024).

2. COMPETING LEGITIMACIES

Pursuing self-government in the current context in British Columbia means addressing at least two, and potentially three, overlapping sources of political authority, each with claims to legitimacy. On one side is the traditional system, which for some First Nations have more than one institution responsible for decision-making (for instance, clan and Keyoh among Dakelh communities). On the other side is the elected band council system, with authority stemming from the *Indian Act*. We see this as demonstrating legal and political pluralism (coexistence of different legal and political interests) for First Nations since many incorporate traditional systems into their decision-making through informal means (for instance, by electing hereditary leaders as mentioned above).

Despite the Crown's efforts to assimilate First Nations and absorb them into European-inspired colonial systems, traditional First Nations systems have survived and continue to hold authority among First Nations communities. These systems are varied across British Columbia, and each community may have greater or lesser attachment to the traditional systems. We take it as a given that traditional systems can and should be recognized by other levels of government. They should be recognized because First Nations communities see them as legitimate expressions of their political will, and continuations of their ancient cultures and systems which have stewarded these lands since time immemorial. Additionally, the work of Jon Borrows[6] and Val Napoleon,[7] among others, has made it clear that there is already legal and

[6] See for instance *Canada's Indigenous Constitution*, Toronto: University of Toronto Press 2010.
[7] See for instance "Gitxsan Democracy: On Its Own Terms," in James Tully et al, eds., *Democratic Multiplicity* (2022) Cambridge University Press, 15:4, 193-213. And "Legal Pluralism and Reconciliation: Journey or Arrival" (Nov. 2019) Maori Law Review.

philosophical grounding for incorporating traditional Indigenous decision-making systems within the colonial system (the Canadian federation).

However, it may be less obvious why the band council system may have some claim to legitimacy among First Nations community members.

In our experience working with several First Nations in British Columbia, there is a variety of opinions expressed by members of each community on how decisions should be made. Many of the most traditionally minded people we have encountered recognize that there are practices in the traditional systems that should not be continued, or resurrected, for contemporary decision-making (for example, just like Europeans, some First Nations practiced slavery). Likewise, many members of First Nations see the Chief and Council as a legitimate decision-making body and have embraced democratic ideals and values for at least part of how to come to decisions.

Legally, Chief and Council is to the federal government as a municipality is to the Province. Just as municipalities are creatures of provincial legislation, Chiefs and Councils are creatures of the federal *Indian Act*, getting all authority from that legislation, except where they have carved out jurisdiction otherwise (for example through the *First Nations Land Management Act*, or Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*). Just like other levels of government in the colonial system, decisions are made by elected representatives – but authority technically flows from the Crown's sovereignty – expressed in the fact, for instance, that First Nations reserves are lands set aside for the use of Indians held in trust by the Crown.

For a First Nation that finalizes a self-government agreement, this basis of authority shifts. By recognizing Aboriginal Title and the inherent rights of self-government, as the Crown has done in a number of agreements with First Nations in BC, there is an implicit recognition that there are multiple sources of authority in BC: First Nations inherent title, and Crown sovereignty (extended over most of the province without agreement, and therefore technically illegal).

By gaining inherent authority, a self-governing First Nation is no longer beholden to the *Indian Act* and therefore is not required to implement a band council system. However, as we have seen in many instances (Haida, Heiltsuk, Kitselas, and others) an elected system is often chosen to work alongside a traditional system. Depending on the community, there may be conflict over whether and how to integrate elected systems into traditional systems (or vice versa).

A Chief and Council is a democratically elected government representing the citizens of a First Nation. The elected band council system was originally created by the colonial Canadian government to disempower traditional systems. They were given the same basic structure as the rest of the representative democratic institutions that make up the Canadian federal and provincial governments.

For this reason, there can be a great deal of hostility towards band councils. However, despite their violent origins, many First Nations members also see them as a legitimate organization representing their interests. This is likely for a number of reasons. Most First Nations members alive today grew up voting in band council elections, making elections part of habit. Democratic representation is also strongly favoured in the colonial society; as we see from political movements around the world, it is also viewed as a way to develop legitimate government in the face of authoritarianism. Put simply, democracy has a great brand. There is also the more complex reality that the *Indian Act* has disenfranchised many people from their traditional systems, and the elected system allows for equal participation. The complex history of how the *Indian Act* removed status from women who married non-status men and granted status to non-First Nations women who married status men, has disrupted, or in many cases, destroyed matrilineal systems such clan systems. This means that there are a lot of people who are members of Indian bands but do not have guaranteed access to a traditional system.

The point here is that determining which system should legitimately represent a First Nation is complicated. We often use the term "postcolonial decision-making" to refer to this process since we are dealing with the fallout of a highly disruptive colonial system that has left its mark nearly everywhere. While we are often tasked with assisting a client in decolonizing their decision-making processes, the "post" in postcolonial recognizes the historical fact of colonial impacts. We also take the position – which admittedly stems from a democratic sensibility – that a First Nations' own members have the authority to determine how they should be governed, and that system of government may include any mix of traditional and elected systems.

3. SELF-GOVERNMENT OPTIONS: WHO IS MAKING WHAT DECISIONS AND HOW

There are really three options for First Nations pursuing self-government. Two of these involve decolonizing decision-making, while a third maintains a colonial approach to decision-making:

1. Fully traditional decision-making
2. Hybrid decision-making
3. Fully elected decision-making

Traditional Approaches

Fully or near-fully traditional decision-making has been pursued and successfully developed into self-government agreements, treaties, and other constructive mechanisms by a number of First Nations. These approaches remove any (or nearly any) elected component of their decision-making, placing all

decision-making authority in traditional structures (whether they be chiefs, clans, or some other traditional structure).

For example, the Teslin Tlingit's government is based on their five clans. While the constitution[8] reflects the primacy of clans in making decisions, they translate this primacy through several councils (General Council, Executive Council, Judicial Council, Youth Council, and Elders Council). The General Council (the Teslin Tlingit's legislative body) is made up of 25 members, five from each clan. The Executive Council is likewise made up mostly of clan representatives. The point here is that this constitution enables Clans to choose representatives on decision-making bodies that function to represent the interests of Teslin Tlingit citizens without using elections to select those representatives. While the various council structures may technically be a step removed from the clans, they are composed of members selected by the clans. Notably, the Teslin Tlingit constitution does not define how Clans shall select representatives on these councils, instead pointing to "traditional custom."

The Clans themselves are technically one step removed from the decision-making process laid out in the constitution. They select, through a clan-determined process, these representatives to sit on the various bodies. Thus, we see the legitimacy of the Teslin Tlingit's system comes from both the Clan's authority and the recognition that individuals selected by the Clans will be capable of representing the members of those Clans and make decisions in their interests. This is a philosophically important point to make, since the bases of authority for representative systems and Clan systems are distinct (and potentially at odds), but in this case we have the Clan system selecting members to function as their representatives in a governing structure, representing a blending of these two systems.

The Gitanyow have also chosen to base their constitution[9] on their traditional system. However, their constitution (which according to their self-government agreement, dated 2021, is being revised) is very specific about their Wilp system, how names are passed, how Wilp leaders are selected and can be removed, etc. Because the Gitanyow constitution follows their traditional decision-making system, there is no distinction between legislative and executive.

It is important to consider the difference in specificity between Gitanyow and Teslin Tlingit's definition of traditional systems. As mentioned, Teslin Tlingit simply point to the clan system. However, Gitanyow has defined their Wilp system in extreme detail in their written constitution. This work of writing down a traditionally oral system has benefits and risks.

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[8] *Teslin Tlingit Constitution*, July 13 2020. https://ttc.yt/documents/official-teslin-tlingit-constitution-2/
[9] *The Gitanyow Ayookxw: The Constitution of the Gitanyow Nation*, September 13, 2009. https://www.gitanyowchiefs.com/wp-content/uploads/2023/08/Gitanyow_Constitution_2009.pdf

Oral systems contain a great deal of implicit confidence in the judgment of traditional leadership positions. For instance, among Tsimshian, if a hereditary chief was deemed not to be the appropriate choice, matriarchs within the clan could choose another chief (usually another son of the previous chief's eldest sister).[10] Among the Nisga'a, the mother of the chief could take on the responsibilities of a young chief until he was deemed old enough to taken on the position.[11]

The specificity of the Gitanyow constitution removes uncertainty, and according to Peeling, 2004,[12] this was in response to the Crown's complaints that the traditional system was too difficult to understand. The specificity apparent in the Gitanyow constitution also clearly meets the Crown's requirements of a transparent chain of authority and removability of decision-makers discussed above.

Peeling also states that the Crown's (at least initial) hesitation to recognize Gitanyow traditional systems was due to the Crown's commitment to democracy as the only legitimate way to make decisions. Earlier versions of the BC Treaty Process required elected councils in order to accept self-government agreements (ibid). Given that the 2021 Gitanyow Governance Accord[13] recognizes the Gitanyow's traditional system at the outset, and we have learned from Crown negotiators themselves that they now require **a transparent chain of authority and removability of decision-makers**, this requirement has been abandoned.

Along with the requirement that First Nations constitutions do not violate the Canadian constitution, these two conditions – a transparent chain of authority and removability of decision-makers – are the only conditions imposed by the Crown on First Nations constitutions.

Hybrid Approaches

Hybrid approaches as we are defining them combine traditional and elected systems, however, these systems often give the weight of constitutionally authorized decision-making power to elected representatives.

The Haida constitution[14] and the various accompanying agreements that enable it are one example of a hybrid approach. In the Haida constitution, there are a number of elected, traditional, and direct-

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[10] Learned through discussions with Gitga'at members about their traditional system.
[11] I learned this during the excellent tour of Hli Goothl Wilp-Adokshl (Museum of the Nisga'a people) located in Laxgalts'ap, Nisga'at territory.
[12] Albert C. Peeling, 2004, "Traditional Governance and Constitution Making among the Gitanyow," First Nations Governance Centre. https://fngovernance.org/wp-content/uploads/2020/06/Constitution_Making_Among_the_Gitanyow.pdf
[13] *The Gitanyow Governance Accord*, Canada, BC, Gitanyow Hereditary Chiefs, August 2021. https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/gitanyow_governance_accord.pdf
[14] *Haida Constitution*, October 2023. https://www.haidanation.ca/about/haida-constitution.

democratic institutions that interact to develop legislation, execute that legislation, and govern the Haida Nation. These include:

- The **Council of the Haida Nation**, composed of a mix of representatives from each Haida community on Haida Gwaii, as well as representatives elected from significant population centres of Haida living outside of Haida Gwaii. The Council is similar to an executive branch, responsible for governing the Nation, and developing policies and regulations.
- The **Hereditary Chiefs Council** is composed of potlatched chiefs, is invited to attend meetings of the Council of the Haida Nation, and functions as an advisory group to the Council; however, it also has specific roles in triggering a special House of Assembly, among other responsibilities.
- The **Secretariat** is a corporate vehicle for receiving and distributing funds for the Haida Nation.
- The **House of Assembly** is the legislative body of the Haida Nation. At least one meeting is held annually at which all members of the Haida Nation are eligible to propose laws to be enacted by the Council of the Haida Nation.

The important point to make here is that the constitution's definition of the Hereditary Chiefs Council points to "potlatched Chiefs" without defining potlatch processes. This is an example of how hybrid approaches have made room for leaving traditional systems as "black boxes" to the Crown in terms of decision-making and composition (as in the Teslin Tlingit clan system mentioned above).

However, like many other hybrid constitutions, the Haida constitution maintains "decision-making weight" within the elected and direct-democratic components of their authority structure. The Hereditary Chiefs act as advisors to the Council of the Haida Nation (along with some other responsibilities as outlined above). This means that elected representatives on the Council carry the decision-making weight in the constitutional structure.

By maintaining decision-making weight among democratic structures, the Haida and others with hybrid systems are able to avoid potential issues that could arise with translating traditional systems into writing. They also meet current Crown conditions of transparent chain of authority and removability of decision-makers.

Other hybrid systems either passed (Kitselas), or proposed (Lax Kwalaams), incorporate hereditary leadership into a voting executive or legislative council without going to the lengths the Gitanyow have done to translate their entire traditional system to the written word. However, both examples keep the number of hereditary representatives below 50% of the total membership of the council.

Some First Nations consider their hereditary systems sacred, especially in contrast to decision-making systems that stem from or deal with the Crown. This perspective holds that traditional decision-making structures should not have to lower themselves to interact with the Crown or make the kinds of decisions

that Councils often need to make (for instance, municipal infrastructure decisions, or even decisions about financial expenditures). The Haida example, and others like it, maintain these administrative and mundane decisions at the elected level, and do not dishonour their hereditary/traditional systems with them. Note also that the Council of the Haida Nation is a national government; there are still village councils in HlGaagilda Llnagaay (Skidegate) and Gaw Tlagée (Old Massett) that handle decisions much as a municipality would.

Fully Elected Decision-Making

Some First Nations have developed self-government that is entirely elected. This includes the Nisga'a and Shíshálh, both of which reached self-government agreements or treaties and developed constitutions outside of the BC Treaty Process, as well as Tsawwassen and Tla'amin who negotiated treaties inside the BC Treaty Process.

Nisga'a, for instance, includes a great deal of reference to traditional structures and values in their constitution – but members of all parts of government are either elected or appointed. The Nisga'a constitution creates the following structures[15]:

- Wilp Si'ayuukhl Nisga'a – the legislative body, composed of directly elected officers (such as the President and Chairperson of the Council of Elders), Chiefs and Councillors from each Nisga'a village, and representatives from the Nisga'a Urban Locals (urban areas with a high Nisga'a population: Vancouver, Prince Rupert, and Terrace).
- The Council of Elders is composed of a directly elected Chairperson and eight regular and eight alternate members appointed by the Executive. They serve an advisory role, with consultation required at various points in the legislative process.
- The Executive – all elected officers of the Nisga'a Lisims government, as well as Chiefs from each Nisga'a village, and one representative from the three Urban Locals.

The Nisga'a have been highly successful in their pioneering pursuit of self-government over their lands. Their form of government reflects the western division between legislative and executive (with judicial responsibilities regarding disputes over legislation delegated to the Supreme Court of Canada). This basic structure is mirrored in the other nations with fully elected constitutions mentioned above.

The next section will consider in more detail the rationale for including elected systems to a greater or lesser extent in constitutions of First Nations who have secured self-government.

[15] Nisga'a Lisims Government, "Government Structure," https://www.nisgaanation.ca/government/nisgaa-lisims-government/government-structure/

4. SCALING GOVERNANCE: IMPLEMENTATION CONSIDERATIONS

As has been discussed throughout this paper, the Indian Band is a structure created by a Crown (Canadian federal) government; as some of our clients have expressed, the use of the term First Nation is often, particularly in British Columbia, a misnomer when referring to an Indian Band. The Nation concept might better be applied to the Dakelh Nation, the Tsimshian Nation, or the Secewepemc Nation. However, many First Nations people identify directly with the Indian Band, and that structure is often the unit through which self-government is negotiated. This presents questions of how governance can be "scaled" – if a community of a few hundred people gains the authority to legislate and regulate their traditional territory, how is it that those laws and regulations are enforced? Given the complexity of the regulations required to enact, for instance, new forestry legislation, where does the responsibility of public service belong?

During our experience working alongside negotiators of reconciliation agreements and engaging with First Nations preparing for or executing self-government agreements, we have learned that implementation needs to be considered early in the process. We have also seen a number of incremental processes that are already in place that give an indication of how to address the questions surrounding implementation and scaling governance.

For instance, the political reality of "co-management" (as developed through, for instance, Forest Landscape Planning) and "co-governance" (as developed through Section 7 of the *Declaration on the Rights of Indigenous Peoples Act* agreements) give an inkling of how First Nations jurisdiction and authority will be implemented in the short term in BC.[16] A provisional definition of co-management is "shared technical decision-making over a particular area or resource."[17] A provisional definition of co-governance is shared authority, control, and crucially, accountability over a particular area or resource.[18]

In the co-management structure being executed through Forest Landscape Planning,[19] the Crown's duty to consult with First Nations, and their commitment to free, prior, and informed consent in the *Declaration*

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[16] We owe the distinction between co-management and co-governance to Garry Merkel's "levels of co" concept.
[17] T. Swerdfager and D. Armitage. 2023. Co-management at a crossroads in Canada: issues, opportunities, and emerging challenges in fisheries and marine contexts. FACETS. 8: 1-10. https://doi.org/10.1139/facets-2022-0217
[18] West Coast Environmental Law, "Marine Co-Governance," https://www.wcel.org/marine-co-governance
[19] Province of British Columbia, "Forest Landscape Plans," https://www2.gov.bc.ca/gov/content/industry/forestry/managing-our-forest-resources/forest-landscape-plans

Act is accomplished through a collaborative decision-making framework. That framework, involving Provincial, First Nations, and sometimes industry representatives, produces a Forest Landscape Plan, and accompanying five-year forest operations plans. Within Forest Landscape Planning, First Nations participate in developing plans that still exist entirely within the borders of the Province's legislative and regulatory system. This leaves the duty of enforcing the plans on the Province's existing systems. It does not contribute to or express First Nations self-determination. However, it is possible that given current and foreseeable constraints in human resources and recognized enforcement authority, First Nations may pursue agreements that delegate First Nation's regulatory enforcement to the Crown.

In co-governance as executed through Section 7 agreements,[20] jurisdiction over a given decision-making area (such as the process to approve a mine, as with the Tahltan's agreement, or docks, as with Shishalh's agreement) is officially shared between the Province and the First Nation. The process for making the decisions on that specific area of jurisdiction is set out in the agreement; permitting in both examples must meet the conditions set out in the agreement and is no longer the sole purview of the provincial government. In the case of Shishalh, the Section 7 agreement on dock permitting extends from their Comprehensive Reconciliation Agreement, first signed in 2018, and renewed in 2025.[21]

The agreement to co-govern dock permits has received a great deal of public attention and is arguably the motivation for the Pender Harber Area Residents Association legal challenge of the *Declaration on the Rights of Indigenous Peoples Act.* However, other local groups have also claimed that engagement around the process leading to co-governance of dock permitting has been a success.[22] As this example shows, the negotiation of self-government agreements (Shishalh has one of the oldest in Canada, dating from 1986) and development of constitutions is one significant step in a much longer process to implement self-government through potentially contentious processes that are subject to much public scrutiny.

The 'Namgis First Nation recently leveraged the co-management developed through their draft Forest Landscape Plan (FLP) into a co-governance agreement over forestry with the Province.[23] This agreement

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[20] Province of British Columbia, "Making Decisions Together," https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/making-decisions-together

[21] Province of British Columbia, "shíshálh Nation – British Columbia Foundation Agreement," https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/sechelt-sh-sh-lh-first-nation/sh-sh-lh-nation-british-columbia-foundation-agreement

[22] Waterfront Protection Coalition, "shishalh Nation - British Columbia Foundation Agreement Renewal Released," https://waterfrontprotection.org/foundation-agreement-renewal-released/

[23] Province of British Columbia, "Province, 'Namgis First Nation reach milestone in forest stewardship agreement," http://news.gov.bc.ca/releases/2025FOR0044-000954.
'Namgis First Nation, Province of British Columbia, *Decision-making Agreement*, October 3 2025, https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/forest-landscape-plans/tfl-37-flp/namgis_first_nation_-_bc_-_section_7_agreement.pdf

is a way to ensure that 'Namgis has granted free prior and informed consent over decisions related to the implementation of the FLP and Forest Operation Plans (FOP).

Co-governance extends the statutory decision-making of the Crown to joint decision-makers defined in Section 7 agreements. For instance, the 'Namgis co-governance agreement gives the joint decision-makers (one delegate each from the Province and 'Namgis, with different joint decision-makers identified for different decisions) the ability to exercise powers formally reserved for the Chief Forester or the Minister under the Forest and Ranges Practices Act (FRPA) related to FLPs and FOPs. These joint decision-makers are supported by technical advisory committees and management committees made up of people appointed by each party to the agreement.

Note that in these Section 7 agreements, First Nations gain joint decision-making authority based on terms already defined in provincial legislation. This is important when considering the philosophical basis of legislation and should be taken into consideration as Nations are developing their approach to implementing self-government agreements and constitutions.

5. WHAT IS THE ROLE OF THE CONSULTANT?

As consultants who actively pursue self-government agreements for clients, and more often help clients with the process of deliberating over what kind of self-government agreement and constitution they want, the team at Resonant Strategic have thought a great deal about how to define our own role in this process.

Unlike many other technical processes for which a First Nation (or other client) may hire an expert to consult, the uniqueness of each First Nation, and the high importance of taking steps away from the *Indian Act* and towards self-government means that there is no simple one-size-fits-all approach to this work. However, we have developed a few guidelines that we use in our work and are eager to share with First Nations considering self-government, and other consultants who are assisting First Nations in this pursuit.

Basic assumptions

First, the basic approach Resonant Strategic takes is in line with Ownership, Control, Access, and Possession (OCAP) of any data gathered and any data products developed. We also take extreme care with the anonymity of participants in our research projects; for most of our projects, we do not live in the communities we are serving, but our participants do. Their opinions should be treated as entirely anonymous.

This section assumes that any consultant or consulting firm engaged in assisting a First Nation enact self-government is doing so via extensive engagement and communication with the First Nation's membership and leadership (both elected and traditional). As discussed above, there are competing centres of legitimacy for many First Nations, and the consultant should honour the validity of all of these. On the democratic side, that means casting a wide net when it comes to bringing public opinion into the process. On the traditional side, it may mean weighing the opinions of hereditary leaders, matriarchs, and knowledge keepers heavier than others.

In consideration of the above, Resonant Strategic takes an iterative approach in our work. There is never a single data gathering foray, followed by a report on findings, leading to a draft constitution, for instance. Research undertaken to understand a community's interests in reasserting jurisdiction and decolonizing decision-making will always contain conflicting opinions. The findings of the research therefore need to be presented back to community and leadership for guidance on choices to make in developing self-government agreements and constitutions.

The Consultant as a Neutral Party

The inconsistencies of politics means that pursuing self-government can unearth many unhealed wounds in a community. There are also many interests at play, both between elected and traditional systems, and within each of those systems. Traditional systems have been disrupted by the *Indian Act*; but no matter the level of disruption, there are always differing interpretations of how traditional authority should be wielded, who should be recognized as having that authority, etc. On the band council side, the winner takes all nature of elections may lead to factions of the community consistently fighting for seats at the council table. Regardless of the nature of these conflicts, it is important to recognize the ubiquity of conflict when making any kind of decision, and in recognizing the conflict, the consultant should maintain as neutral a position as possible.

This does not mean simply accepting statements made that the consultant knows to be false or not taking a position on the way forward after having conducted a great deal of research. But it does mean being extremely careful about what kinds of direction you are willing to take from the client, which often is the Band administration or some administrative sub-unit of the Band.

To maintain neutrality, and be able to demonstrate the neutrality, we have found that it is beneficial to obtain a public facing project charter that:

1. Commits the Band Council or the director of the administrative unit to a level of acceptance of the outcomes of the work; and
2. Sets the parameters of the work being undertaken by the consultant (mirroring contractual language if possible).

Since we are most often contracted by the Band council, we are sometimes faced with suspicion by those representing other centres of legitimacy (hereditary leadership, for instance). However, a project charter can help to lessen these suspicions.

The final component of neutrality, and a bridge to building trust among community members, is to offer many opportunities to participate in community engagement about the project over an extended period of time.. Consultants are often brought into a community to make a few changes, share technical expertise, and leave again. This approach does not allow for the sustained thought and mediation required to come to a satisfactory self-government approach. In our experience, demonstrating that you continue to show up, no matter how hard community meetings may be, or how skeptical the audience is, can break down barriers and build trust among community members, leading to more open sharing of opinions, and better outcomes. Resonant commits to our client communities to work with them for as long as it takes to get through the self-government process; this can also mean taking on the responsibility of securing funding for the work. On the other hand, it may mean taking breaks from the project or being ready to hand work over to either in-house staff or other consultants. The point here is that the outcome is more important than the consultant's own ego or other priorities.

Interim Decision-Making Structures

In just the same way that communities that are considering self-government should be contemplating implementation during their negotiations, we also ensure we consider what "interim decision-making" should look like when helping to develop self-government agreements and constitutions. As First Nations migrate from the *Indian Act*, they may need to set up their own custom ratification mechanisms. When it is the Indian Band itself that is decolonizing decision-making, they may be required to establish new ways of making decisions through democratic processes, i.e. a community vote. This often means changing the election code and can be another opportunity to develop mechanisms for community input into important decisions that can then be directly ported into a constitution or self-government agreement.

CONCLUSION

Self-government agreements and constitutions can take significant steps towards decolonizing decision-making for First Nations. As we have discussed here, there are complex considerations that need to be made to ensure legitimate decision-making processes result from the years of work and negotiations that go into these agreements. Our approach is to respect both the legitimate decision-making authority of traditional systems, and the collective will of members of First Nations in decolonizing decision-making systems. This approach acknowledges the complexity of overlapping bases of authority deemed legitimate by citizens of First Nations. It also is pragmatic and has the highest likelihood of ensuring the

legitimacy, and therefore the durability, of decision-making structures adopted in a self-government agreement.

First Nations have difficult decisions to make in negotiating self-government agreements and developing constitutions. The choice of where to put the most weight – elected or traditional – will guide how decisions are made for years, and possibly generations to come. First Nations also have difficult decisions to make in how to negotiate the implementation of their authority, as seen in the discussion of Section 7 agreements above. The Crown is not giving up or altering its authority, however illegitimate, on its own. It has been pushed to do so through generations of advocacy and successful legal battles. First Nations will need to continue to push on the Crown to see meaningful authority carved out within the overlapping areas of jurisdiction inside the Canadian federation.

As one of our colleagues, a lawyer working for a client who is also a member of the nation, puts it, "we are looking to pass the 200-year test." He means that in helping members and leaders (both elected and hereditary) come to agreement on the structure of decision-making, we want something that will stand the test of time and not need to be amended in the next 200 years. That is a lofty goal, but we take it as central to the work we do. While there are negotiators, consultants, leaders, and citizens who may want to quickly wrap up a constitution in order to finally get out from under the *Indian Act*, we think it wise to take the time necessary, and consider all of the elements outlined in this paper – and more – before submitting a constitution to the final required test of a community vote. By being diligent and deeply engaging with community members and leaders, we see a real potential to truly decolonize decision-making by First Nations in BC.