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Special Issue on Modern Treaty Implementation Research

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"This land claims to us as Indian people represents a chance for us to do something for ourselves; to do something with our lives; to do something that we as Indian people can be proud of in the future, and perhaps this land claims settlement could even be something that the Canadian people are proud and perhaps even the Liberal Government."

— Daniel Johnson (Tlen), Chairman of the Council for Yukon Indians, recorded in minutes of a meeting with Prime Minister Pierre Elliot Trudeau on August 17, 1977. A copy of this document is stored in the Tr'ondëk Hwëch'in government fonds in the Tr'ondëk Hwëch'in archives.

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FEATURES

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LAND CLAIMS AGREEMENTS COALITION

Carleton UNIVERSITY
Canada's Capital University

Tłı̨chǫ Ndek'àowo
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COVER IMAGE: Bull's Eye Face, courtesy Lianne Marie Leda Charlie.

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Message from the Land Claims Agreements Coalition Co-Chairs

As Co-Chairs of the Land Claims Agreements Coalition, we are pleased to welcome this special edition of Northern Public Affairs, focused on the implementation of modern treaties.

The Land Claims Agreements Coalition (LCAC) was established to ensure that our modern treaties (comprehensive land claims agreements) and associated self-government agreements are respected, honoured, and fully implemented.

For Indigenous signatories, modern treaties offer opportunities for partnership in resource development, political and economic development, and social and cultural well-being. They are the basis for a new, positive relationship between Indigenous Peoples and the wider Canadian society.

This particular edition of Northern Public Affairs focuses on issues primarily from the Modern Treaties Implementation Research Project, a partnership between the Land Claim Agreements Coalition and Carleton University, with a national office based in Yellowknife and hosted by the Tłı̨chǫ Government.

This partnership is the first of its kind between the LCAC and a university, and between modern treaty practitioners and academics across Canada. The project came about as a result of extensive discussion over a number of years between LCAC members. Those discussions highlighted the need for research on modern treaty implementation, and the obstacles to that implementation.

It is our hope that the research undertaken through this partnership will help generate evidence required to inform policy and decision-making within our governments and organizations as well as within the federal, provincial, and territorial governments. The project is also intended to educate the next generation of Indigenous and non-Indigenous scholars on the importance and nuances of modern treaties and their implementation, in ways that respect and foster Indigenous knowledge and various research methods.

Eva Clayton
President, Nisga'a Nation
LCAC CO-CHAIR

Photo Credit: Land Claims Agreements Coalition

Aluki Kotierk
President, Nunavut Tunngavik Inc.
LCAC CO-CHAIR

Photo Credit: Land Claims Agreements Coalition

Message from the Tłı̨chǫ Government Chief Executive Council

The Tłı̨chǫ Government is host to the Modern Treaties Implementation Research Project national coordinating office, and has actively participated in its development and research through co-leading the Lands theme.

In 2005 the Tłı̨chǫ Nation ratified the Tłı̨chǫ Agreement, a modern treaty with the Government of Canada. It is the first combined comprehensive land claim and self-government agreement in the Northwest Territories. The agreement provides and defines certain rights relating to lands, resources and self-government. Some of the highlights of the agreement include:

- Creation of the Tłı̨chǫ Government;
- Ownership of 39,000 km2 of land located between Great Slave Lake and Great Bear Lake including surface and subsurface rights;
- The ability to define its membership known as Tłı̨chǫ citizens;
- Jurisdiction over lands and resources in the Tłı̨chǫ traditional territory;
- The establishment of the Wek'èezhíi Land and Water Board and the Wek'èezhíi Renewable Resources Board;
- A share of mineral royalties from the Mackenzie Valley.

The Tłı̨chǫ Government has been a member of the Land Claims Agreements Coalition since 2005. Through our own experience implementing a modern treaty, and through working with modern treaty holders throughout Canada, we see the importance of research as a way to identify and understand best practices and impacts of modern treaty implementation. As the papers in this special issue show, the Modern Treaties Implementation Research Project is starting to result in greater interest in researching modern treaty implementation, and is providing opportunities for Indigenous cultural knowledge holders, scholars, and students to think deeply about modern treaty implementation, and to do research working in partnership with modern treaty holders. We look forward to continuing to support this project, and achieving results that will lead to a better understanding of what is needed to fully implement modern treaties. ◉

Photo Credit: Tłı̨chǫ Government

Members of the Tłı̨chǫ Chief Executive Council (from left): Chief Charlie Foot Ball, Chief Clifford Daniels, Grand Chief George Mackenzie, Chief Alfonz Nitisiza, Chief David Wedawin.

The first of its kind: The Modern Treaties Implementation Research Project

Frances Abele, Stephanie Irlbacher-Fox, & Joshua Gladstone

Nearly half a century ago, Canada's political leadership agreed to negotiate comprehensive land claim agreements – modern treaties – with nations and peoples who had not previously concluded treaties, and who wished to do so. The federal change of heart was initially an exceedingly cautious response to a number of historical forces. One of these was the accumulating jurisprudence on Indigenous rights, beginning with the 1973 Supreme Court of Canada decision in Calder. It was also a response to the growing political power of mobilized Indigenous Peoples, and the apprehension that Indigenous Peoples' determination to defend their rights would impede resource development.

Since the establishment of the Office of Native Claims in 1974, 26 modern treaties have been concluded. Unsurprisingly, these treaties vary, reflecting the major changes in Indigenous-Canada relations over the same period. A major influence has been the evolving constitutional framework following patriation of the Constitution in 1982 and entrenchment of "existing aboriginal and treaty rights." Besides shifting federal negotiating mandates, implementation of modern treaties has been fraught with challenges. There have been differences of high principle: does the treaty mean that the Crown and Indigenous parties are now quits? Or does it open a new and enduring government-to-government relationship? There have been questions of federal capacity: virtually all federal departments and agencies have specific responsibilities related to treaty implementation, though officials in many have been unaware of these for long periods, and often lack sufficient expertise to address them. Meanwhile, treaty holders wonder if inaction on treaty implementation is due to lack of federal awareness, lack of enthusiasm, or a more conscious refusal to engage, on the grounds that to do so would result in drawing more effort and resources from, and consequent change for, business as usual. There have also been struggles for provincial and territorial governments, as they have had to "make room" for Indigenous governments and take treaty commitments fully into account.

The result is that modern treaties have not become the success stories they hold the potential to be. The earliest modern treaties, such as the James Bay and Northern Quebec Agreement, and the Inuvialuit Final Agreement, did not include implementation plans. Modern treaty holders have had to go to court, or settle out of court, to resolve disputes over treaty implementation. The Auditor General of Canada has criticized the federal government for inadequate measures to monitor and implement agreement obligations. Perhaps most importantly, treaties generally have been vastly underfunded, with some activities not being funded at all, which has had the effect of essentially gutting aspects of the potential of treaties to improve the lives, material conditions, and life chances of the Indigenous Peoples whose futures the modern treaties are meant to enhance. In many cases, modern treaty signatories have used their own source revenues, and in some cases, income from settlement agreements, to implement their treaties. Using such funds to support treaty implementation has reduced their abilities to foster alternative and more locally impactful forms of economic development. Further, many modern treaty holders operate in contexts where essential services, infrastructure, and education and health systems are inadequate or non-existent, resulting in inaccessibility of basic services such as clean water, medical, and educational services, which, in turn, results in social suffering and other challenges that further interfere with modern treaties' potential for success.

Indigenous modern treaty signatories have long advocated for successive federal governments to confront these challenges. The election of a Liberal government in 2015 promised change. Among other commitments, the Liberal platform called for a renewed relationship with Indigenous

Peoples based on a commitment to enact the recommendations of the Truth and Reconciliation Commission, beginning with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples. These high-level commitments were a departure from a previous decade of Indigenous-Crown relations marked by hostility and non-communication. The platform raised expectations that Indigenous Peoples would work closely with the new federal government to enact its commitments, including the commitment to renew treaty relationships "based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future."[2]

Over the course of the 2015-2019 Liberal mandate, the fate of modern treaty implementation reform has become entwined with the federal government's efforts to configure a comprehensive approach to Indigenous rights recognition. This has led to changes in the machinery of government, outlined in the Cabinet Directive on the Federal Approach to Modern Treaty Implementation.[3] It has also created the opportunity for broad legislation and policy reform. The commitment by the Prime Minister in February 2018 to develop a Recognition and Implementation of Indigenous Rights Framework (RIIRF) in partnership with First Nations, Inuit, and Métis peoples signalled the federal government's approach to change. Consultations on the RIIRF went ahead, but Indigenous concerns about the transparency and accountability of the process[4] caused the federal government to retreat from a comprehensive legislative package and move instead to pursue more narrowly focused legislation on Indigenous child welfare[5] and Indigenous languages[6]. It was not only Liberal initiatives that fizzled. Bill C-262, the bill introduced by the NDP's Romeo Saganash that would ensure the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples, passed the House of Commons with a strong majority but failed to pass in the Senate due to Conservative opposition. If it had passed, this legislation would have had implications for the interpretation of law and policy related to the duty to consult and accommodate concerning development on Indigenous lands – including modern treaty lands.

Indigenous modern treaty holders have always stated consistently and forcefully that their agreements provide tools to enact their right to self-determination. As a matter of high policy, modern treaties provide a constitutional basis for Indigenous signatories to control their own cultural, economic, and social development in ways that recognize their continuity as peoples within Canada. Not long ago, it was the denial of these rights that made possible state paternalism, discrimination, and neglect, enabling the worst forms of colonial domination and violence. Today, a refusal to address the factors that undermine effective implementation of modern treaties would jeopardize the solemn commitments they contain and undermine the rightful expectations of Indigenous Peoples and nations who wagered their futures on a renewed, nation-to-nation relationship with the Crown. A failure to fix enduring implementation challenges may be seen as an indictment of the federal government's commitment to reconcile colonial history and practices with the persistence of Indigenous Peoples as the holders of collective rights.

This special issue of Northern Public Affairs presents a number of responses to the challenges of modern treaty implementation. Despite the obvious need, there has never been an independent academic study of modern treaty implementation. Most of the essays in this collection represent the first sounding of the results of the first such study – the Modern Treaties Implementation Research Project, a Social Sciences and Humanities Partnership Grant co-developed with the members of the Land Claims Agreements Coalition.

The Land Claim Agreements Coalition is an advocacy organization representing 26 "modern treaty" (MT) holders: those Indigenous governments and representative organizations that have negotiated agreements, on behalf of their nations and peoples, under the comprehensive land claims policy since it was introduced in 1973. Between 2012-2015, modern treaty holders worked to seek a source of funding and way to organize to generate evidence around modern treaty implementation challenges and successes. In 2017, the Social Sciences and Humanities Research Council awarded a $2.5M Partnership Grant focused on researching modern treaties, establishing a five-year research partnership between MT holders and academics from across Canada, with the intent of better understanding treaty implementation issues, supporting and training a new generation of Indigenous academic and community-based researchers, and generating quality evidence for Canadian policy makers at all levels of government. The project's approach is decolonizing and reconciliatory: the project is jointly hosted by Carleton University and the

Tłı̨chǫ government; the five themes are directed by Indigenous practitioners drawn from Indigenous governments, in partnership with academic co-leads from universities across Canada; and, the priorities for research – the five theme areas – were established by modern treaty government officials.

The Modern Treaties Implementation Research Project is a first step in what we hope will be many years of treaty implementation research that will contribute to fostering effective treaty implementation and policy making, as well as educating a new generation of researchers about the importance of implementation from the perspective of modern treaty holder organizations and the collectives that those organizations represent. It is our goal that non-Indigenous researchers working with this project approach their tasks in culturally competent and respectful ways, understanding their responsibilities as settler Canadians in a context of reciprocity that will end colonial norms in research. But most importantly the project seeks to expand the involvement and foster the leadership of a new generation of Indigenous students, community members, and scholars, by creating space for them to undertake research in support of the spirit and intent of modern treaties. ◉

Frances Abele is Chancellor's Professor in the School of Public Policy and Administration, Carleton University.

Stephanie Irlbacher-Fox is Adjunct Professor in the School of Public Policy and Administration, Carleton University, and Principal Investigator for the Modern Treaty Implementation Research Project.

Joshua Gladstone is a co-founding editor of Northern Public Affairs.

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Lianne Marie Leda Charlie: Hot pink bull moose, modern treaties, and decolonization

Jessica Simpson

Lianne Marie Leda Charlie is a woman of Little Salmon Carmacks First Nation, Northern Tutchone. She is a PhD candidate at the University of Hawai`i at Mānoa and an instructor in the Indigenous Governance degree program at Yukon College. She is also an artist and a new mother.

As part of the art exhibit "To Talk to Others" featured at the Yukon Arts Centre, winter 2018-19, five Indigenous Yukon artists were invited by Valerie Salez to create pieces in response to minutes from a 1977 meeting between Pierre Elliott Trudeau and Yukon First Nations leaders on the Mackenzie Valley Pipeline. Lianne responded with a life-sized hot pink papier-mâché moose covered in the Yukon's Umbrella Final Agreement (UFA), which caught the eye of many, including us here at the Modern Treaties Implementation Research Project. In this interview, I sat down with Lianne to listen to her unpack the metaphorical parallels between the hot pink moose, the struggles with modern treaties, and the Umbrella Final Agreement.

This interview was edited for clarity.

Jessica Simpson (JS): So, maybe you can tell me a about how the moose was constructed?

Well, I've never done anything like this before – I'm a digital artist, everything I make doesn't even have material form. I happen to have a friend who does this kind of thing in Vancouver, so I gave her a call and asked, "How would I construct this thing? Where would you even start?" She sat with that for a few days and eventually took me through step-by-step.

She found a 2D life size bull moose pattern for a lawn ornament – you know those toys with the wood sticks and the slats? It's like that but life sized made by a company in the U.S. She recommended I start with that, and then 3-Dify it. It's 2D plywood frame, and then we filled it out with Styrofoam ribbing, rump, and legs. My friend, Sarah Porter, an architect and a very creative person, made that base out of carved Styrofoam. In the shaping of the body, there was a lot of referencing Google images trying to find images of the bull moose from the right angle trying to imagine how its butt sticks out, how it connects to the legs... Then we laid chicken wire, duct tape, construction adhesive, and then layers of papier-mâché.

In that beginning process, we had a small core of people working on the project and then when we started the papier-mâché it became a community project. We were lucky enough to get some space at Yukon College and then I just invited people – "I'm working on this thing, come help" – and all of a sudden about 25 people came and it just became a matter of handing things off to people.

JS: That sounds symbolic of how communities should work – you have this whole thing, but you can't do it all on your own.

Exactly. It is interesting, the linkages between the relationship of making the moose and the theory of creating our desired futures. Identifying this desired goal, the mix of skills sets required in order to make this thing you want. And for us it just happened to be a life sized hot pink papier-mâché bull moose – but it made me realize it could have been anything. We needed all of these people from different communities, different ages, different skill sets, different places, different ideas to buy into this and see themselves reflected in this idea and empower people to own it and take responsibility for what it is that they are going to contribute to it.

So, one thing that stands out – on one of those community work days a student from my class came to help. She had been there for a couple of hours and understood what was happening, what she needed to do and had some experience now,

so when someone new came she was in a position to be like "this is what we're doing, this is how you do it, these are the 'tricks-of-the-trade' and now you can help." One of the interactions happened to be with the Dean of Liberal Arts coming in new and she was in a position to teach him what was happening and then he stepped in.

So it's interesting to think of positionality, and being in positions of knowledge and power and then sharing and disseminating that knowledge and power outwards in new configurations of people. So there's an interesting outcome or practice that we can even think about when designing our governance systems or trying to create something together.

JS: Now we're touching on the next question – what is the connection between modern treaties and the hot pink moose? Is there anything you want to say about that?

To clarify, the UFA is the framework that guides modern treaty making. The agreements that come from it are the treaties. The UFA is in everybody's agreements and those become the legal documents.

But I wanted to make that connection between a moose and the UFA. The moose, is something that has sustained our people forever. It feeds us, it clothes us, and it represents a way of being and a relationship that is our ancestral way. Then we have a modern treaty that feeds, clothes, sustains us and then by putting those two together (moose and the UFA), my intention was to help me depict some hard questions that I had about modern treaty, land claims, our ancestral way, and the responsibilities we have to our land, to ourselves, and to our future. I don't know the answers to that question, but it's about putting the question out there so that we can think through it together.

JS: It's a think piece really. It gets you thinking and it's not just something pretty to look at.

What's really neat about this is that people are drawn to it. It's a hot pink moose, and it's huge and it's standing there and you're like "WHAT

Photo credit: Lianne Marie Leda Charlie

Lianne Marie Leda Charlie's hot pink bull moose

IS THAT?" And when you come into it, all of a sudden you're asking "What's the UFA? What does that mean? Why would you put those things together? Why is it pink? Why is the rack gold? Why are those arrows there?"

JS: Well, this is reminding me of the concept of how the treaties are supposed to represent the relationship between Canada and Indigenous Peoples, therefore all Canadians are treaty people. So, anybody walking into this [art installation] is automatically engaging with the treaty.

And that's interesting when thinking of who was all there to make it [the UFA]. If you do take the idea of "we are all treaty people," and this is something I've also heard this in the Yukon, Indigenous people are reminding non-Indigenous people that this your government that signed these agreements too and so you actually have a responsibility to us, to these agreements, and there is work there for you to do. So that becomes something to think about in the creation of the moose.

JS: I want to touch on what was the inspiration for the project – it was part of "To Talk to Others."

Valerie Salez, the person who brought us all together for the exhibition "To Talk to Others," was working for the Tr'ondek Hwechin heritage division in Dawson City about 10 years ago. She came across this transcript of a meeting that took place in 1977 and Pierre Elliott Trudeau was in the Yukon on holiday and ended up having a meeting with the First Nations leadership at the time and this is a transcript from that meeting.

When you see Trudeau, he is actually trying to get a sense of the leadership's receptivity to a joint venture with the Mackenzie Valley Pipeline, which at the time was approved and they wanted to put another pipeline in the Yukon. In the transcript, the leadership was like "We're just trying to figure out the land claims process, so are you guys [the Government of Canada]. We have a way of life and a way of being that we need to protect, something like a pipeline threatens that. So, we can't have that conversation right now without having some sort of security around what's happening with our land claim." Then you see Trudeau being really black and white around being modern and traditional: He keeps saying that "If you're not going to take on economic development in that way, then it sounds like you want to be traditional. No tv's, no radio, no…"

JS: How colonial!

So ridiculous!

Five Yukon artists got this transcript and support to interpret this any way we wanted. In that [transcript] I saw the challenges and struggles with resource extraction, this need and desire to live life in a way that our ancestors would recognize, and the fact that that is constantly under threat in various forms.

And then I really picked up on the place of paper in our politics right now. So that's why the moose is made out of paper. The other pieces in my collection are a stretched hide made out of paper on a frame, and the paper is the land claims maps. The third piece is a baby belt, a garment we would use to traditionally carry our babies. It's also made out of paper, the Little Salmon Carmacks First Nation land claims map, because I was reflecting on the afterbirth ceremony we did for our baby this past July, which meant putting the placenta out on the land in a tree because that's what our people would have done. Because I had all of those land claims maps, I learned where I put the placenta. And then we made this baby belt in response to the feelings that came up with all of that.

So together, the collection [moose, stretched moose hide, and baby belt] grapples with the fact that our politics are largely determined and guided by paper, whereas land would have had that place in our ancestral practices. We are constantly trying to bring the land into a paper politics world and it just doesn't go together.

JS: You have mentioned before that there is this anxiety about: "What are young people doing to bring forward the original spirit and intent of the treaties?" How do we get the next generation educated in the original spirit and intent of our treaties?

The thing that comes up for me is what kind of skills does the next generation need to have? One of them is to understand these agreements, but we also need our people on the land doing things our ancestors would recognize. Unfortunately, those things are different. Like, it's the paper or the land. It would be really great if we can say they can do both, but I think about myself and I'm skilled in paper and my land skills are minimal, and that means that I'm not out there. And when you look closely at what Indigenous theorists are saying, especially how settler colonialism gets defined, articulated, and practiced – the whole intention was to get us off the land. And so when

I know that, there's the anxiety because I want to support youth to be out on the land, I want myself and my baby to be comfortable out on the land. That is hard, anxious work because there's a gap in what I've learned because of colonialism. My dad's family was violently taken off the land, so there's a gap in the knowledge transmission on how to be comfortable out there.

I also feel anxiety around what youth need to learn. I want to fully understand these agreements and how the state has operated through these agreements, [so that I can teach that to the youth] and then the youth can decide what it is that we need to do. With that understanding [of the agreements], there's consciousness and intentionality with respect to what it is that we are doing with our time. The youth might go "it's really important to be on the land, that I am out there, that I know my language, that I know our practices, that my family is healthy and comfortable and safe." And, that's scary for me because I also hear that there is this necessity that we understand what the agreements are, that we know how they work, and that we use them to the best of our ability. That means capacity building in very specific, office-based, things, but when it comes to prioritizing what we are doing with our time, we need people to be comfortable, safe, and healthy on the land.

JS: When you were speaking earlier, you were speaking about [what] the UFA is for all of the Yukon, but there are all of these different nations. The UFA is divided amongst all of them. How do you divide it amongst those that also have shared land? That's a real visual of the concept of "bringing land into paper."

A friend who helped with the antlers, his name is Patrick, he talks about how that moose will move amongst the land despite lines, and that's a teaching for us as we navigate the pathway moving forward. That moose is walking across borders, these lines, Category A Land, B Land, where we have title land and where we don't. The moose doesn't move in the world that way. So what does that tell us about the potential for moving forward for us? Can we move in a world that doesn't prioritize those lines in the way that they're drawn and tell us what to do – what that paper is telling us to do? Can we move on the land like our ancestors who were literally following the moose? ◉

Editor's Note

The conversation that sparked the "To Talk to Others" exhibit occurred in 1977, a pivotal year in Northern Indigenous-Canada relations. There was public debate about the future of the Northern economy, much of it turning on proposals to build oil or natural gas pipelines to bring Northern energy reserves south. These proposals galvanized Indigenous people all over the north, who saw international corporations and the federal government making plans to transform their lands forever. This was the beginning of the land claim movement that would instead transform Northern political life and institutions.

In May 1977, Volume One of Thomas Berger's Report on the Mackenzie Valley Pipeline was released. As suggested by the title, Northern Frontier, Northern Homeland offers an analysis of what is at issue in northern development decision-making. Berger's report recommended a ten year moratorium on pipeline construction in the Mackenzie Valley, and a permanent ban on development in the North Slope. The Inquiry process and its report effectively interrupted federal and industry Northern development plans for Denendeh. In Yukon, the discussion developed differently. In July 1977, an inquiry led by Kenneth Lysyck concluded that a pipeline along the Alaska Highway was acceptable, with conditions, while in the same month, the National Energy Board concluded a review of multiple proposed routes to approve the Alaska Highway route. Neither pipeline was ever built, as world energy prices and proven Northern reserves both turned out to be lower than anticipated. (In the early 1980s, though, a pipeline to take oil from Norman Wells to northern Alberta was constructed, through unceded Dene territory.)

- Frances Abele

No time for a modern treaty

Dakota Erutse

I can understand the sense of moral attractiveness which comes from working for Indigenous people—or *with* them, it makes no difference. You live in Canada: the best country in the world. It's a country that ranks high on the Human Development Index. It's the country that belts out northern lights in Yellowknife and Iqaluit; the country where canoeists mount their oars under the midnight sun—where everyone asks freely, Where are you from? alongside their how-are-you's; the country without Donald Trump. Amidst such freedom, glory, and privilege, you think, there's still but one sad case in the back: the case of Indigenous people. You ask, Where are their rights? What about their missing and murdered women and girls, their lack of clean drinking water, and their sacred lands? We need to implement UNDRIP—fast. We need to get those TRC Calls to Action going—fast.

For all that, you refuse to let Canada's glossy national character bleed out, and bleed hard. And you don't want to risk your own ethical complacency, so you must ask, as a way to be grateful and yet conscious of a place that has both its opportunities and its problems, How can we let this happen in Canada? *Our* Canada, the yours-mine-and-ours Canada!

It's a narrative of decent intentions—a sense of the dutiful, a quest for equality. You make it a personal matter of *I'm paying it forward* or *I'm amplifying marginalized voices* or *I just want to do good in life.* You arrive resolutely at the conclusion that we have problems of our own. Indian problems within our own borders. Except, you are no longer of Pierre Elliott Trudeau's ilk, who brought the 1969 White Paper, nor of Stephen Harper's, who didn't give a damn. Now, you are allies and partners in reconciliation dealing squarely with these Indian problems—these injustices toward Indigenous people. This is an attractive connection for you to have, the one with Indigenous people, for it is a working relationship that comes with an ethical payout. It is the appearance

Photo credit: Brandy Saturley. Licensed under CC BY-ND 2.0

Cameron Falls Hike, Yellowknife, NWT

of doing good for this marginalized segment of Canadian society that provides you a moral boost and a reputation, whether as a consultant, a politician, a scholar—or even as an all-round decent Canadian.

I can understand the renegade urgency with which you push back the historical wrongs done to Indigenous people. Now, you simply want to make things right. It is great to have the support of all-round decent Canadians as I embark upon Project Reconciliation and Project Decolonization.

What's with my understanding? you ask.

I cannot say for certain. It's not a matter of empathy, it's of what I see. I see a contemporary narrative—that of Project Reconciliation and Project Decolonization—for which I am thrust into the collective identity of Indigenous People, Indigenous People of Canada, Indigenous Canadian, etc. It is a collectivity for which it is probably best that I burn my Indian Status Card before joining the ranks (I'm reminded of my nephew, 9 years old, who was recently proud to show me his own Indian Status Card—how to break the news to him?).

It used to be that we were Indians, with the understanding that some were Inuit and some were Métis. It used to be that we were First Nations, Aboriginals, and Natives. Yes, these used-to-be's are still in common parlance, in some circles, but they now lack the rigour of what's socially acceptable. I should either know my real identity, in the ethno-cultural sense of the word, or stick to *Indigenous* and expect to be called upon for specifics.

Which begs the question, What does it mean to be Indigenous?

It means a recognition of the obvious: after the first day when a White man entered the continent, all manifestations of colonialism succeeded in ravaging Indigenous people—stripped for the most part of their languages, their land, their sense of self-worth and their spirituality.

It means a self-consciousness of that history, that colonial legacy, and the need to break from it. It means a belief in the self-determination of Indigenous people, and in the reconciliation process so long as it provides an equal voice to Indigenous people in whatever context.

All good stuff. I wish we heard more of it early on. Yet I cannot help but wonder about *whatever context*. How much of this narrative actually relates to me?

I have a hard time keeping track of expectations, that's all. There are lots of them. I had a job interview, recently, with a regional transportation authority, for a role called Senior Indigenous Relations Lead. To gain a fuller appreciation of Section 35 of the Canadian Constitution, thinking it had mattered and thinking this the right preparation for the job, I spent three weeks reading the relevant case law. At the interview I was asked whether I knew about UNDRIP. I wanted to say, *Yes, and I suppose we can thank Romeo Saganash for it*, but I felt stunned and defeated. I only said my understanding of UNDRIP was "basic"—which is true.

Other expectations of being Indigenous come as loaded questions. Do *you* support pipelines? Are you a two-spirit, or do you buy into the binary gender business? And what are *your* Calls to Action for Canadians?

I remember a community engagement meeting I attended as a host, on behalf of the Sahtu Land Use Planning Board of which I am a member. (The board has its origins in the Sahtu modern treaty.) After the meeting had finished an Old Lady approached us, her voice irate and yet calm (the balance of which, in my experience, probably had to do with the alcohol in her breath) when she said, "The Queen, she don't fucken trap around here. Who the hell she thinks she is? She don't even live in this country. And you guys, too, you work for the government, eh? Don't fuck with my land."

A part of me had the jitters—the part that says I'm Indigenous and she's Indigenous, and she's right. She's conscious of the colonial legacy. Finally, someone *local* who gets it. I wish there was more talk like it. But the other part of me, the one that likes to believe there's humanity in everyone, had the sense that this was no way to have a respectful conversation.

As I look ahead, I'm reminded of Prime Minister Justin Trudeau and the irritation I had felt when he apologized, with tears, for residential schools. Didn't Stephen Harper already apologize, without tears, back in 2008, on behalf of the government? Shouldn't Trudeau get started on changing law and policy respecting Indigenous people? The words "moral attractiveness" and "appearance" come to mind.

Why Old Lady and why Justin Trudeau? I'm not exactly sure. I can only go with what I see. I'll accept my whatever context and the expectations of being Indigenous. I have to prepare for an upcoming job interview and an upcoming board meeting. I have to read my copy of UNDRIP and my modern treaty. ◉

Dakota Erutse was born in Yellowknife and raised in Fort Good Hope, NT. He is a participant of the Sahtu Dene and Métis Comprehensive Land Claim Agreement. He lives in Vancouver, BC.

FEATURES

Gowhaedo Gonàowo (Ancestral ways): Mapping modern treaty implementation

John B. Zoe with Jessica Simpson & Hayden King

Many of them [Elders] may be gone physically and their names may have gone with them, but their words and system did not go with them…

—Tłı̨chǫ Elder Nick Black. Transcript on Self-Government, 1995. Translated by John B. Zoe

Our Ancestors lived with the rhythms of the natural world and adjusted to the ebbs and tides of food sources, and relationships with other Indigenous nations with whom we have overlapping interests. In the centre of each nation is a language, culture, and way of life, practiced and honed over many generations. Much of this documented into the landscape by way of place names to record and remember how we addressed food harvesting sources and methods as well as conflict and peace. Of course, since 1492 and the following centuries, colonization has pushed Indigenous peoples towards assimilation, and over time into a new narrative as wards of the state with no recourse or options. Our resistance to those processes led to changes in assimilatory Indian policies and eventually into treaties. However, these treaties remained unfulfilled and further negotiations have led to new negotiations and new settlements. Through this history Indigenous peoples have been working to reclaim their own recognition of what was taken.

Yet, in this era of the modern treaty, even after we have come to an agreement about how to share the land, there are no policies in place to implement these new agreements (and even the older ones for that matter). If we are to contribute towards a policy of implementation, we need to ensure that our values in relation to lands takes into consideration our own narratives and methods of management to ensure that

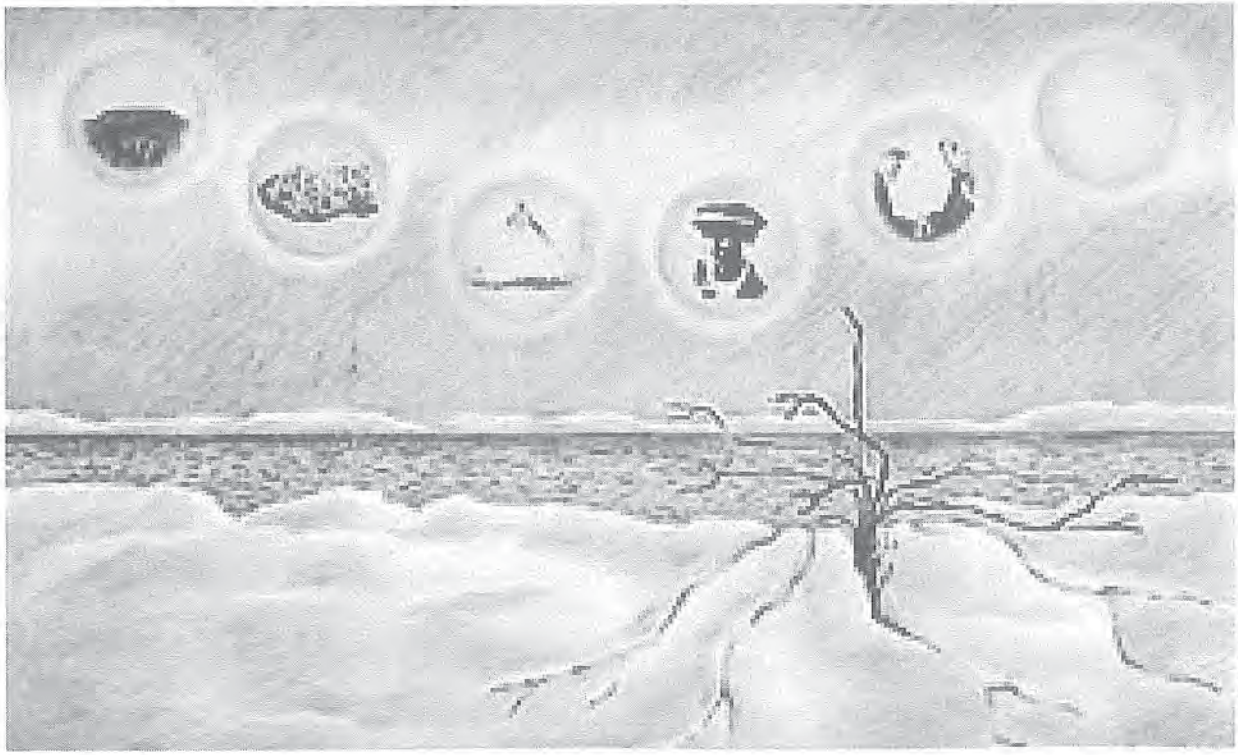

Photo Credit: John B. Zoe

Depiction of Tłı̨chǫ cosmology

our languages, culture and way of life are captured in implementation. We have made some efforts towards this goal. The Tłı̨chǫ Government is part of the Land Claims Agreements Coalition and continues to participate in its meetings and initiatives.

An Elder once told me that if you think you have nothing to share, talk about your experiences and the rest will follow. Many of the main influences in my life are from my first teachers: my parents, grandmother, siblings, relatives, and community members. Over the years I've also had the opportunity to interact with most of the stories, histories and experiences that I've heard from the people of the land, who still are out there armed with knowledge of our ancestors. These stories from the Elders and the landscape are the foundation for our nàowo (a Tłı̨chǫ concept that encompasses our language, culture, way of life, as well as our knowledge and laws).

It has been said by our Elders that "the land is like a book." The place-names, and their stories on the landscape are related to our traditional activities. The trails leading out to the barren lands provided natural access for harvesting food and medicines. We know that these stories tell us how to live and survive on the land as we have always done. Place-names on the landscape are built in layers from pre-contact times to the present and are the ongoing source of raising Indigenous rights and title that we seek recognition for in modern treaties. This is true of those who are negotiating treaties, and those, like the Tłı̨chǫ who have negotiated agreements

It has been 15 years since the signing of the Tłı̨chǫ Agreement. Unless it is a tool to revitalize our language, culture, and importantly relationships to the land, it will be a failure.

are working towards implementation. It has been 15 years since the signing of the Tłı̨chǫ Agreement. Unless it is a tool to revitalize our language, culture, and importantly relationships to the land, it will be a failure.

What I am going to tell you now are things that I've heard over time and things that have informed us on where we are headed. This article covers three main eras of Tłı̨chǫ stories, or put another way, Tłı̨chǫ relationships to the land. They span from the era of legends and pre-contact history, colonization and early treaties and modern treaty negotiations towards "recognition" and the future. Each of these eras reflect Tłı̨chǫ values and priorities, and each era overlaps with or is tied to the previous era. Embedded in each era holds a vision for our future. The final section of this article considers our path forward and the challenges that remain.

Legends and Yamoozah

There are old stories told over campfires over many generations about our relationship with the animals on which we rely on for food, clothing, equipment and sustenance. In the stories the animals and people were as one and they communicated to one another. In one of the stories, there came a time when the animals and people came together to determine who they were going to be. A moose hunter wanted to become a

Photo credit: John B. Zoe

The late Nick Black, Tłı̨chǫ Elder

trout and embedded all of his hunting tools and parts of moose into the head of the fish he was to become. When people caught trout, cooked and ate it, they laid out all of the bones from the head so that the fish can tell its own story. This connection between story, place-names, and custom makes co-existing with the animals a reality and gives recognition to the animals that we rely on to survive.

Eventually conflict arose between the people and the animals as to who was to be gatherer and prey. There are physical areas with place names that describe rituals performed by people to get a sense of their well-being when sites were visited. It was at one of these places that animals were acting as gatherers and people were prey. Yamoozah and his brother were found by

an old man out gathering for food, took them back to the encampment and raised them to become young men. One day while the old man slept they carved a hole on top of his head and dropped in stones and he turned into a mountain. The young men parted ways and Yamoozah started to travel, and in his travels he neutralized the conflict and provided order between the animals and people so they can co-exist together.

The stories of this era provide further understanding of the relationship between humans and animals as embedded in the landscape by way of place names. The landscape that holds these early stories are better told at the sites where the stories unfolded as they should all be accompanied by an activity and an interpretation by an Elder. The land, after all, is the story. Or in more academic terms: "It is a cultural landscape where physical features are used as mnemonic devices to order and help preserve oral narratives, which themselves encode knowledge relative to identity, history, culture and subsistence" (Andrews, 2004). The stories, spanning time, symbolize and define our relationship with the animals and the natural world. These in turn are the foundations for our language, culture and way of life.

Colonization and early treaties

Anytime anyone goes anywhere, they need to eat, sleep, find a place to plan or prepare on how these resources can be harnessed for ongoing support of the local people and access to lands for the natural resources as a start. This time period of early contact is about those impacts on the Tłı̨chǫ by the newcomers. The early contact period is a time of encroachment and land occupation by people who were not Tłı̨chǫ. When newcomers came, they took an inventory of the land and the people and the beginnings of land-use and eventually of ownership.

Far away from Tłı̨chǫ territory, in the Great Lakes region, the English and the French were negotiating the terms of colonialism. After the Seven Years War in 1763, land was being exchanged between the colonial empires without considering Indigenous peoples relationship to the land. While the British Crown claimed a Royal Proclamation could bestow land rights, it also created a system where a foreign power made decisions about Indigenous lands. The pre-confederation treaties and the Numbered Treaties followed. By 1867, Canada was delegated authority to continue this process on behalf of the Crown and with these new powers, continued to take lands and resources from Indigenous people and redistribute them to settler Canadians. Of course, as these processes reached the North, they isolated Indigenous people from their own lands, resources, and ways of life. Indigenous people didn't fit anywhere into this redistribution scheme; in fact, we were not even considered to be citizens, but wards of this new country called Canada. Indeed, the only way Indigenous people could interact with Canada was through the Indian Agent at Indian Affairs.

In this time period, things slowly began to change. People continued to live in the same areas and hunt to survive as our ancestors did since time immemorial. But as the trading increased in the North as it expanded greatly from the south, we began to see the introduction of tools and weapons, such as rifles and knives, which were welcomed by Indigenous nations as new tools for harvesting as well as to take more to trade. There are Indigenous peoples in all areas who have overlapping areas where tensions are always present. With new tools, the tensions can very easily escalate. There are stories of early skirmishes and eventually agreements being made between Indigenous peoples and one such story is embedded in the landscape by way of place names.

Explorers were also in the Tłı̨chǫ area. Sir John Franklin documented his attempt to find passage to the Polar Sea and his views are part of an ongoing narrative of how Tłı̨chǫ lands were documented as part of an inventory, along with Tłı̨chǫ inhabitants. Tłı̨chǫ posessed knowledge that was also identified as a resource of the area that could be used by the newcomers. Eventually Trading Posts were established. These allowed Tłı̨chǫ to acquire goods and tools for redistribution, which the people came to rely on and seek out, a reliance that the newcomers could use to secure support for greater encroachments in the Tłı̨chǫ area, and in other areas. Churches soon followed the traders, and new forms of religions were imposed, creating a system that conferred power on those religions. Traditional Tłı̨chǫ spiritual and cultural practices were frowned upon and this disapproval was enacted by many methods, for example, the method the Priests and traders taking censuses of Tłı̨chǫ, which involved their changing of our family names. Eventually trade networks began to replace Tłı̨chǫ movements on the lands, with the fur emerging fur trade commercializing animals and furs as commodities. In addition to the re-naming of individuals and families, new place-names were established for specific locations, such as Trading posts.

As this time period drew on, increasingly, the only way for Indigenous people to interact with Canada was through the "bubble" of Indian Affairs. Because Indigenous people were not considered citizens of Canada until 1961, if you wanted to vote, join the army, drink alcohol, or go to university you had to leave your status "at the door." While status was a colonial designation, it also bundled our rights to the land

and communities and became the only material and legal link to life as Tłı̨chǫ. The only other Canadians authorized to enter that bubble besides the government were the churches, which were collaborators with government. And this was the start of residential schools.

Next came the need to make a treaty. Mǫfwi was a Tłı̨chǫ leader selected by people to be their representative in Treaty 11 negotiations of 1921. Chief Mǫfwi pronounced: "As long as the sun rises, the river flows, and the land does not move, we will not be restricted from our way of life" (Tłı̨chǫ, 2014). He also drew the boundary for what is now known as Mǫfwi Gogha De Nihtłee. Mǫfwi was selected because of his strong character, and ability to protect the land against the newcomers who were interested in taking it for their own use. He negotiated in good faith using our naowo so that we could live in peace with the settlers who were, at this time, flowing like a river into our territory.

Instead of implementing a treaty that gives recognition and authority to how life was before the impacts of settler society, government actions after treaty signing became even more intrusive, which taken together had the effect of, in a practical sense, to wipe out Tłı̨chǫ and other Indigenous peoples. The final text of Treaty #11 was one sided, pre-written and intended to authorize Canada to distribute and exploit renewable and non-renewable resources in our territory. It also paved the way for occupation of our lands by a new form of colonial outpost, that of the Indian Agent, whose power was growing since the time of Ek'awi. Meanwhile our Elders have told us that "we just need to fulfill our version of the treaty" by affirming the word and actions of Mǫfwi.

Recognition of the Tłı̨chǫ Agreement and future generations

Between the signing of both Treaty 8 by our Dene neighbors to the south, and the signing of treaty 11 by the Tłı̨chǫ and other Dene, the lack of treaty implementation combined with the assimilative policies came to a head. For the Tłı̨chǫ, because of the resistance that emerged from the aftermath of Treaty #11, Tłı̨chǫ ultimately were able to re-negotiate our relationship towards the fulfillment of the spirit and intent of the early treaty. While there have been many changes to our politics, the Tłı̨chǫ traditional government will always be there, embedded in the landscape through history, language and culture and helped drive these new negotiations. As Chief Negotiator for the Tłı̨chǫ towards the Tłı̨chǫ Agreement, I took it upon myself to understand Tłı̨chǫ history better because it was important as we entered the modern treaty process. For us, the new treaty was about gaining recognition for the authority our traditional Tłı̨chǫ government has always had. Our job was, and continues to be, re-establishing jurisdiction in our homeland, reinstating traditional early Tłı̨chǫ place-names, and ensuring these traditions and ways of life are passed down to future generations.

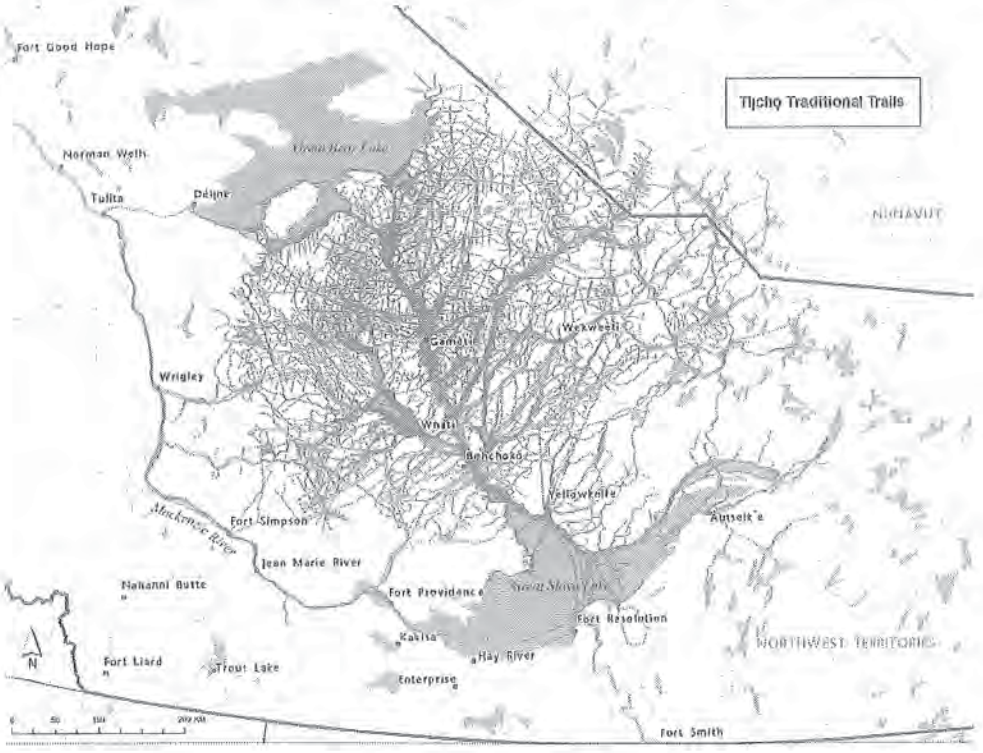

Photo credit: Dr. Tom Andrews, Idaà Trail Heritage Resource Inventory, Prince of Wales Northern Heritage Centre, Yellowknife, NT, 1999.

Tłı̨chǫ traditional trails

It is not an easy task. In 1982, with the patriation of the Canadian constitution, Indigenous peoples had more opportunities to pursue land-claims and self-government. We could finally get out of the Indian Act (except the federal government still decides who and what an Indian is, and attached rights to each category). But Canadian constitutionalism has also allowed the legitimization of Canadian sovereignty and the "rights" to distribute lands and resources to provinces, municipalities, and Canadians generally. Although the Tłı̨chǫ Agreement contains twenty-seven chapters that address lands and the authority over them, wrestling that jurisdiction back will take many more years. Indeed, while many modern treaties have been finalized, we now find that Canada has no overarching policy for implementation, which can often end up in disputes. We need to agree on a policy for implementation that is co-described such as a national policy, so that we can get away from the current method of using the courts when conflicts arise between Canada and Indigenous governments.

The survival of future generations of Tłı̨chǫ requires that the youth remain rooted in their language, culture, and way of life. When Tłı̨chǫ were living in the bush, the old people had everybody with them there and there were knowledge transfers every day. Now, in order to do traditional activities, we need to push the schools, where the youth spend so much of their time, to bridge the gap. We need to re-establish our culturally based processes that have been cast to the wayside for generations since the first treaty. At the time of writing, the Northwest Territories is debating the future of post-secondary education and possibly creating a polytechnic institution. For us, university is a means for developing skills that can straddle Western and Tłı̨chǫ knowledge so that all Northerners can benefit. If we move forward in this direction, it needs to be done in a way that is collaborative with Indigenous communities and governments so that we ensure the stories and the identity is embedded in our young people so as Chief Jimmy Bruneau said, that they become "strong like two people."

A lot of consideration must be given to the kind of skills we need to develop and how to develop them, how a university will be funded, and its curriculum and governance structure. And then there is research, which is much needed, and which must seek to build capacity, develop skills, and facilitate a transfer of knowledge between communities at the highest level and with the best quality. Issues that are a priority for communities can become a pathway to develop knowledge, skills, and stable employment. Because issues are researched in the communities, we should pursue a decentralized institution where education can be brought to students where they live and with the highest standards of ethics. Education is critical to the coming eras of the Tłı̨chǫ, and for realizing the intent of the treaties.

Modern treaties are an extension of who we are and have always been. The future challenges for Indigenous peoples are still being defined, but for the first time since contact Tłı̨chǫ have an opportunity to re-establish a culture and society that incorporates our knowledge and values, breathing life into our place-names, which so much else revolves around. The Elders have always said that we need to spend more time on the land because that is who we were before all of the encroachment and impacts from foreign systems. Our history, knowledge and way of life is in the landscape. We must continue to spend time in the bush, travelling with the elders and the youth in canoes because it is more important than ever to be knowledgeable in two ways. We have inherited stories, and we have the responsibility to give this inheritance to the next generation so that the stories are not left behind – and instead, they are taken with us. ◉

Dr. John B. Zoe was the Chief Land Claims Negotiator for the former Treaty 11 Council of the NWT from 1994 until its conclusion with the establishment of the Tłı̨chǫ Government in 2005. He has an Honourary Doctor of Laws from the University of Alberta in recognition of his work in the development of the new government, as well as his contributions to projects that are built upon a foundation of Tłı̨chǫ language, culture and way of life. John is now a senior advisor to the Tłı̨chǫ Government.

Jessica Simpson is currently a Research Advisor at Hotıı̀ ts'eeda, the NWT SPOR SUPPORT Unit. She is a Tłı̨chǫ citizen from Whatı̀ First Nations, born and raised in Yellowknife, NT. Jessica spent several years working for co-management and environmental monitoring agencies doing research and communications.

Hayden King is Anishinaabe from Beausoleil First Nation on Gchi'mnissing, in Huronia Ontario. The executive director of Yellowhead Institute and advisor to the Faculty of Arts on Indigenous Education, Dr. King's research and commentary on Indigenous nationhood and colonialism in Canada is published widely.

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Shaping the Northern political landscape: Comprehensive land claims agreements

Graham White

It is difficult to underestimate the importance of the settled Northern comprehensive land claims for Indigenous Peoples and for governance generally. This is not to say, as is evident from other articles in this issue, that Northern Indigenous Peoples are anything like completely satisfied with how claims have worked out in practice or, indeed, that all of them accept the basic premises underpinning comprehensive claims. Still, the provisions – and the shortcomings – of the claims represent fundamentally important elements of political life in the North.

Two essential facts about comprehensive claims agreements highlight their significance. First, the claims are – and are recognized as such by the Government of Canada – treaties. A treaty is no run-of-the-mill government agreement, but rather a solemn, binding covenant between sovereign entities; not for nothing do Indigenous Peoples refer to treaties as sacred. Second, Section 35 of the Constitution Act, 1982 proclaims that, along with other "Aboriginal and treaty rights," Indigenous rights under existing or future land claims agreements are "recognized and affirmed." Once settled, comprehensive land claims become part of Canada's constitutional framework.

This article offers an overview of the history and nature of comprehensive land claims. To date, 26 such claims have been finalized; most are in the North, and a handful are in southern British Columbia. Others are being negotiated elsewhere in southern Canada. Given space constraints, this account necessarily leaves out many important details and nuances about claims and the claims process.

Comprehensive claims are distinct from "specific claims." Specific claims are designed to rectify wrongs against First Nations relating to Canada's implementation of historical treaties. They could involve failure to provide promised financial and other benefits, inadequate protection of First Nations lands or other implementation improprieties. Hundreds of specific claims have been settled, with hundreds more under negotiation or pending. Typically, settlements entail financial compensation; rarely, if ever, do they involve governance matters. By contrast, comprehensive claims include financial compensation, land ownership, governance provisions and other elements.

Federal claims policy[2]

The signing of Treaty 11 in 1921-2 marked the end of more than two centuries of treaty making between Indigenous Peoples and British and Canadian authorities. Two fundamental problems beset both pre-Confederation treaties and the "numbered treaties" signed between 1871 and 1923. First, there was a fundamental disagreement as to the nature of the treaties. The Canadian government largely saw the treaties as land deals, by which the Indigenous Peoples gave up their lands and their autonomy in return for specified benefits. By contrast, the Indigenous Peoples believed the treaties to be peace and friendship agreements for sharing lands and resources, entailing neither transfer of land ownership to the Canadian state nor surrender of political sovereignty. In turn, this reflected the oftentimes questionable processes characterizing treaty making, evident for example in substantial differences between the oral commitments made by the Canadian negotiators and the written texts of the treaties, which many Indigenous leaders could not understand as they spoke and read little, if any, English (Fumoleau, 1973).

Second, treaties were never signed over huge swaths of Canada, including all of present-day Nunavut, Northern Quebec and Labrador, most of Yukon and British Columbia and parts of the present-day NWT. The Indigenous Peoples in these regions were never conquered militarily, yet without even the semblance of a treaty relationship, the Canadian state simply assumed control and pushed the original inhabitants to the margins socially and politically. This absence of treaties across much of Canada led to the development of the federal government's comprehensive land claims policy.

Various Indigenous Peoples had been pushing for many years for Canada to recognize their

rights to their traditional territories and to self-government, with little success. A major legal breakthrough occurred with the 1973 Calder case brought forward by the Nisga'a of Northwestern British Columbia. Although the Nisga'a lost, the justices of the Supreme Court of Canada recognized that Aboriginal title to traditional Indigenous lands once existed and several justices concluded that it still existed as "unextinguished Aboriginal title." It is widely believed that the Calder case forced the federal government to develop a comprehensive claims policy in anticipation of future legal challenges. While Calder hastened Ottawa's response, Christa Scholtz of McGill University has shown through analysis of cabinet documents that the federal government was already well on the way to establishing a formal policy for land claims (Scholtz, 2006).

Federal comprehensive claims policy emerged in tandem with the negotiation and 1975 settlement of the James Bay and Northern Quebec Agreement, which was negotiated and finalized in record time, owing to the Quebec government's need to ensure that its massive James Bay hydro-electric project was on sound legal ground. Many of the policy's basic provisions remain in place today, though, as outlined below, some have changed. As summarized in the 1981 policy statement In All Fairness (Minister of Indian Affairs and Northern Development, 1981), the federal government established and ensured compliance with the claims process, including the basic decision as to whether an Indigenous claim should be accepted for negotiation. Among the important elements of the policy was this: claims were only to be entertained in areas not already subject to treaty, though an important exception was made in the NWT where the implementation of Treaties 8 and 11 was judged to have been so fundamentally flawed as to warrant negotiation of a claim. A central objective for the federal government was certainty and finality as to jurisdiction over lands; accordingly, extinguishment of Indigenous title became a central requirement for settling claims. Ottawa refused to permit self-government demands to be addressed in claims processes; both Indigenous and government negotiators have said that this restriction shaped the nature of the early finalized claims in important ways. Given the exclusion of self-government concerns, the claims process focussed on land ownership and use, wildlife management and money; minimal attention was paid to social issues such as education, health and welfare. Citing limited capacity to manage the complex processes involved, Ottawa was initially only willing to negotiate six claims at a time.

Widespread dissatisfaction – Indigenous leaders found the In All Fairness title ironic – led Conservative DIAND Minister David Crombie to establish a task force, headed by Murray Coolican, charged with examining the comprehensive claims policy. The "Coolican Report," Living Treaties, Lasting Agreements, "recommended abandonment of cash and land deals, and a wholesale broadening of the land claims policy to allow for the negotiation of social, political and cultural issues. It recommended also that land claims settlements affirm, rather than extinguish aboriginal rights" (Fenge & Barnaby, 1987, p.13). Ottawa's revised policy, the 1986 Comprehensive Land Claims Policy (Minister of Indian Affairs and Northern Development, 1986) offered some modification of the 1981 policy, most notably, perhaps, the abandonment of the requirement for blanket extinguishment of Aboriginal rights, but it stopped well short of the Coolican Report principles.

In 1995, the Liberal government's recognition of "the inherent right to self-government" included willingness to entertain both self-government demands and land claims at the same negotiating table. This fundamental shift opened the way for very different claims processes and settlements, exemplified in the Tłı̨chǫ Agreement and the Labrador Inuit Land Claims Agreement, both of which include far-reaching self-government provisions.

Although federal claims policy is constantly under review, little of major significance has changed since the 1990s. A 2014 paper, Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights (Aboriginal Affairs and Northern Development, 2014, p.3) described as an "interim policy," put forward no substantial proposals for modifying either the process or the outcome of claims negotiations.

In January 2019, the Liberal government announced, without going into specifics, that it was working towards a sweeping revamp of policies on comprehensive claims and self-government, to be in place by June 2019. Indigenous leaders, some of whom disparaged the plan as "White Paper 2.0," pushed back strongly, calling for an Indigenous-led process. At an Assembly of First Nations forum in May, Crown-Indigenous Relations and Northern Affairs Minister Carolyn Bennett bowed to pressure and abandoned the plan. Officials, she said, were now working on "a 'directive' to guide federal negotiators at dozens of tables discussing modern

treaty and self-government agreements with First Nations." (Barrera, 2019) No timeline was specified.

A change of great import was announced in the March 2019 federal budget. Prior to the announcement, Indigenous claimant groups, typically heavily outgunned by Ottawa in terms of expertise and financial wherewithal, were able to pursue claims by virtue of loans from the federal government. These loans, which often mounted into the millions, sometimes tens of millions, had to be repaid out of claims compensation monies once the claims were finalized. At least one First Nation abandoned its claim at least in part because of its calculation that the loans it would need to repay exceeded the money it could expect from its claim. In a major policy reversal, the budget promised to forgive existing loans and to return to claimant groups the value of loans they had paid off. Estimates were that this would amount to $1.4 billion, including $938 million in fiscal 2018-19 alone (Minister of Finance, 2019).

Process

Some noteworthy changes have occurred in the claims process since the 1970s, such as Ottawa's acceptance in 1995 of self-government as an integral element of claims negotiations; the enhancement of the territorial governments' role in the process, from little more than observers to key partners; and the recent announcement of loan forgiveness. In most respects, however, the process remains much as it was when the claims policy was first enunciated.

Most significant perhaps, is the federal government's continuing preeminent role in all aspects of the process. In effect, Ottawa sets the rules of the process and retains final decision-making power over proposed settlements. At the outset, the federal government determines whether to even accept a claim for negotiation; claimant groups are required to provide extensive information to Ottawa on subjects such as use and occupancy of traditional lands.

Once the federal government accepts a claim for negotiation, a framework agreement is developed, setting out the basic issues and the process to be followed. As in other phases of the process, Ottawa, the claimant group, and the provincial or territorial government involved must all approve the framework, though Ottawa is the dominant player. Eventually, unless negotiations break down, an agreement-in-principle (AIP), emerges. The AIP, which is not legally binding, forms the basis for thrashing out formal language in a final agreement. The tentative agreement requires the passage of enabling legislation in Parliament and in the territorial or provincial legislature as well as a ratification vote by members of the claimant group. More than one tentative agreement has been derailed when ratification failed.

Summarizing the process in this way might seem to imply a quick and straightforward process. The reality is far different. The James Bay and Northern Quebec Agreement may have been settled in a remarkably short period of time, but many subsequent claims took two decades or more to come to fruition, with many stops and starts along the way. And some, such as the Labrador Innu claim, first put forward in 1977 (though not accepted until 1991), are still under negotiation.

A finalized claim is a daunting document, running sometimes to hundreds of pages of dense legal language – which on occasion (often by design) lacks clarity on important issues. Critically important are the accompanying implementation plans, which set out in extensive detail which parties to the claim are responsible for fulfilling which provisions, funding levels, accountability mechanisms and the like. Most cover the first decade of the claim; re-negotiation is often fraught as the parties try to rectify what they see as shortcomings and problems in the claims or implementation contracts. Many older claims no longer operate under implementation contracts but instead have transitioned to non-binding implementation plans.

What, then, do comprehensive claims entail?

Comprehensive claims – Common provisions

Provisions of the finalized comprehensive land claims across the North vary a good deal depending, among other things, on the federal government's policy at the time, the objectives and priorities of the Indigenous claimant groups and the particulars of the lands and governance issues subject to claims. Each settled claim has unique provisions, but certain features are found in all claims. In return for relinquishing Aboriginal title to their traditional lands (but not other Aboriginal rights) to the Crown, claimant groups receive:

- Cash: Ottawa pays substantial amounts of money over a specific period ($1.14 billion over 14 years in the case of the Nunavut claim) for the land, including for past usage. These monies are paid to the organization representing the claim beneficiaries and invested in trust funds and economic development projects. The interest generated is used to fund social, cultural and political activities.

- Title to land: Ownership of specific parcels of land is formally vested in the Aboriginal organization (again, to be held in common for all beneficiaries). Total land quantum ranges from about 15 per cent to nearly 30 per cent of the total "settlement area." A proportion of this land includes subsurface rights; this is significant since land ownership in Canada does not normally include rights to the subsurface. Specific lands are selected by the claimant group in negotiations with government, on the basis of economic potential, cultural and spiritual importance, environmental sensitivity, and related factors.

- Access and harvesting rights: The rights of claim beneficiaries to travel on and to hunt and fish throughout their traditional lands is affirmed, subject to conservation measures, safety issues and the like.

- Governance commitments: Early settled claims typically included federal commitments to negotiate wide-ranging self-government regimes and general frameworks for the negotiations. Since Ottawa agreed to negotiate self-government alongside land claims in 1995, some land claim agreements have included extensive self-government provisions.

- Co-management boards: Each settled claim provides for the establishment of a suite of tri-partite boards, featuring guaranteed Indigenous participation, dealing with wildlife, land-use planning and environmental regulation.

In addition, each claim includes a host of miscellaneous provisions and benefits, ranging from royalty arrangements to preferential hiring in government to guaranteed participation in the creation and management of national parks.

Implementation issues

For Indigenous Peoples, finalizing a comprehensive land claim, though a long, arduous process, by no means represents the end of the journey. Experience has shown that ensuring full and proper implementation of claim provisions can be every bit as difficult – and important – as settling claims. Frustration with Ottawa's implementation failures led in 2003 to the creation of the Land Claims Agreements Coalition, an organization that brings together many of the Indigenous governments and organizations with finalized claims to increase public awareness of land claims and to push the federal government on a range of implementation issues.

Other contributions to this issue examine the challenges involved in ensuring that Ottawa lives up to its implementation responsibilities. Suffice it to say here that proper implementation is necessary to fulfill the promise of comprehensive land claims. ◉

Graham White is Professor Emeritus of Political Science, University of Toronto. His book on co-management boards in the three territories will be published in the Spring by the University of British Columbia Press.

Notes

1. For more detailed accounts a good source, with links to a wide range of documents and other materials, is the website of the Land Claims Agreements Coalition (www.landclaimscoalition.ca). See especially "Modern treaties 101: A crash course." See also Fenge (2015).
2. This section only considers a few highlights in the evolution of federal claims policy. For a more extensive discussion, see Fenge, "Negotiation and implementation."
3. See Chapter 3: Indigenous land rights and cabinet decision-making in Canada (1945-1973).

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Power and politics: Financing the spirit and intent of modern treaties

Frances Abele, Fahad Ahmad, & Caroline Grady

Modern treaties open a new relationship between Indigenous signatories and the Crown. Financial arrangements are a central feature of this evolving relationship for their symbolic and practical importance to the relationship and because they may empower, restrict or distract from the essential process of post-agreement nation-building. Like other features of contemporary nation-to-nation, government-to-government relationships, financial arrangements remain a work in progress – shaped and overshadowed by the imbalance of power between Indigenous Peoples and nations, and the Crown.

Financial arrangements are among the most complex and varied provisions of modern treaties and self-government agreements. In this introductory report on our research for the financing theme of the Modern Treaty Implementation Research Project we offer an inventory of financial arrangements in modern treaties along with a brief analysis of how the negotiating relationship has evolved over time. We conclude with a few encouraging words about further research opportunities to address some of the ways in which these arrangements could be improved.

The term "modern treaty" refers to the comprehensive land claim agreements negotiated between the Crown and Indigenous authorities since the mid-1970s. Land claim agreements have at times been accompanied by self-government agreements, some of which were negotiated at the same time (in the same document) while others have been negotiated separately. The reason for this variation lies in federal policy. Until the mid-1990s, federal negotiators explicitly excluded discussion of any new political arrangements for Indigenous nations (Drury, 1980). The few agreements negotiated under this constraint thus lack a full expression of self-government. However, despite the constraint the Indigenous parties were able to make some headway on governance – for example by entrenching substantial co-management powers in the agreements. Under pressure from evolving jurisprudence (particularly Sparrow and see Canada, 1993), the federal prohibition on negotiation of governance arrangements was reversed in 1995 with affirmation of the inherent right to self-government.

Shifting federal policy has thus created four sorts of outcomes. Some signatories of land claim agreements have gone on to negotiate "companion" self-government agreements (for example, the Sahtu Dene and Métis Comprehensive Land Claim Agreement), some new treaties have included self-government provisions (such as the Labrador Inuit Land Claims Agreement), land claim agreements have been negotiated without self-government agreements (such as the Nunavik Inuit Land Claims Agreement), and finally, stand-alone self-government agreements, both comprehensive and sectoral, were reached. In this discussion, our focus is on the first three of these outcomes – modern treaties, with and without self-government provisions, negotiated at one table or consecutively. We have not investigated stand-alone self-government agreements.

The financial components in modern treaties include cash payments for lands ceded by Indigenous nations, treaty implementation funding, resource revenue sharing mechanisms with federal and/or provincial governments, and economic opportunities for business development. Modern treaties also include provisions for funding specific activities such as the hunter support program in the James Bay and Northern Quebec Agreement, co-management boards in several agreements, the fisheries fund in the Nisga'a Final Agreement and the Tsawwassen First Nation Final Agreement as well as property tax assistance in the Tłı̨chǫ Land Claim and Self-Government Final Agreement. In the exceptional case of Nunavut, their agreement provides for the creation of a new territory, adding federal-territorial fiscal relations to an already complex arrangement. For reasons of space, we note but do not discuss these specific provisions and the connections among federal-territorial fiscal relations and treaty funding arrangements. These important matters will be discussed in future publications.

The description of fiscal arrangements below is based upon a reading of the revised (latest versions of) texts of all existing land claim and self-government agreements. We have not yet examined additions, amendments, subsequent agreements, or for that matter, actual practices. The original texts

	Year signed	First Nation	Provincial/ Territorial location	Resource revenue sharing provision in original MT
Modern Treaties with SGAs	1995	Teslin Tlingit Champagne and Aishihik Nacho Nyak Dun Vuntut Gwitch'in	Yukon Yukon Yukon Yukon	Yes Yes Yes Yes
	1998	Little Salmon/Carmacks Selkirk Tr'ondëk Hwëch'in	Yukon Yukon Yukon	Yes Yes Yes
	2000	Nisga'a	B.C.	No
	2002	Ta'an Kwach'an	Yukon	Yes
	2004	Kluane	Yukon	Yes
	2005	Kwanlin Dun Tłı̨chǫ Labrador Inuit/Nunatsiavut	Yukon N.W.T. N.F. & Labrador	Yes Yes Yes
	2006	Carcross Tagish	Yukon	Yes
	2009	Tsawwassen	B.C.	No
	2011	Maa-nulth	B.C.	Yes
	2013	Yale	B.C.	No
	2016	Tla'amin	B.C.	Yes
Modern Treaties without SGAs	1975	James Bay Northern Quebec	Quebec	No
	1978	Northeastern Quebec	Quebec	No
	1984	Inuvialuit	N.W.T.	No
	1992	Gwich'in	N.W.T.	Yes
	1993	Nunavut	Nunavut	Yes
	1994	Sahtu Dene and Metis	N.W.T.	No
	2008	Nunavik	Quebec	Yes
	2012	Eeyou	Quebec	Yes
Standalone SGAs	1986	Sechelt	B.C.	No
	2005	Westbank	B.C.	No
	2014	Sioux Valley Dakota	Manitoba	No
	2015	Dél̨ı̨ne	N.W.T.	No
Sectoral SGAs	1999	Mi'kmaw Kina'Matsui (Mi'kmaq Education Acts)	Quebec	No
	2018	Anishinabek Nation Education Agreement	Ontario	No

Table 1: Modern Treaties (MTs) and Self-government agreements (SGAs) (Source: CIRNAC, Final Agreements and Related Implementation Matters, https://www.rcaanc-cirnac.gc.ca/eng/1100100030583/1529420498350)

of the treaties are important historical documents in themselves. They reflect the results of negotiations among over 30 Indigenous Peoples and nations, six provinces and territories, and the federal government. As a set, the agreements reflect the compromises reached over forty years between priorities of Indigenous nations and Peoples and those embodied in Canadian public institutions – and taken together, form an important part of the framework of Canadian and Indigenous nation-building.

Financial arrangements in modern treaties

Cash payments

All of the modern treaties include cash payments in compensation for lands ceded to the Crown. These tax-exempt funds are transferred at intervals over a substantial period. For example, the 1984 Inuvialuit Final Agreement provides for $45 million (1977 dollars) to be paid to the Inuvialuit Regional Corporation in installments during 1984-1997, while the 1993 Nunavut Agreement mandates payment of $1.173 billion over 14 years to Nunavut Tunngavik Incorporated (NTI). In British Columbia, the 2016 Tla'amin Final Agreement, provides for a total of $41 million to be dispersed over 10 years. The Yukon Umbrella Final Agreement stipulates a value of $242.673 million (1998 dollars) is to be dispersed among the different Yukon First Nations. The large range in amounts of capital transfers is apparently loosely related to population size of a nation and, of course, reflects the rate of inflation.

As the cash transfers are compensation for ceded land rights, they are meant to create a capital fund that the Indigenous parties could use as they choose – a means to build economic self-determination. They were not meant to replace funding for programs that are provided to other citizens of Canada from public funds. Treaty-holding organizations have made portfolio investments and they have also purchased or founded regional airlines, local transportation and power companies, fisheries enterprises as well as other businesses. Treaty-holding organizations have also chosen to subsidize social initiatives that are not meant to be profitable. For example, NTI funds bereavement and compassionate travel programs, an Elders' benefit program, a scholarship, and hunter support programs, in part with revenue from cash compensation funds.

There are also two aspects of federal negotiating policy that have significantly reduced the value of the capital transfers: the system of issuing loans against a final settlement to provide Indigenous parties with the means to negotiate, and the failure to include the cost of treaty implementation in some early agreements' overall financial provisions.

Since no Indigenous nations or Peoples have been in a position to fund their own land claim preparations and negotiations, they have relied upon federal funding advanced as a loan against a final settlement. Indebtedness grew over the decades of negotiation, placing pressure on negotiators to settle and leaving a legacy of post-settlement debt for the new governments and organizations. This constraint was removed in the March 2019 federal budget, which announced the federal intention to forgive outstanding loans and to return to Indigenous signatories the amounts they have already paid back. The funds are substantial; according to Budget 2019 amount to $1.4 billion over seven years, with $938 million to be dispersed by end of fiscal 2018-19.

If negotiations require funding, so does implementation of the agreement – as these require further internal discussion and deliberation, research and development, and the establishment of new institutions. The first modern treaties (the James Bay and Northern Quebec Agreement and the Inuvialuit Agreement) include no mention of implementation funding, an omission that has forced these early signatories to use their capital for this purpose. Subsequent agreements do include implementation funding, though the amounts provided vary wildly. For example, the 1993 Yukon Umbrella Final Agreement provides a total of $4.5 million for implementation to the Council for Yukon Indians and individual First Nations, while the 2005 Nunatsiavut Agreement includes provision for federal payments of $190 million over nine years for implementation of the agreement. One might ask how these amounts are determined, and what precisely counts as "implementation" as distinct from program development and administration.

Funding of treaty negotiations

Treaty negotiation is expensive. Funding is required for research, internal consultation, legal and other expertise, analysis and travel as well as salaries for teams of negotiators who have often worked over many years. Besides the financial cost, there are important costs to personal and family life imposed by long negotiations, frequent absences, and the pressures of negotiating the future of one's people.

As noted above, the financial costs of negotiation will no longer be borne by the Indigenous parties. The new terms for receiving negotiation funding, however, are stringent. They require that Indigenous parties qualify for funding against a list of nine criteria, such as departmentally approved work-plans that define "measurable objectives" and evidence

of sound financial management practices (audits). Payments are based upon deliverables outlined in contribution agreements.

The distribution of funding is envisioned as follows, with no rationale offered to explain the amounts:

Aggregation	Recognition of Rights Discussions		Self-Government		Comprehensive Claims and Treaties	
	Urban	Remote**	Urban	Remote**	Urban	Remote**
Indigenous communities (typically under 1500*)	250	300	350	400	1500	1700
Indigenous communities (typically over 1500*)	550	650	1000	1200	1700	2000
Treaties/Regional	1000	1200	2000	2300	3500	4000
Provincial	1750	2000	2500	3000	4000	4600

Table 2: Negotiation Funding Levels (000s/year) as at 2019 (adapted from https://www.aadnc-aandc.gc.ca/eng/1386360760450/1386360857470)

*The department will determine the most appropriate source for the population figures depending on the Indigenous group which has responsibility for such statistics.

**Where applicable, maximums are higher to allow for travel costs in remote regions of the country.

Revenue from land ownership and resource development

Revenue from Indigenous lands and the regulation of development on these lands is a topic of enormous complexity. Current practices have deep roots in the history of colonization and settlement. The negotiations leading up to Confederation in 1867 (from which Indigenous nations were excluded) assigned revenues from Crown lands to the provinces. Although in the late 19th century resource development taxation was not seen as an important source of revenue, it has grown to be a major part of the income of many provinces. Once Indigenous jurisdiction and rights to revenue are recognized, it inevitably entails some loss to provincial and – in the territorial North – federal and territorial orders. After long years of agitation and negotiation by territorial governments for "province-like" jurisdiction (Dacks, 1990), the public governments of the Yukon and N.W.T have benefitted from devolution of land and resource management responsibilities and access to revenue.

All comprehensive land claim agreements identify lands for which the Indigenous parties hold certain surface and/or subsurface rights, variously specified. The first comprehensive claim agreement that was negotiated, the 1975 James Bay and Northern Quebec Agreement, states that all lands in the settlement area remain provincial public lands, though on "Category I" lands, the Indigenous parties' consent is required for any new development. There is no mention of revenue from development on these lands. In 2002, however, the Cree Nation negotiated an accord with the province that provides for shared resource revenues from hydro-electric, mining, and forestry operations on Cree territories. Payments from these sources will reach $70 million a year for 50 years (Coates, 2015, p. 17). Unlike the 1975 Agreement, the 2002 accord is not constitutionally protected.

In all subsequently negotiated modern treaties, treaty-holders have negotiated the capacity to tax development on selected lands. In addition to revenue from development on their own selected lands, 21 out of 26 modern treaties (Yukon agreements counted separately) include resource revenue-sharing provisions concerning revenue from other parts of their original territory (see Table 1). As an example, under the Tłı̨chǫ Final Agreement, the territorial government agrees to pay the Tłı̨chǫ Government, in each calendar year, 10.429% of the first $2 million of annual resource revenues from the Tłı̨chǫ traditional territory and 2.086% of any additional annual revenues.

Resource revenue from subsurface resources has been the subject of contentious negotiations. For example, the Yukon Umbrella Final Agreement defines Category A lands as those over which Yukon First Nations have complete surface and subsurface ownership and Category B lands as those

where Yukon First Nations only own surface rights. Yukon First Nations receive 100% of the resource revenue from category A lands but share resource revenue with the territory on category B lands. The agreement specifies that, for the first $2 million in annual resource revenue, Yukon First Nations will receive 50% of the difference between crown/territorial royalty and Yukon First Nation royalty. As per the Crown interpretation, if a Yukon First Nation already owned revenue-generating category A land, then, it would count toward First Nation royalty, thus reducing the amount available to other First Nations owning category B lands. In 2018, after long-drawn negotiations, this problematic interpretation was updated, so that now a nation's revenues from category A lands will not affect Crown royalty payments for other First Nations.

These are a few examples of the ways in which the future of Indigenous self-government has been shaped by apparently technical decisions related to finances and interpretation of financial clauses in agreements.

The challenges of financial arrangements in self-government agreements

As we noted earlier, federal opposition to negotiating self-government with Indigenous nations and Peoples dissolved after some landmark Supreme Court of Canada decisions that interpreted Section 35 of the Constitution Act to include an inherent right of self-government. Since 1995, it has been possible for modern treaties to include self-government provisions. Some Indigenous nations have chosen to negotiate a land claim and self-government in sequence, while others have chosen a single agreement to cover both (see Table 1 above).

Canada's Fiscal Approach for Self-government Arrangements policy (2015) commits the Crown to "consistent and equitable allocation of federal funding" under a fiscal methodology to support governance, treaty implementation, and social services, among other categories of funding (and see Assembly of First Nations and Canada, c. 2018). The methodology also specifies offsets to federal funding based on income that Indigenous governments may generate from resources revenues, taxation, economic development projects, and other fees, together called "own source revenue" (OSR). Current funding arrangements under self-government are described in the following figure:

Numerous issues have arisen in the application of Canada's fiscal methodology for self-government. One of the components of the fiscal transfer from the federal government is supposed to enable Indigenous self-governments to provide adequate social services, healthcare, and education offerings for residents of

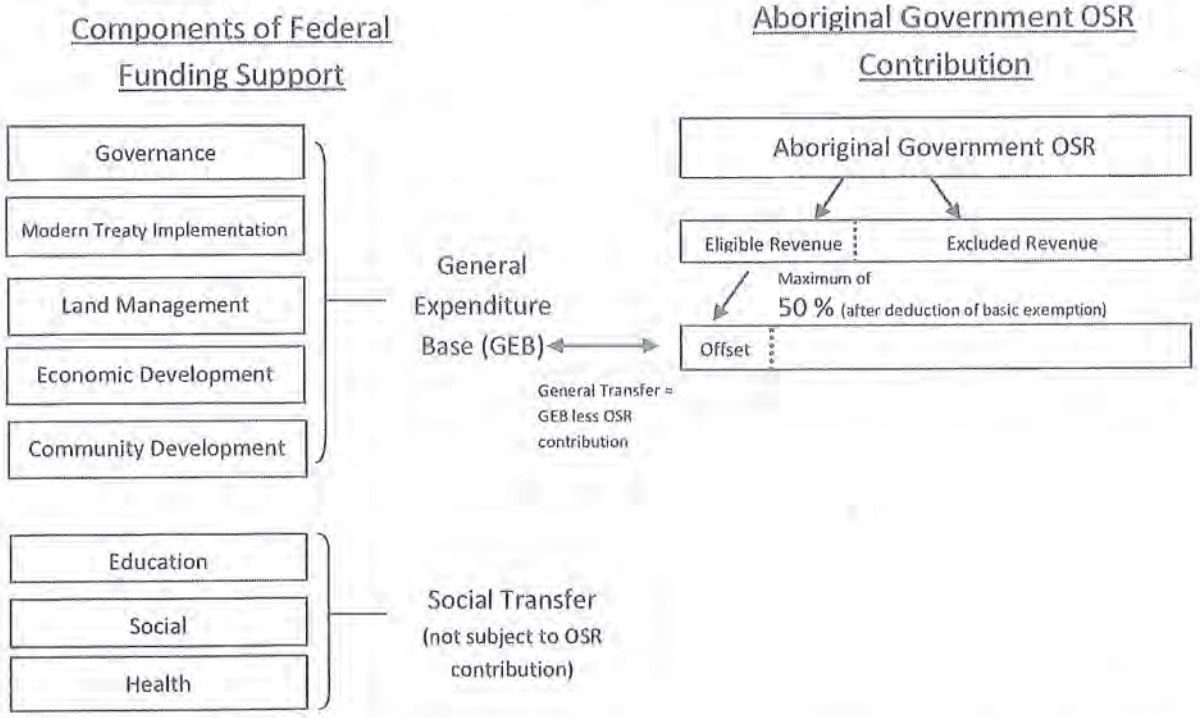

Figure 1: Fiscal Transfer Model specified in Canada's Fiscal Approach for Self-Government Agreements, 2015 (https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/canadaS-fiscal_approach_1438090806392_eng.pdf)

their nation and, more generally, develop public infrastructure as they assume responsibilities that previously lay with federal or provincial governments. Modern treaties and self-government agreements specify that the social transfer should allow Indigenous self-governments to provide these public services at levels that are "comparable" to municipal and provincial services in other (non-Indigenous) jurisdictions. However, the levels of funding in the fiscal transfer continue to be insufficient and do not take into account the need for services to meet emerging community needs or the possibility that original baseline funding was inadequate (McCarthy, 2013). In assessing the Labrador Inuit Land Claims Agreement, a 2015 report by the Auditor General of Canada noted that insufficient funding levels to the Nunatsiavut government limited the government's ability to address the housing needs of Nunatsiavut residents.

Another point of contention relates to own source revenue (OSR). Fiscal agreements assume Indigenous self-governments will be able to generate OSRs at a steady annual pace and based on these projected OSR calculations, the fiscal transfer amount is clawed back over time. Based on OSR projections, in the sixth year of an agreement, 3.3% of the fiscal transfer is clawed back, and after 20 years, the clawback rate is 50%. However, the assumptions about OSR are based on an unrealistic understanding about the sources of revenue available to Indigenous self-governments and how quickly emerging Indigenous self-governments will be able to generate OSR (McCarthy, 2013). These issues combined with the inflexible nature of the agreements essentially translate to less financial resources available to Indigenous self-governments for purposes of governance, treaty implementation, and other important functions.

In conclusion

It is evident that the recent negotiations about how to fund self-government are in effect replicating some of the negotiations that took place in advance of Confederation, and subsequent agreement among Canadian elites about how public finance would be managed in the new country of Canada. It is likely that the 2018-9 negotiations will be just as consequential for Indigenous governments as were those of a century and a half ago for the other two orders. As was no doubt the case in the 19th century, the negotiations have taken place under the umbrella of a fairly clear sense of direction, but among the weeds of detail and practice.

In 2017, an updated mandate letter to the Minister of Indigenous Affairs directed her to:

> *deepen work with the Minister of Finance to establish a new fiscal relationship with Indigenous Peoples that moves towards sufficient, predictable, and sustained funding for communities, a renewed economic and fiscal relationship that ensures nations have the revenue generation and fiscal capacity to govern effectively, and to provide programs and services to those for whom they are responsible.*

This direction has led to high level negotiations, memoranda of understanding, and negotiations about detailed procedures at a number of working-level tables. Working-level negotiations have consumed many months of effort by technical staff from across the country and are expected to bear fruit before the next election. Whatever the result is, it is unlikely to be the end of discussion.

For the community of scholars and practitioners who are attentive to the power of public finance to shape human affairs, there is a need for much more research on fiscal matters to support the negotiation of amendments to the fiscal federation that lives up to the grand purposes of reconciliation and Indigenous resurgence. We are some distance from that goal. There remains a lack of a common understanding of jurisdiction and service comparability between the Crown and Indigenous governments. Moreover, the federal government views (and wishes to cost) Indigenous governments as municipalities when, in fact, the scope of authority and responsibilities of Indigenous governments makes their governance function uniquely complex and well beyond the scope of municipal government. These discrepancies are also evident in the funding of Indian Act governments and over the generations it has proven very difficult to remedy. It is important that the current processes to address funding of the Indigenous governments whose relationship with the federal government is shaped by modern treaties address this problem before it is institutionalized. There are many related questions, such as, for example, determination of adequate funding levels for the smaller nations who are parties to treaties, recognition that "baselines" drawn from past practice may simply institutionalize historical inequality, and recognition of Indigenous nations' entitlement to the full array of funding available to the provincial order of government, including such things as special purpose infrastructure funds that are not "in the constitution" but are necessary to public well-being. The federal purse, being the most capacious, must be open to this. ◉

Authors

Frances Abele is Chancellor's Professor in the School of Public Policy and Administration, Carleton University.

Fahad Ahmad is a nonprofit consultant and a PhD candidate at the School of Public Policy and Administration at Carleton University. He is a member of the team researching treaty financing and fiscal relationships on the SSHRC funded Modern Treaties Implementation Research Project.

Caroline Grady is Southern Tutchone and is a member of the Ta'an Kwäch'än Council. She is currently an LL.M. candidate at the University of Victoria.

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A new relationship? Reflections on the collaborative federal fiscal policy development process

Rosanna Nicol, Adam Perry, Bobby Clark, & Martin Papillon

No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation and partnership.

— Justin Trudeau, Mandate Letter, Minister of Crown-Indigenous Relations, October 2017.

Canada recognizes that implementing this new fiscal relationship requires systemic change within the federal government and the way it works with Indigenous governments. This renewed fiscal relationship represents an important step in that direction.

— Paragraph 17, Canada's Collaborative Self-Government Fiscal Policy, January 2019.

When the Trudeau government first came to power in 2015, "renewing" the relationship with Indigenous Peoples was a key priority. Indigenous organizations and governments, the new Prime Minister promised, would be considered equal partners in the development of policies and legislation that directly concern them. The collaborative federal fiscal policy development process is one example of this new approach to policy making. Under this process, representatives of self-governing Indigenous governments have been working with federal officials to rewrite the federal fiscal policy on how self-government is financed.

As of January 2019, the process has produced the new Collaborative Federal Fiscal Policy for Self-Government and an initial batch of technical annexes; it is now entering its second phase with work on the remaining annexes covering a range of topics from costing the expenditure need of an Indigenous government for lands and resource management to a new approach for addressing an Indigenous government's fiscal capacity within the federal transfer calculation. This policy guides federal negotiators in their negotiations with Indigenous governments to develop legally binding fiscal agreements and associated transfers of funds. In contrast to previous policy, the framework presents a transparent costing methodology based on what it actually costs to run a self-government, rather than an opaque formula approach. It includes an interim solution to the federal practice of clawing back federal transfers if an Indigenous government generates its own revenue, even if still severely underfunded, and it includes a new commitment and approach to closing the gaps in infrastructure, housing and social wellbeing experienced in self-governing communities.

Significant work remains to be done on the policy, and it is too soon to pass definitive judgement on the outcome of this process; however, it is possible, after three years of sustained engagement, to draw some lessons from the standpoint of Indigenous governments. What are the main challenges Indigenous government representatives have faced in this process? Is this truly a joint policy-making exercise or is it merely, as King and Pasternak have argued in a report on the various "tables" set up by the federal government, window-dressing for the status quo?

We build on some of the authors' close engagement in the collaborative fiscal policy process to offer an insider's view of the exercise so far. We highlight positive innovations in the process itself, which have led to less adversarial exchanges and a higher level of trust and openness between officials of the parties. However, at the time of writing, many

of the policy changes resulting from this process remain to be implemented and some of the more difficult discussions on the structural elements of Indigenous governments' financing have yet to take place. We remain cautiously optimistic about the potential of this collaborative approach to transform intergovernmental relations between Indigenous governments and federal departments. If this policy work results in improved fiscal relationships that accurately reflect the real costs of managing jurisdictional authority and administering services, there is greater potential to shift these intergovernmental relations out of the courts and into truly working relationships.

Our analysis is informed in part by participating in the fiscal policy development process, contrasted with knowledge and experience of decades of frustrations in the negotiation and implementation of modern treaties and self-government agreements. The analysis is also informed by a pragmatic approach to Crown-Indigenous relations, under which we assume transformative change will not occur in one day. Fundamental obstacles remain for developing government-to-government relations based on mutual respect and relatively equal bases of power, but we believe small advances like those achieved in the collaborative fiscal process should not be dismissed out of hand. Faced with a long history of colonial dominance which stripped them of many aspects of culturally-informed governance, coupled with chronic underfunding of governance responsibilities, many Indigenous governments have an interest in looking for all possible opportunities to make gains, even if they are incremental in nature. In this view, small steps over time may lay the groundwork for fundamental shifts. At the heart of inspiration for change are the citizens of the Indigenous governments, whose daily lives are deeply affected by intergovernmental relationships. For many communities struggling with the ongoing impacts of colonization, even the smallest of incremental gains may lead to improvements in peoples' everyday lives. For that reason alone, this work is worth the effort.

Seeking a renewed fiscal relationship

Modern treaty and self-government signatories experience ongoing challenges in implementing their agreements, in large part due to inadequate funding. The refusal of Canada to ensure sufficient funding to fulfil its treaty commitments presents a significant challenge. For example, Canadians are entitled to comparable public services regardless of where they live, yet communities within Indigenous government jurisdiction suffer significant deficits in public infrastructure (e.g. water treatment facilities), in housing, and in access to education and health services. Underfunding can also limit an Indigenous government's ability to adequately participate in environmental and resource management decisions and processes, as required in their agreements and treaties. This practice of underfunding was criticized in a number of reports over the years, including from the Auditor General of Canada, the Senate of Canada, and the United Nations Special Rapporteur on the Rights of Indigenous Peoples. The 2008 Senate Committee Report states that "time and again, witnesses told us that far from achieving a level of fiscal certainty, they experience chronic problems in securing the provision of timely, adequate funding to meet the various undertakings set out in the agreements. Funding shortfalls limit the ability of Aboriginal signatories to properly discharge their treaty responsibilities and restrict enjoyment of the rights promised to them under their Agreements."

For signatories, disputes over what constitutes adequate financing consume time and resources that would be better used to implement agreements and improve the quality of life of their citizens. A number of conflicts on implementation funding have led to court cases, some forcing Canada to revise its approach in negotiating bilateral agreements with treaty signatories, and, in other instances, settle significant out of court settlements, as was the case with the Nunavut Agreement.

The election of the Trudeau Liberals created an opportunity to shift the focus towards a more collaborative approach to addressing implementation issues, and the launch of the collaborative federal fiscal policy development process was part of this shift. This process was meant to be a new relationship in action: Indigenous government and federal officials were to share the pen in drafting a new federal fiscal policy for self-government, as equal partners. Most of the officials involved had known each other from years of working together, often in challenging and adversarial circumstances. This presented an opportunity to work together in a new way, requiring a level of trust and transparency beyond what the parties were accustomed to.

Overview of the collaborative federal fiscal policy development process

Meetings between the Minister of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and the Land Claims Agreements Coalition leaders and subsequent meetings with Yukon chiefs

led to an agreement to pursue a collaborative policy development process. Officials were given an initial six-month timeline to trial this new way of working together and demonstrate whether it held potential. In May 2016, Indigenous governments and federal representatives gathered in Vancouver to lay the foundation of the work ahead. Technical working groups were formed to develop detailed policy elements, such as defining principles and policy scope for the process; addressing issues of comparability; establishing a transparent method for assessing the expenditure need of self-government based on actual historical costs of implementing self-government; and developing an approach to revenue and cost sharing. It was agreed that federal and Indigenous government officials would share the work of drafting relevant documents. Recognizing that the task of helping Canada rewrite its fiscal policy was above and beyond the scope of Indigenous governments' regular intergovernmental work, Canada agreed to finance portions of this process. These meetings were attended by a variety of professional advisors, technical experts, Indigenous government staff, and the occasional elected leader. On the federal side, working group members consisted mostly of senior staff within CIRNAC, policy analysts and advisors, director-level involvement as needed, and regular check-ins at the senior assistant deputy minister level.

The first seven months focused on drafting principles for the new policy, but it became clear that developing principles in the absence of tangible policy change was challenging and perhaps not useful. In January 2018, work shifted to building a model of expenditure need for self-government, based on treaties and agreements, operational requirements, existing benchmarks, and the expertise in the room. For the next year, Indigenous governments and federal representatives worked closely, organized into six working groups and a steering committee. These groups met monthly in-person, and documents were drafted via email and teleconference between meetings. The pace and volume of materials were intense as the group worked to meet deadlines often dictated by windows of opportunity within the federal system for Cabinet and budgetary review.

To date, the process has yielded the Collaborative Federal Fiscal Policy for Self-Government. The new policy includes two elements: a commitment to ongoing and sufficient fiscal resources to provide comparable public services (a financing approach) and a framework for achieving equity in socioeconomic outcomes (the "gaps-closing" element). The policy details a method for costing governance and administration expenditure needs for self-government; an approach for culture, language and heritage expenditure needs; an approach to funding infrastructure maintenance and replacement; an interim approach to addressing fiscal capacity, and a new framework for achieving equity in socioeconomic outcomes that focuses on social wellbeing and infrastructure. The new policy and its annexes were adopted by Cabinet and are reflected in the 2019 federal budget. Indigenous governments are presently renegotiating their respective fiscal agreements to reflect these policy changes. While critical work remains to complete the remaining annexes, the policy framework so far is an improvement over previous policy, chiefly in that it reflects approaches that acknowledge and incorporate actual governance costs and their variations between different signatory environments, while leaving space for bilateral negotiation as required by the agreements. The policy, if adopted and honored by Canada, will create a new and improved fiscal relationship.

Reflections on a dynamic process

The process is now entering its second phase, where the focus is on building out the remaining annexes that will provide details for implementing elements of the Collaborative Federal Fiscal Policy for Self-Government. While it may be too soon to pass judgement on the new policy and its impact over the long term, we can draw lessons from the process itself. The questions shaping this analysis include: Was this truly a joint policy-making exercise? If so, what could be described as success features, what challenges arose and how were these mitigated (or not)?

Gatekeeping

From the outset, we note that Canada set basic eligibility criteria for participation in the process. Canada opened the process to those Indigenous governments operating under comprehensive self-government regimes, whether connected to a land claim agreement or not. This has the effect of excluding signatories to land claim agreements that do not include self-government agreements and including self-government signatories, regardless of whether they have a land claim agreement. While there may be arguments in favor of this approach for particular expenditure need areas, it is notable that Indigenous governments and land claim agreement holders do not organize themselves this way. The distinctions created for this process are, in this respect, a false one, and one imposed by Can-

ada, which may have far-reaching consequences in terms of the inter-governmental relationship. This has also caused hurdles within the process, for example, recently, Canada has had to create an "add on" technical working group to engage directly with land claim agreement signatories that do not have self-government agreements, in order to develop an approach to financing lands and resources authorities held by modern treaty holders outside of self-government agreements.

Status, agenda-setting and mandates

While unequal power relations are often inevitable in a joint policy exercise, notably because of unequal resources and allocation of authority among the parties in relation to each other, the potential for a successful process is perhaps best achieved when partners are considered with equal status and value. This involves more than symbolic language. It involves a willingness to listen and to work on the basis of mutual agreement and consensus. The capacity to set the agenda is an important aspect of such policy-making, particularly if a process is intended to be transparent. If the agenda is set unilaterally by one of the partners or if the mandate of officials representing decision-making bodies is set too narrowly, it is hard to establish a process that can effectively develop solutions.

The early days of the fiscal process included difficult moments, when Indigenous government representatives had to push to make sure the openness expressed in high-level political statements was visible in the officials-level approach and mandate. Since then, much of 2017 was spent collaboratively setting the agenda – developing the framework of the new policy and getting direction to proceed. The Collaborative Federal Fiscal Policy sets out that co-developed agenda, yet the real test for meaningful collaboration will likely rest with developing annexes and finalizing costing approaches. For example, it will be important to watch if critical issues that Indigenous governments have always insisted need addressing are sidelined, specifically questions around access to revenues (e.g. from corporate income tax generated on Indigenous government's traditional territories) and how service population is defined when it comes to calculating the funding for service delivery (e.g. in the First Nation context, funding is often still based on Indian Act status rather than the Indigenous government's own citizenship list).

Building trust

A collaborative process requires a high level of trust between participants at the political and officials level. There is a long history of broken promises by Canada in treaty implementation, as evidenced by court cases, out of court settlements, and reports of Canada's Auditor General. Initially, participants experienced trust levels that were quite low. One worry on the side of Indigenous governments was that the "spirit and intent" of discussions would not be adequately reflected in decisions, since federal decision-makers were rarely in the room. There was concern that senior government officials with decision-making authority should demonstrate commitment to a meaningful process to address long standing problems with Canada's financing approach. One way that Canada signaled this commitment early in the process was placing a moratorium on own-source revenue claw-backs. Additionally, the interim funding announced in the 2018 federal budget was a confidence-building measure signaling that, while the policy development work was taking longer than hoped, Canada was committed to putting resources behind this. The 2018 budget funds provided support for increased funding for governance costs and initial funds for addressing gaps in infrastructure, housing and social wellbeing.

Perhaps the most inspiring and fruitful meetings in the process have been those where officials demonstrate an understanding of the benefits of building shared capacity and learning together. While the tone of meetings has varied depending on the nature of the work at hand, it has evolved over time away from a bargaining logic between established positions towards what we view as a problem-solving logic. The focus has been less on the respective positions of the parties than on finding innovative solutions to respond to collectively identified challenges. This iterative process is not only more effective at achieving results, it is also more conducive to establishing trust and positive working relationships. This could not have happened without clear support from the senior assistant deputy minister level within CIRNAC for department officials to engage in policy discussion transparently and without the usual limitation of needing prior higher-level approval before entertaining new ideas or approaches.

The willingness, especially from certain Indigenous governments, to have their representatives engage in the work of deepening perspectives and developing policy content and costing methodologies with federal representatives has been instrumental to creating this collaborative problem-solving environment. This is despite a hurriedly evolving

process whereby technical working groups meet by phone almost every day and over monthly week-long meetings. With this amount of time spent working together, significant collegiality has developed between Indigenous government and federal participants, fostering expectations of shared problem-solving. However, new faces at the table can disrupt this developing dynamic. Integrating new participants into the process is an important challenge that will likely grow as the process continues. The collegiality and the jargon that develops over years of working together, along with the sheer volume of material developed over time, presents a barrier to new participants, which can limit collaboration.

The process to develop the Collaborative Federal Fiscal Policy for Self-Government has been a uniquely multilateral process. Building trust and maintaining proper communication mechanisms within the Indigenous government caucus has been essential, albeit at times difficult to manage given the diversity of stakeholder involvement. The level of solidarity, support and information sharing is significant and promises to be a positive legacy of this process. Significant time in caucus is critical to build solutions that work for everyone. Indigenous government representatives must tactfully navigate the priorities and circumstances of their respective governments. Each Indigenous government has its bilateral relationship with the Crown as well as unique cultural and structural circumstances, including provincial and territorial government dynamics. The collective process has to be balanced with the bilateral relationships and negotiations that are required in self-government agreements. Overall, a balance has been struck between collective work and bilateral implementation. This has allowed Indigenous governments to achieve tangible gains, but whether it is the right balance is likely to be debated for years to come.

Keeping a narrow focus while building a whole of government approach

A key to success so far has been the ability to maintain discussions focused on mutually agreed goals that are ambitious but targeted enough to lead to concrete results. Occasionally this focus has been challenged by federal departments looking to use the fiscal process meetings to further their own unrelated initiatives. Indigenous governments, engaged in the process for the purpose of collaborating on developing a federal fiscal policy, have been clear that the process is not a "one-stop-shop" for federal engagement with self-government signatories. Such an approach risks undermining legally-protected (and in some cases constitutionally-protected) bilateral relationships. Using the fiscal policy process as a means to other ends also risks undermining the collaborative work ethic that emerged out of a discrete and relatively narrow focus.

The example of the work and effort required to build the trust within the fiscal process might provide a template for similar relationships across the various directorates, departments, and agencies, directly, or indirectly, involved in self-government implementation. The potential held by this approach is not uniquely relevant to Indigenous-Crown relations; all intergovernmental processes could benefit.

One lesson we take is that it is essential for federal government leaders such as deputy ministers, ministers, and prime minister, to understand this process so that their departments can learn from it and replicate it where possible, participate in it when appropriate and, most importantly, avoid duplication of work and efforts. The fiscal process has not yet proven entirely successful in building a coherent, whole of government approach. Despite efforts to bring key decision-makers from a range of departments to the collaborative table, federal representation is often limited to mid-level CIRNAC officials. It is then up to these representatives to ensure other departments and agencies are aware of discussions and commitments made. This is challenging for Canada, whose departments have historically worked in silos; thus, it remains vertical, rather than horizontal, in its approach to decision-making. Recent approvals of collaborative policy work have been encouraging, but improvements to federal internal coordination are urgently required to reduce working in silos. Self-government agreements are with the Crown, not with a particular department, yet the federal government has not organized itself in a way to recognize and uphold these commitments that cross-cut its current organizational structure. The resulting time-consuming duplication of efforts by various government departments needs to be avoided to ensure funding and human resources are utilized effectively.

However, there have been positive developments in bringing in a whole of government approach to the fiscal process, which have yielded results, especially with the Department of Finance and Statistics Canada. The Department of Finance is a key decision-maker within the federal government and its willingness to have representa-

tives participate in the process and raise concerns at the collaborative table (rather than afterwards behind closed doors) so that solutions can be developed together has been critically important and reflects a new approach. Similarly, Statistics Canada has recently become involved in some of the work around socioeconomic gaps, bringing a willingness to share information about the limitations to the current data landscape and improve access to data about their citizens for Indigenous governments. In the next phase of the process, as the work shifts to areas like heritage, fisheries, and housing, similar involvement of other federal departments will be necessary to ensure a whole-of-government understanding of and support for effectively implementing a new fiscal relationship.

Leadership and knowledge building

The collaborative fiscal process is resource intensive, requiring a high level of engagement for all parties involved. While capacity can be a challenge for Indigenous governments, this is also true for Canada. Much time and effort has been devoted to educating federal representatives about self-government and the roles, responsibilities, and expenditure needs of self-governing Indigenous governments. The process of correcting assumptions and misconceptions brought to the table by federal officials unfamiliar with self-government agreements has helped to achieve mutual understanding, and consequently a fiscal policy that respects the extensive responsibilities of Indigenous governments, their respective modern treaty or self-government agreements, and their unique circumstances.

To this end, Indigenous governments have offered their experience-informed analyses of implementation as a basis for innovative ideas for a more workable fiscal approach. Indigenous governments have used their skilled professionals, lawyers, economists, social scientists, and consultants, who bring a depth of experience on the issues that many federal officials simply do not have. Strong Indigenous leadership support for the process has been important to properly resource the process with the technical and experiential knowledge of implementation, which has often resulted in federal officials finding themselves responding to Indigenous-led solutions rather than proposing their own. In spite of this, the strength of collective Indigenous government voices and their accumulated knowledge and expertise has resulted in previously well-entrenched federal positions being challenged (although many remain).

Conclusion

For decades prior to the collaborative fiscal process, Indigenous governments have experienced lengthy difficulties in implementing their agreements in a context of inadequate fiscal agreements coupled with lack of understanding of treaties and agreements across most federal government departments. While there have been some false starts and many difficult conversations along the way, the collaborative fiscal process has been fairly successful. A federal fiscal policy is being developed through a process in which Indigenous government representatives are playing a key role in setting the agenda and developing policy solutions to the identified problems. Two major contributing factors include the trust that has been built between the officials involved, and the capacity of Indigenous government officials to meaningfully drive the process. It has been a joint policy-making exercise so far, and we will be watching closely to see that it continues.

The process has proved itself in terms of delivering the basis for the Collaborative Federal Fiscal Policy for Self-Government and the associated budget necessary for its implementation. It is too soon to say if this collaborative process will result in only incremental, though important, changes to the levels of federal transfers Indigenous governments receive and the resulting on-the-ground changes to the lives of their citizens, or whether it will be transformative on a larger, structural scale, affecting the Canadian federation and supporting the meaningful sharing of jurisdiction as set out in the agreements.

The success of the process may in fact reveal its relatively limited ambitions. The focus was, and still is, strictly on fiscal aspects of self-government implementation. While this narrow focus facilitated the development of a results-oriented approach with concrete, targeted goals, it leaves little space for questioning some of the other problematic aspects of the Crown-Indigenous relationship. To paraphrase King and Pasternak's previously cited study, the re-packaging of policy problems to focus on fiscal responsibilities and accountability is an effective way to avoid addressing fundamental concerns over jurisdictional rights and the protection of land and resources. If the genuine intent is to change the very foundation of the relationship, energy and focus must extend beyond fiscal renewal discussions. While we do not disagree with their analysis, in our view transforming the Crown-Indigenous relationship on a larger scale is ongoing work, and this collaborative fiscal process is a route to fulfill a specific relational goal within that effort.

The collaborative federal fiscal policy development process has resulted in concrete change and provides an example of successful joint policy making that could be emulated in other contexts. For many, change is not happening fast enough to improve the lives of First Nations, Métis, and Inuit. The pace of change is painfully slow. Improving relationships is complex, interpersonal, and will take time and this effort must be undertaken in many different ways. Having patience and making time to build positive working relationships is important for establishing and sustaining long term, transformative change. As the fiscal process transitions to its second phase, we remain cautiously optimistic that change is possible through patient hard work and commitment to working together. ◉

Authors

Rosanna Nicol works as a consultant in project management and facilitation at NVision Insight Group Inc. and is the assistant coordinator for Indigenous governments in the collaborative federal fiscal policy development process. She is a Rhodes Scholar with a Master's in Development Studies from Oxford University.

Adam Perry has a PhD in social anthropology and works for the Nisga'a Lisims Government as a data analyst. His academic interests include understanding societal and cultural change, aspects of rural social and economic development, and the political and social processes that exist in and between formal institutions.

Bobby Clark is the Director of Communications and Intergovernmental Relations with Nisga'a Lisims Government. He is the Chair for the Nisga'a Museum Advisory Committee and is a board member representing his home community of Laxgalts'ap on the Wilp Wilxo'oskwhl Nisga'a Institute (WWNI). He has a Bachelor of Arts in First Nations Studies from WWNI and the University of Northern British Columbia.

Martin Papillon is Associate Professor in the Department of Political Science at the Université de Montréal, where he is also Director of the Centre de Recherche sur les Politiques et le Développement Social (CPDS). His academic work focuses on multilevel citizenship and governance in the context of Indigenous-Crown relations in Canada.

Notes

1. Often called "own-source revenue" offsets, this previous policy was a major barrier to pursuing self-government. The new policy reframes it as "fiscal capacity" and includes a commitment to co-develop an approach that takes into consideration an Indigenous government's fiscal capacity. Until that time, an Indigenous government's fiscal capacity is not taken into consideration when calculating the federal fiscal transfer, which means Indigenous governments are able to focus additional resources on improving quality of life for their citizens (Paragraph 73-75 Canada's Collaborative Self-Government Fiscal Policy, January 2019). See also: https://nelliganlaw.ca/blog/indigenous-law/source-revenue-reconcili-action/
2. https://www.theglobeandmail.com/news/politics/close-the-gap-between-canada-and-its-aboriginal-people-afn-chief/article24430620/
3. See H. King and S. Pasternak, Canada's Emerging Indigenous Rights Framework: A Critical Analysis, The Yellowhead Institute, June 2018: https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf
4. Standing Senate Committee on Aboriginal Affairs, Honouring the spirit of modern treaties: Closing the loopholes. special study on the implementation of comprehensive land claims agreements in Canada, Senate of Canada, May 2008: http://publications.gc.ca/site/fra/394531/publication.html, at p.40.
5. In 2006, Nunavut Tunngavik Inc., the Inuit organization that represents the Inuit of Nunavut, filed a $1 billion lawsuit against the Government of Canada for failure to fully implement the Nunavut Land Claims Agreement. The suit was settled in 2015 with an award of $255.5 million.
6. There are 24 self-governing Indigenous governments participating in the process at varying levels of intensity, from a core group who consistently has technical representatives at in-person and working group meetings through to others who follow the process via email and check-in occasionally. The Indigenous government participants have contracted coordination support and organize themselves with regular caucus meetings, by phone and in-person.
7. See Crown-Indigenous Relations and Northern Affairs Canada, 2017–18 Departmental Results Report: https://www.rcaanc-cirnac.gc.ca/eng/1539041238525/1539041286526
8. We are still waiting on a public announcement regarding the Cabinet approval and adoption of this policy; however, it is reflected in Budget 2019 including "investments to support a new co-developed collaborative self-government fiscal policy" (page 148, Investing in the Middle Class Budget 2019).
9. There are two sectoral self-government arrangements in Canada at present, in the realms of health and education. These signatories were not included in the fiscal process.
10. There are a few self-government arrangements that are not part of a land claim (Westbank, Sechelt, Sioux Valley Dakota Nation), which is quite a different arrangement than self-government as part of a land claim.
11. See CBC News, Self-governing First Nations can keep all revenues, Ottawa says, June 27, 2017. https://www.cbc.ca/news/canada/north/first-nations-own-source-revenue-policy-moratorium-1.4180624

ERRATA

In the current issue of *Northern Public Affairs* (Volume 6, Issue 2, December 2019), the article titled *A new relationship? Reflections on the collaborative federal fiscal policy development process* by Rosanna Nicol, Adam Perry, Bobby Clark, and Martin Papillon (pp. 34-40) was originally published without numbers anchoring the endnotes in the text. The PDF and HTML versions were corrected before the issue's release and can be found online at:

https://www.northernpublicaffairs.ca/index/volume-6-special-issue-2-special-issue-on-modern-treaty-implementation-research/a-new-relationship-reflections-on-the-collaborative-federal-fiscal-policy-development-process/

Correct endnote anchors (counting 1 line between body text and headers) are as follows:

Endnote 1: Page 34, column 2, line 6, after "underfunded"
Endnote 2: Page 34, column 2, line 9, after "communities"
Endnote 3: Page 34, column 2, line 21, after "quo"
Endnote 4: Page 35, column 2, line 22, after "Agreements"
Endnote 5: Page 35, column 2, line 32, after "Agreement"
Endnote 6: Page 36, column 1, line 39, after "governments"
Endnote 7: Page 36, column 2, line 9, after "infrastructure"
Endnote 8: Page 36, column 2, line 11, after "budget"
Endnote 9: Page 36, column 2, line 42, after "comprehensive"
Endnote 10: Page 36, column 2, line 48, after "agreement"
Endnote 11: Page 37, column 2, line 17, after "claw-backs"

Implementing a modern treaty in British Columbia: Lived experiences from Huu-ay-aht First Nations—Maa-nulth Treaty signatories

Huu-ay-aht First Nations, Vanessa Sloan Morgan, Marc Calabretta, Becki Nookemis, Jon Aarssen, & Heather Castleden

Since the comprehensive land claim era began in 1973, only 26 final agreements have been reached. Negotiation of these agreements brought many challenges; the same is true for implementation. The few studies that have focused on implementing modern treaties have primarily looked north to Nunavut, the Northwest Territories, and Yukon as well as the Nisga'a Final Agreement. Of these, there is a dearth of critical scholarly analysis of the everyday lived experiences of the Indigenous individuals, families, and community members who are most affected by the implementation of modern treaties. These signatories are reporting challenges with having these agreements upheld and their authorities recognized by provincial and federal bodies. The cost of leaving the lived realities of modern treaty signatories unexplored is significant given the state's push to settle the "Land Question." Our research investigates how Huu-ay-aht signatories to the Maa-nulth Treaty ("Maa-nulth First Nations Final Agreement") (effective as of 2011 in British Columbia) experienced the first six years of implementation (2011-2017), while exploring how their sacred principles – Hishuk matsawaak (everything is one and is connected), ʔiisaak (respect with caring), and ʔuuʔaɬuk (caring for present and future generations) – continue to direct the Nation's implementation process and relationships to their ḥaḥuuli (chiefly territories).

Modern treaties: Canada's latest answer to the "Land Question"

First Nations territories across what is now commonly known as the province of British Columbia (BC) remain largely untreatied. Despite a lack of treaties, the provincial and federal governments have laid claim to Indigenous lands and resources. Yet First Nations have long asserted their legal authorities to their homelands through both Indigenous and common law. For example, in 1859 on the west side of Vancouver Island, Huu-ay-aht First Nations' Tayii Ḥaẃiɬ ("head hereditary chief" in the Nuucaaŋuɬ language) Cliishin required William Eddy Banfield, who in 1861 would take up the role of Indian agent, to sign a land purchase agreement treaty for his proposed use of Rance Island. Signed with cedar bark to represent Huu-ay-aht's sacred and unrelinquishable connection to their homelands, the treaty solidified Tayii Ḥaẃiɬ Cliishin's authority over the Huu-ay-aht ḥaḥuuli (chiefly territories). The written agreement was also a means through which Huu-ay-aht leadership felt mamaaɬni (non-Indigenous peoples) could understand – a treaty outlining mamaaɬni use of Huu-ay-aht lands and waters and Huu-ay-aht authority over them (see Figure 1). This and many other historic and contemporary examples show a lack of colonial regard for Indigenous title across the province. In response, alliances of First Nations across BC, such as the Allied Tribes of BC and later, the Union of BC Indian Chiefs and the First Nations Summit, have relentlessly pressed for the "Land Question" to be addressed honourably (see, for example, Union of British Columbia Indian Chiefs, 2010).

Over a century after that cedar bark treaty, Canada's legal system finally recognized that land in BC was unceded (e.g., Calder v. BC, 1973; Delgamuukw v. BC, 1997; Tsilhqot'in Nation v. BC, 2014). To seek "certainty" over land ownership and clearly delineate rights to lands and jurisdiction over resources (Manuel & Derrickson, 2017), the British Columbia Treaty Commission (BCTC) was formed in 1993. Since then, the BCTC's goal has been to facilitate negotiations, support negotiation funding, and educate the public about treaty negotiations. Land and self-government are negotiated through the BCTC's six-stage negotiation framework. Once final agreements go into effect, the 1876 Indian Act no longer applies, with self-government provisions enacted by First Nations, and certain lands (though certainly not all-encompassing traditional territories) are returned "as-is" (clear cut, etc.) in the form of fee simple property. That said, colonial dynamics

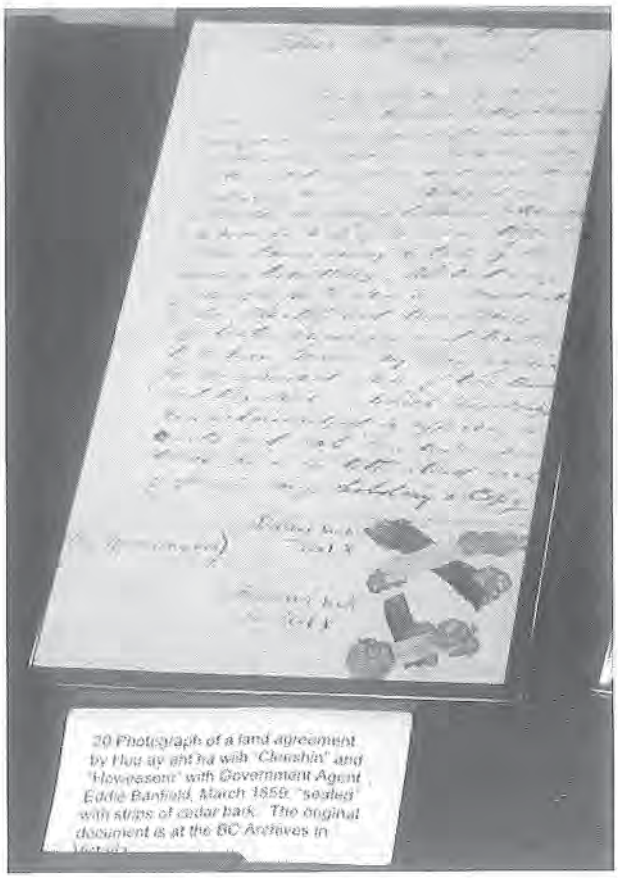

Figure 1: Land purchase treaty signed in 1859 by Tayii Ḥaw̓iłʔ Cliishin and William Eddy Banfield for Huu-ay-aht territories on Rance Island (Picture taken at Huu-ay-aht First Nations' repatriation event during the 2016 Peoples' Assembly; see Huu-ay-aht First Nations [2016] for more on the event).

persist not only during the six stages of negotiation (Mack, 2009), but also through implementation (Irbacher-Fox, 2009; Nadasdy, 2017; Sloan Morgan, Castleden, & Huu-ay-aht First Nations, 2018).

In response to this asymmetry, Indigenous treaty signatories and scholars are beginning to identify the need to assess how treaties affect signatories' daily lives; to date, these studies have looked to Northern Canada (e.g., Irbacher-Fox, 2009; Kulchyski, 2005; Nadasdy, 2017) and the Nisga'a Final Agreement (e.g., Molloy, 2000). Less attention has been paid to the experiences of First Nations in BC with respect to the more recently implemented final agreements with Tsawwassen First Nation (2009), Tla'amin Nation (2016), and the five Maa-nulth Nations (2011). By virtue of these agreements, these nations joined the nation-wide Land Claims Agreement Coalition (formed in 2003), whose membership includes all modern treaty Indigenous signatories, which seeks to ensure these treaties are "respected, honoured, and fully implemented." While this coalition was useful, in 2018 the BC-based signatories formed the Alliance of BC Modern Treaty Nations as a collective means of addressing provincially-specific issues.

Each of these BC-based First Nations has had unique experiences with implementation; not only in the context of intergovernmental relationships but also within their respective communities. Exploring these relationships is important, especially as the federal and provincial governments push to settle claims within a treaty structure in need of improvement. For these reasons, although there are five Nuu-chah-nulth Nation signatories to the Maa-nulth Treaty, we focus on insights from Huu-ay-aht First Nations, with particular interest in how the Nuu-chah-nulth sacred principles – Hishuk ma-tsawaak (everything is one and is connected), ʔiisaak (respect with caring), and ʔuuʔałuk (caring for present and future generations) – guided treaty negotiations and the process of replacing the Indian Act with Huu-ay-aht First Nations' Constitution and a modern treaty. Our community-academic research partnership has engaged Huu-ay-aht muščim (citizens) and leaders to investigate how Huu-ay-aht signatories to the Maa-nulth Treaty experienced the first six years of implementation. We engaged with youth, Elders, urban, and off-grid rural muščim, as well as Huu-ay-aht leadership, staff, negotiators, and those supporting implementation.

Our research is governed by a Huu-ay-aht Research Advisory Committee that is, at the request of Huu-ay-aht First Nations' Executive Council, arms-length from the government itself. Membership includes: Tayii Ḥaw̓iłʔ Ẋiišin (the head hereditary chief, representing the Ha'wiih Council), Simon Dennis (an Elder representing the Lower Mainland), Mercedes Williams (a youth representative from the Lower Mainland), Stella Peters and Jane Peters (both knowledge-keepers representing the Treaty Settlement Lands including the village of Anacla), and Edward Johnson Jr. (a cultural advisor representing Nanaimo and Port Alberni). We also collected information from Huu-ay-aht archival documents, semi-structured interviews, photovoice, paper-based surveys, and multiple community engagement sessions with muščim across five geographic locations. Updates were given in Huu-ay-aht's quarterly newsletter Uyaqhmis, and at the annual Peoples' Assembly, which is open to all Huu-ay-aht muščim and is itself an arm of Huu-ay-aht First Nations' four-pronged self-governance structure (see Figure 2). Our general findings are detailed below.

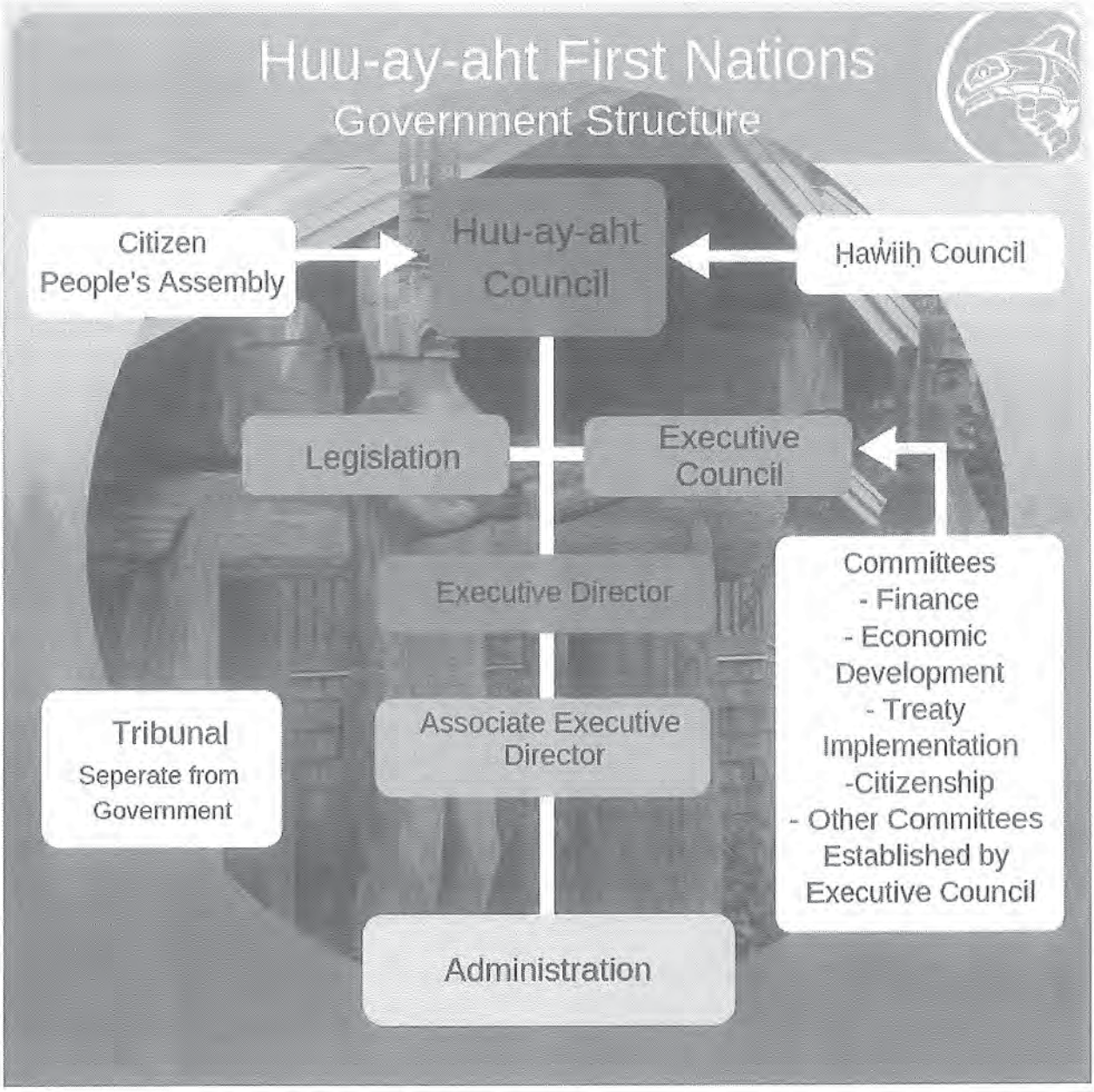

Figure 2: Huu-ay-aht First Nations self-governance structure under the Maa-nulth Treaty

The first six years of Maa-nulth Treaty implementation (2011-2017)

The legal premise of modern treaties is asymmetrical (see Mack, 2009). This dynamic permeated the initial years of Huu-ay-aht implementation, specifically concerning federal and provincial representatives' lack of understanding about how implementation is operationalized, making effective nation-to-nation relationships difficult. Interpersonal, not just professional relationships, matter; they are fundamental to working together in a good way. An unsettling moment for Huu-ay-aht leaders that demonstrated this lack of state awareness took place immediately after the treaty went into effect. After nearly two decades of active engagement and relationship-building at the negotiation table, the federal and provincial negotiating personnel were replaced with implementation personnel. Little protocol was outlined for this transition, leaving Huu-ay-aht feeling "divorced" from a relationship that was purportedly based on mutual respect, not at all what was much-anticipated in the new "nation-to-nation" relationship.

The provincial and federal governments also recognized they were struggling internally to ensure a whole-of-government approach to implementation. In 2015, and after a shift from a Conservative to a Liberal majority, the federal government issued a cabinet directive in an attempt to foster more effective treaty relations with BC First Nations and all holders of comprehensive land claims (Indigenous and Northern Affairs Canada, 2015).

Additionally, a Treaty Obligations Monitoring System and a Deputy Minister's Oversight Committee were instituted to ensure treaty responsibilities across Federal Departments were upheld. In 2016, the provincial government was piloting an Automated Treaty Obligation System and First Nations Secretariat to ensure treaty responsibilities were implemented as a whole-of-government approach.

Our own experience in attempting to gather archival data from all sides of the treaty table demonstrated this. After multiple requests to and meetings with the federal government to access federal government their archives in August 2016, November 2016, and April 2017, we were asked to provide a Band Council Resolution (BCR). Yet BCRs were no longer part of the Huu-ay-aht governance structure. Thus, we responded with a letter attesting to this fact; the letter was signed by all levels of Huu-ay-aht leadership. We never received a revised federal response to our letter, nor did we gain access to the data. This simple but significant incident is but one example that demonstrates a common experience amongst Huu-ay-aht muscim and Nation staff in the early years of implementing the Maa-nulth Treaty.

In sum, relationship problems have not been limited to a fragmented "INAC-to-nation" (rather than "whole of government-to-nation" approach). Huu-ay-aht leadership has continuously expressed the need for the governments of BC and Canada to recognize how ineffective treaty implementation can affect the daily lives of muscim. This sentiment was even echoed by a portion of the federal and provincial representatives who participated in our study. An example illustrates this impact. Huu-ay-aht First Nations' sockeye salmon allocation could not be met two years in a row because salmon runs in Huu-ay-aht's domestic fishing areas were low; the federal Minister of the Department of Fisheries and Oceans had to authorize salmon being caught in other waters, with procedures to do so outlined in the Maa-nulth Treaty. The extensive delays in gaining the federal approval, despite the treaty provision for such operational guidelines, affected muscim livelihoods, diets, and cultural practices. In response, Huu-ay-aht leadership suggested that all government officials working on treaty files be educated on the fine details of treaty relationships and the importance of enacting their responsibilities in a timely fashion.

On multiple occasions, research participants also expressed frustration with communicating to federal representatives in Ottawa about the remoteness of Huu-ay-aht's Treaty Settlement Lands and how many muscim reside outside of these territories. They recommended that government representatives whose work involves implementation develop a relational understanding of the territories (including lands, waters, and sockeye) as well as the basic geography of where Treaty Settlement Lands are located and where treaty signatories live. Frequent turnover in federal and provincial employees on treaty files further hindered efficient implementation since having to develop relationships and educate new staff detracted from community-level priorities. Two potentially positive changes were initiated in 2018. The first was Maa-nulth Nations and BC signed a "government-to-government" agreement affirming their commitment to work in treaty partnership on topics of mutual interest, such as land and resource management, and a regular forum to discuss economic opportunities. The second was the signing of the Principals' Accord on Transforming Treaty Negotiations in British Columbia. In this accord, Canada, BC, and the First Nations Summit (one of the principals representing First Nations interests and modern treaty negotiations across BC) agreed to implement the United Nations Declaration on the Rights of Indigenous Peoples and the 94 Calls to Action by the Truth and Reconciliation Commission of Canada in treaty negotiation and implementation, as well as to work to recognize, rather than extinguish and modify, Aboriginal title and rights. The level to which these agreements will improve modern treaty relations remains to be seen.

ʔuuʔaluk, ʔiisaak, and Hishuk ma-tsawaak: Inextinguishable sacred principles

While critiques of modern treaties and the need to revisit the framework for both negotiation (e.g., Mack, 2009) and implementation (e.g., Sloan Morgan et al., 2018) exist, on the whole Huu-ay-aht First Nations view the Maa-nulth Final Agreement as a tool for advancing the Nation's self-determining goals. These goals, envisioned through Huu-ay-aht's sacred principles of ʔuuʔaluk, ʔiisaak, and hishuk ma-tsawaak, are advanced by the Huu-ay-aht Constitution (2012). Here, we provide select examples of how these sacred principles are embodied in Huu-ay-aht's post-treaty, self-governance context. For instance, Huu-ay-aht First Nations is advancing community priorities by taking care of future generations through self-governance provisions that direct programs and services. In many cases, these programs and services exceed those available through federal and provincial governments. Of note in 2017, Huu-ay-aht commissioned an inde-

pendent social services study, which resulted in 30 recommendations to support Huu-ay-aht children in care, work towards bringing them home, and wrap around services for entire families and the community. The Huu-ay-aht Government has already implemented all of these recommendations (see Huu-ay-aht First Nations, 2017).

Financially, the Nation has expanded economic options in its Treaty Settlement Lands. An emphasis on sustainability, in combination with improved financial holdings and authorities, have supported efforts to restore Huu-ay-aht forestry and fisheries. The nation has significantly increased its land holdings (inclusive of forest tenure and purchased property) from the previous reserve system. It has also completed the first phase of a new housing subdivision, which is intended to relocate residents from the lower village of Anacla (originally located in a tsunami inundation zone), centralize community services, and encourage musčim living away to move home (Huu-ay-aht First Nations, 2019). One final example of the principles working together is embodied during the annual People's Assembly where nation-wide decision-making occurs. All musčim have the opportunity to express their views, vote on, and propose motions that influence the future direction of the nation. In doing so, the principle of Hishuk ma-tsawaak (everything is connected, everything is one) (Atleo, 2004) is enacted as such decision-making enables musčim to consider the economic and cultural needs, and priorities of future generations and all lifeforms.

Waałsi?Χin: Coming home

Implementing the Maa-nulth Treaty, like all modern treaties in Canada, has had untold challenges. Ultimately, we concur with critiques of scholars and community leaders, some cited here, that to honourably implement a nation-to-nation relationship, a fundamental review of the asymmetrical relationships inherent in modern treaty negotiation and implementation is necessary. With this in mind, we sought to focus on how Huu-ay-aht have embedded self-defined priorities and sacred principles in Maa-nulth Treaty negotiations and implementation despite the challenges experienced to date. In so doing, we highlight how Huu-ay-aht are working to improve the health of their ḥaḥuuḥi, reinstate Ḥa'wiiḥ authority, uphold sacred relational and inextinguishable principles according to Naas (the creator), and advance the ultimate goal of supporting musčim who are wanting to come home – waałsi?Χin. ◉

Huu-ay-aht First Nations is a self-governing, modern treaty nation whose lands are located in the Barclay Sound on Vancouver Island in British Columbia, Canada; they have occupied these lands and waters since time immemorial. It has a citizenry of 750 people who primarily reside in or near their treaty settlement lands.

Vanessa Sloan Morgan is a mamaatni Postdoctoral Fellow in the Geography Program at the University of Northern British Columbia and grew up on unceded Coast Salish territories. Vanessa has engaged in research with Huu-ay-aht First Nations for a decade.

Marc Calabretta is a first-generation mamaatni, and began studying in the Huu-ay-aht archives for his Master's thesis research in 2015. After completing his MA degree in 2018, Marc has been the Health, Environment, and Communities Research Lab (HEC Lab) Manager.

Becki Nookemis is a member of Huu-ay-aht First Nations. She graduated from Vancouver Island University in 2018 with a BA degree in Psychology, First Nations Studies and a Certificate of Addiction Studies. Becki has engaged in this research for the past two and a half years.

Jon Aarssen is a mamaatni MA candidate in the Department of Geography and Planning at Queen's University. For the past three years he has worked with Huu-ay-aht to gather and share personal experiences of negotiations and implementation of the Maa-nulth Treaty.

Heather Castleden (corresponding author) is a mamaatni Canada Research Chair in Reconciling Relations for Health, Environments, and Communities and Associate Professor at Queen's University. The Director of the HEC Lab, Heather has worked in solidarity with Huu-ay-aht First Nations through a research partnership for the past 15 years.

Notes

1. The comprehensive land claims agreement process – the Canada wide process of negotiating land and self-government provisions – was initiated in 1973. The BC-specific process built off the larger land claims negotiation framework to create a distinctly BC framework directed by the independent and tripartite BC Treaty Commission.
2. The five Nuu-chah-nulth Nations of the Maa-nulth Treaty Society are: Huu-ay-aht First Nations; Toquaht Nation; Uchucklesaht Tribe; Ucluelet First Nations; and Ka:'yu:'k't'h'/Chek'tle- s7et'h' First Nations.
3. In March 2019, the federal government announced it would eliminate outstanding treaty negotiation loans, a decision that is long overdue and has been called for by modern treaty nations since the outset of negotiations (BCTC, 2019). Specifically, Budget 2019 announced $1.4 billion in reimbursements for loans to Indigenous groups for treaty negotiations and $4.5 million to settle land claims and to 'advance reconciliation'.

4. For a comprehensive list of challenges implementing the Maa-nulth Treaty and recommendations during the first six years of implementation, see Sloan Morgan, Castleden & Huu-ay-aht First Nations, 2018, p. 325-327.
5. We recognize concerns that modern treaties are mechanisms used to translate Indigenous territories into property (e.g., Atleo, 2010; Mack, 2009) and thus territories into sites of capital accumulation.
6. In 2019 we (authors) received a new Insight Grant from the Social Sciences and Humanities Research Council of Canada to continue our research into the implementation of the Maa-nulth treaty.

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Towards a modern treaties implementation review commission

Kirk Cameron & Alastair Campbell

Today, Canada has 26 comprehensive land claims agreements in place with Indigenous Peoples; some of these agreements include self-government provisions or link to discrete self-government agreements. All are recognized and affirmed in the Constitution Act, 1982. In this article they are referred to as "modern treaties."

In 2003 the Indigenous signatories of these agreements agreed to work together to change government policy and approaches to the implementation of modern treaties. They did not establish a legal entity for this purpose, but an informal body, with no executive or secretariat, and two co-chairs. The body was termed the Land Claims Agreements Coalition (LCAC), and it continues to operate today.

Of particular importance to advancing their members' collective interests is the LCAC's desire for the Government of Canada (Canada) to create an independent implementation review body to review and advise Parliament on improvements that could be made to the government's implementation efforts. The authors provide background on the LCAC's positions and the work undertaken to define the proposed Modern Treaties Implementation Review Commission (MTIRC).

Formation of the Land Claims Agreements Coalition

In 2003, Indigenous modern treaty organizations met in Ottawa to discuss the challenges they faced relating to the effective implementation of their agreements by Canada. The challenges ranged from differing interpretations of the terms of modern treaties, to appropriate time frames for the implementation of particular provisions, to the adequacy of resources required to fully meet the obligations set out in these agreements. All faced problems stemming from a failure on Canada's part to fully meet the terms of the constitutionally recognized agreements they had spent years negotiating. As one meeting participant put it, Indigenous people see modern treaties as marriage documents, but the government sees them as divorce arrangements.

By the end of the meeting, the participating organizations agreed that four basic changes in government policy and organization were needed to ensure that their agreements were fully implemented. The first was for Canada to recognize that agreements are with the Crown, not one government department. Secondly, Canada needed to recognize that modern treaties are living agreements, not technical contracts with narrow objectives. This means, among other things, that there must be sufficient resources provided to support the new relationships they create. Thirdly, modern treaty implementation must become the responsibility of senior federal officials. Finally, Indigenous organizations called on Canada to establish

> an independent implementation audit and review body, separate from the Department of Indian Affairs and Northern Development. This could be the Auditor General's department, or a similar office reporting directly to Parliament. Annual reports will be prepared by this office, in consultation with groups with land claims agreements.[1]

The meeting concluded with the Indigenous organizations calling on the federal government to develop a land claims agreements implementation policy in close consultation with Indigenous modern treaty signatories. They also formed the LCAC as a working alliance, to lobby for the policy changes they had elaborated.

The response from the federal government to the LCAC was mixed. Initially, some of the four points were positively received and meetings took place over several months between LCAC representatives and officials from the federal government's Privy Council Office (PCO), in an attempt to draft an implementation policy as advocated. But these exploratory discussions came to an end with the 2006 federal election. The PCO was reorganized by the incoming Conservative government and its Aboriginal Affairs Secretariat responsibilities were

moved to the Department of Indian Affairs and Northern Development (DIAND)[2]. Joint work on a proposed implementation policy came to an end and LCAC made numerous attempts to restart discussions with Jim Prentice, then Minister of Indian and Northern Affairs, and Prime Minister Harper, but all were rebuffed. In December of the same year, the LCAC leadership adopted the 4-10 Declaration, reiterating and elaborating on the four points put forward in 2003, including the call for an independent review body.[3]

Senate Committee on Aboriginal Peoples

In the absence of LCAC dialogue with DIAND ministers and senior officials, some LCAC members approached members of Parliament and senators to raise the issue of the government's failure to meet its modern treaty obligations. As a result of these approaches, in 2007 the Senate Committee on Aboriginal Peoples was mandated to review modern treaty implementation on the initiative of its chair, Senator Gerry St. Germain.

Among those who made presentations to the Committee were numerous LCAC members, federal officials, and the Office of the Auditor General.

The Assistant Auditor General, Ronald Campbell, testified on the challenges faced by modern treaty signatories in appropriate implementation of their agreements by Canada as follows:

> First . . . Indian and Northern Affairs Canada still has not developed a strategy for implementing the Inuvialuit Final Agreement. This is similar to what we found in our 2003 audit of land claims with the Gwich'in and the Inuit: We found that Indian and Northern Affairs Canada was not effective in coordinating federal responsibilities.
>
> Second, we found that Indian and Northern Affairs Canada does not monitor how Canada fulfills its obligations. Although the department publishes an annual implementation report, this report only lists the activities of federal participants, not the extent to which Canada's obligations are being met. We made similar observations in our audits of 1998 and 2003, in which we noted that the department did not have a system for tracking whether obligations were met by other federal departments.
>
> Finally, we found that the department has taken no action to monitor progress toward achieving the principles of the agreement. This mirrors what we found in our 2003 audit, where we noted that Indian and Northern Affairs Canada had focused on the letter of its obligations but that it had not taken into account the spirit and intent of the agreements.[4]

Testifying before the same senate committee, DIAND Deputy Minister Michael Wernick expressed support for the 4-10 Declaration, but stated that the necessary authority to establish an oversight body, such as the MTIRC, lay outside his department:

> The machinery of government is for the Prime Minister to decide, but the idea of having somebody on the outside hold[ing] up the mirror is a good one. That can be either in the legislative branch of government, which means it has to be somewhere around the Auditor General, or it has to be in the executive part of government, which means it must be around Treasury Board. Those are the only two options I can see.[5]

On the basis of extensive testimony, considered within the terms of its broad mandate, the Senate Committee's 2008 report recommended, in part:

> That the Government of Canada, in collaboration with the Land Claims Agreements Coalition and its present and future members, take immediate steps to establish an independent body, through legislation, such as a Modern Treaty Commission, to oversee the implementation of comprehensive land claims agreements, including financial matters.
>
> That the mandate of the Commission be developed jointly with the Land Claims Agreements Coalition and its members.[6]

No action was taken on this recommendation, and relations between the Coalition and the federal government did not significantly improve until Bernard Valcourt was appointed Minister of DIAND in February, 2013. In contrast to previous ministers, Valcourt immediately engaged with the LCAC leadership and, in 2015, announced that he had secured a Cabinet Directive on The Federal Approach to Modern Treaty Implementation, which established a Deputy Ministers' Oversight Committee and a Modern Treaties Implementation Office.[7]

The LCAC leaders welcomed these as substantial measures addressing, in part, the first three of the LCAC's four policy priorities from 2003. However, the LCAC's fourth priority – the creation of an independent audit and review body – remained unaddressed. This proposal, as a machinery of gov-

ernment matter, obviously went beyond Valcourt's authority.

Models examined

In the absence of further movement in this direction, LCAC members decided that they needed to develop the idea of an independent review body in more detail.

In 2016 external research was commissioned to review and assess how various elements of eight existing Canadian institutions might be useful in the design of such an independent review body, including: The National Defence and Canadian Forces Ombudsman; the Yukon Ombudsman; the Office of the Correctional Investigator; the Parliamentary Budget Officer; the Cree-Naskapi Commission; Canada's Commissioner of Official Languages; the Office of the Auditor General of Canada; and the Commissioner of the Environment and Sustainable Development.

Ultimately, LCAC adopted a design based on aspects of the different models it assessed, one that was closest overall to the Commissioner of the Environment and Sustainable Development. A Modern Treaties Implementation Review Commission: A Proposal to the Government of Canada by the Land Claims Agreements Coalition was forwarded to the Prime Minister, and released publicly, in November 2017.[8]

The proposal to Canada

The proposed Modern Treaties Implementation Review Commission would be a legislatively established independent review body, reporting to Parliament on the effectiveness of government in meeting the terms of modern treaties in Canada.

Key elements of the MTIRC proposal to Canada are outlined here.

Three fundamental objectives are identified to frame the model: credibility, effectiveness, and independence. MTIRC's purpose is then defined as being to monitor and report to Parliament on the progress of modern treaty implementation matters, and to examine government actions required by, relating to, or in any way affecting, the implementation of modern treaties.

Photo credit: iStock.com/BalkansCat

Ottawa River with Victoria Island in background.

For each institution, the researchers examined five features LCAC had identified as priorities: (1) a reporting relationship to ensure independence; (2) the extent of authority of the commission in relation to Canada and to the Indigenous organizations; (3) the capacity to initiate reviews of implementation issues; (4) the capacity to direct where its findings and recommendations would be received; and (5) the ability to acquire requisite information from government departments and agencies necessary for the thorough examination of implementation matters. Those aspects of each model that appeared best suited to what the LCAC wished to achieve were highlighted. There were strengths and drawbacks in each model.

Structurally, the MTIRC would be an adjunct office within the Office of the Auditor General of Canada. This is important to give the commission both structure and credibility within the federal system of government, and in this regard a parallel is drawn with the Commissioner of the Environment and Sustainable Development.

The MTIRC office would be headed by a commissioner appointed by the Auditor General

in consultation with modern treaty governments or organizations, following the same appointment process used in selecting the Commissioner of the Environment and Sustainable Development. This appointment process would help establish an independent, non-partisan body that is fair, credible and independent. Ensuring the timely appointment of commissioners would also be critical, and the proposal therefore calls for deadlines to be set out in legislation.

Ultimately, budgetary and administrative support would be provided by the Office of the Auditor General. This would help to reduce costs and create efficiencies that would not be realized if the commission were to be set up as a stand-alone agency.

The mandate and authority of the proposed MTIRC are outlined in the following way: the commission would initiate and conduct reviews on topics relating to the implementation of modern treaties, and self-government agreements negotiated pursuant to or in conjunction with modern treaties. The proposal also makes it clear that where a matter has no connection with a modern treaty, it would not fall within the commission's purview. The commission would report to Parliament without government interference. The legislation creating the commission would require federal departments and agencies to provide all information requested by the commission (this is consistent with powers of the Office of the Auditor General and the Commissioner of the Environment and Sustainable Development). In addition, the legislation would enable the commission to enter into agreements with the provinces and territories to assist with the transfer of information. This is important, given that provincial and territorial governments have considerable responsibilities, along with the federal government, for meeting implementation requirements. Finally, the proposal calls for the commission to have a mechanism giving citizens covered by modern treaties the right to petition the commission, a similar instrument to that of the Commissioner of the Environment and Sustainable Development.

As noted earlier, the commission's mandate would be supported through an Act of Parliament. The proposal asks Canada to collaborate closely with LCAC (as directed by its member organizations) in the development and subsequent review of the mandating legislation. It is common practice for consultation to occur on the development of legislation that legitimates modern treaties, and a similar approach is recommended here. This is a critical step in giving the legislation legitimacy in the eyes of the modern treaties rights-holders. It is also contemplated that the mandating legislation would require Canada to engage with modern treaty governments and organizations on future occasions if changes to the mandating legislation are contemplated.

The proposal to Canada is also clear on the limits of the commission's mandate. Specifically, it would have no mandate to review or comment on modern treaty negotiation policies, nor would it have the authority to substitute for dispute resolution instruments set out in the treaties relating to consultation, mediation or arbitration. However, where there are concerns on the part of modern treaty signatories relating to these kinds of instruments, the commission may review and report on ways to address such concerns. As well, the commission would neither replace nor affect the mandates of other bodies such as the Office of the Auditor General itself, the Canadian Human Rights Commission, or the Cree-Naskapi Commission. Reiterating a key point in its proposed mandate, the MTIRC would have no authority in any area not involving a modern treaty. In other words, issues that relate to a specific claim by an Indigenous group, or issues between Canada and a self-governing First Nation without a Modern Treaty, would not fall under the purview of the MTIRC.

Conclusion

Despite earlier promising signs in the Senate Committee on Aboriginal Peoples and its 2008 Report to Parliament, to date there has been little, if any, progress on moving the concept forward. First Nations members of the LCAC advanced the case for the establishment of the MTIRC during a meeting of Modern Treaty and Self-Governing First Nations with the Prime Minister of Canada on November 1, 2017 and again on January 8, 2019. Inuit leaders also advanced the proposal through the Inuit-Crown Partnership Committee (the federal government having established different forums to deal with Inuit and First Nations on modern treaty issues). Staff from LCAC members also raised the proposal in "engagement sessions" devoted to the Recognition and Implementation of Indigenous Rights Framework (RIIRF).

Generally, there has been little or no enthusiasm for the LCAC's proposal within the federal government. While there has been frequent cursory reference to the option of creating an independent oversight body during meetings at the leadership and officials' levels, this has typically been phrased

in broad and undefined terms. For example, an "engagement document" prepared for the RIIRF process by the Department of Crown-Indigenous Relations and Northern Affairs reads:

> The independent oversight body could report directly to Parliament and be mandated to monitor and report on the Government of Canada's progress on implementing Indigenous rights and the United Nations Declaration on the Rights of Indigenous Peoples. This body could also undertake public education activities on Indigenous rights.[9]

LCAC never proposed a body with such generic responsibilities, but instead an office directly charged with the review of modern treaty implementation. This is acknowledged in a subsequent RIIRF document, perhaps influenced by the fact that LCAC members attended some RIIRF engagement sessions:

> Alternatively, some have recommended bodies with more narrow mandates. For instance, it has been proposed that an oversight body be established as an adjunct office within the Office of the Auditor General to monitor and report to Parliament on the progress of modern treaty implementation throughout Canada and to examine Canada's actions affecting the implementation of modern treaties. Under this approach, additional institutions would be required to fulfill a similar oversight function for other treaties and to serve any other proposed functions.[10]

Here the Department of Crown-Indigenous Relations acknowledges the MTIRC to some extent. However, the LCAC proposal is to establish a review body, not an "oversight body" (a term that can be variously interpreted). Further, the issue is raised that the MTIRC proposal will require the creation of additional institutions to perform similar functions, for example in relation to the historic treaties and for other functions. LCAC developed the MTIRC proposal to deal with the particular concerns arising from the implementation of modern treaties. Other bodies for other purposes are the responsibility of the proponents, and Canada.

There has been little government support for the concept of an independent review body reporting to Parliament. Federal documents and discussions with officials suggest that Canada's preference is to create an office within the executive, ultimately eroding the independence that would give the body the ability to speak to Canadians through Parliament. No doubt the severe criticisms of government practice and culture voiced by the late Michael Ferguson, the previous Auditor General, have made the proposal of placing the MTIRC within the Auditor General's Office unpalatable to those inside the offices of power in Ottawa.

The outcome of the October federal election presents a new opportunity to the LCAC to advance their MTIRC proposal. Given the minority status of the government, Parliamentarians will now have an opportunity to exercise greater influence over directions taken by government with the Indigenous peoples of Canada. LCAC members will thus continue to advance their proposal, and seek political support for it, with a view to ensuring its eventual establishment. ◉

Kirk Cameron has worked most of his 35-year career in northern Canada, both in government and as a governance consultant. He worked extensively with the Land Claims Agreements Coalition in preparing the submission to Canada on the creation of the Modern Treaties Implementation Review Commission.

Alastair Campbell is a Senior Policy Advisor with Nunavut Tunngavik Incorporated (NTI), and he has worked for NTI since 2002, in Iqaluit and Ottawa. His NTI work has included extensive involvement with the Land Claims Agreements Coalition.

Notes

1. Redefining Relationships: Statement from the Participants, Ottawa, 14 November, 2003.
2. P.C. 2006-119, March 3, 2006.
3. http://www.landclaimscoalition.ca/assets/Four_Ten_Declaration_061206_FINAL.pdf
4. Proceedings of the Standing Senate Committee on Aboriginal Peoples; Issue 1 - Evidence - Meeting of December 11, 2007.
5. Proceedings of the Standing Senate Committee on Aboriginal Peoples; Issue 3 - Evidence - Meeting of February 12, 2008.
6. Honouring the Spirit of Modern Treaties: Closing the Loopholes. Interim Report, Special Study on the implementation of comprehensive land claims agreements in Canada, Standing Senate Committee on Aboriginal Peoples, May 8, 2008, P. x.
7. https://www.rcaanc-cirnac.gc.ca/eng/1436450503766/1544714947616
8. http://landclaimscoalition.ca/wp-content/uploads/2018/02/MTIRC-Doc-and-Letter-to-Trudeau-1.pdf
9. Engagement Document: Working Together to Create the Foundation for the Federal Recognition and Implementation of the Inherent and Treaty Rights of Indigenous Peoples in Canada, Crown-Indigenous Relations and Northern Affairs Canada, [July 2018], P. 8. See also https://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708#chp2d Overview of a Recognition and Implementation of Indigenous Rights Framework 10 October, 2018).
10. https://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708

Judicial interventions in modern treaty implementation: Dispute resolution and living treaties

Janna Promislow & Alain Verrier

Parties resort to the Canadian courts when other efforts to resolve disputes fail. Disputes in the interpretation and implementation of modern treaties are no different, as evident in a growing body of case law. Disputes over the meaning of obligations under treaty provisions are to be expected, and dispute resolution is necessary to maintain strong working treaty relationships that can weather political changes within the parties and changes in the broader socio-economic environment. When disputes arise, treaty partners must consider when to seek resolutions from courts as opposed to the dispute resolution mechanisms negotiated as part of modern treaties. Such decisions depend in part on the availability and nature of dispute resolution under the treaties, and in part on the principles and remedies that judges have applied to similar disputes.

This article provides an overview of recent cases that demonstrate judicial attention to supporting strong treaty relationships through treaty interpretation and remedies. While the issues at stake range from development assessment processes and co-management, to consultation, and to negotiations over financing, all of these cases address disputes about implementation brought by Indigenous parties. Advocates from a number of treaty parties have called for an approach to implementation that understands modern treaties as an expression of an evolving Crown-Indigenous relationship, and the agreements themselves as "living documents" (Canada, Standing Committee on Indigenous and Northern Affairs, 2018, see pp. 18, 43, 47, 56)[1]. The resolution of treaty disputes in a manner that supports a living treaty approach requires balance between strong remedies to address immediate concerns and an eye on the future, with principles and directions that encourage parties to correct the course of their relationship.

The discussion begins with a review of the interpretive approach established in the Supreme Court cases to date and then considers a few key lower court decisions. The case law reviewed demonstrates the close relationship between issues of interpretation and issues of implementation. While each case requires the court to consider its role in resolving treaty disputes, there is strong judicial recognition of the need to intervene in disputes and re-direct inter-governmental negotiations to support treaty processes.

Principles of interpretation

Interpretive and consultation issues are the only modern treaty matters that have reached the Supreme Court. Two cases in 2010 marked the Court's first consideration of the interpretation of modern treaties: Quebec (AG) v Moses (2010), addressing the development assessment processes mandated in the text of the James Bay and Northern Quebec Agreement in relation to review of a mining project proposal, and Beckman v Little Salmon/Carmacks First Nation (2010), also about development assessment but this time focussing on the consultation obligations and interpretive principles that apply when the processes committed to in the agreement were not yet implemented. Broadly speaking, two different approaches to treaty interpretation were argued. On the one hand, the Court was asked to uphold the integrity of the written agreement and find resolutions to the issues based on the text of the agreements, an approach which emphasizes respect for the sophistication of the parties who enter into the agreements. On the other hand, the Court was asked to see the agreements within a larger constitutional framework, including the application of the honour of the Crown doctrine to the interpretation of modern treaties, in recognition that treaties are part of a process of reconciliation rather than an achievement of reconciliation in and of themselves.[2]

While the majority in the 2010 cases took the latter approach, each case also included a minority or dissenting opinion that took the former approach, emphasizing the potential opposition

of these principles. The Supreme Court's unanimous decision in the more recent First Nation of Nacho Nyak Dun v Yukon (2017) (NND) explains that both principles apply to serve a purpose of supporting a healthy relationship between Indigenous Peoples and the Crown through the treaty:

> Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text as a whole and the treaty's objectives. Indeed, a modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted "in an ungenerous manner or as if it were an everyday commercial contract. Furthermore, while courts must "strive to respect [the] handiwork" of the parties to a modern treaty, this is always "subject to such constitutional limitations as the honour of the Crown" (at para 37, citations omitted).

NND also recognizes the reconciliation processes at stake as requiring a balance between "forbearance" or restraint on the part of courts to allow the parties to find negotiated solutions (at paras 3, 33), and the need for judicial intervention and "adequate scrutiny of Crown conduct to ensure constitutional compliance" in light of the status of the treaties as constitutional documents (at para 34).

Judicial interventions of note

The experience in the lower courts suggests that judges have not been shy to intervene when treaty parties have taken their dispute into that forum. In Corp. Makivik v Québec (Procureur général) (2011), for example, the Quebec Superior Court attended to Indigenous perspectives to understand whether the specified consultation obligations applied to the minister's decision about caribou hunting and conservation measures under the provision being interpreted (at para 116). This type of "purposive approach" looks at the text but also beyond the text of a provision to ensure that the interpretation arrived at serves the larger context and purpose of the provisions and the treaty. Based on its interpretation, the Superior Court found a breach of the consultation provisions but did not find a breach of the honour of the Crown because the power of decision remained with the Minister regardless of a procedural obligation to consult. The Superior Court declined to give the Cree, Inuit and Naskapi communities the strong remedies they sought to invalidate the regulations that gave effect to the Minister's decision. The communities successfully appealed the decision to the Quebec Court of Appeal (Corp. Makivik v Québec [Procureur général], [2014]). The Court of Appeal also took a purposive approach to reach a more substantive view of the consultation obligations in the treaty, including that the Minister had to remain open minded through the consultation process (at paras 77-79), to find that the Minister had breached the honour of the Crown and to declare that communities' treaty rights had been unjustifiably violated.

Treaty financing has been a key issue in the implementation of modern treaties, and indeed is critical to the success of treaties and robust treaty relationships. Related disputes have been brought to the courts by Nunavut Tunngavik Inc. (NTI) and the Teslin Tlingit Council (TTC), and in both cases the courts again demonstrated a willingness to intervene and re-set the inter-governmental relationships on a more principled track.

In Nunavut, the dispute over the failure to implement a monitoring plan for the "health of the ecosystemic and socio-economic environment" of the settlement area under Article 12.7.6 of the Nunavut Agreement was finally settled following the Court of Appeal decision on a summary judgment application in Nunavut Tunngavik Inc v Canada (2014) (NTI). The road to this settlement included 17 attempts by NTI[3] to resolve these disagreements through the Nunavut Arbitration Board, established under article 38 of the Agreement. These attempts failed because the Government of Canada did not agree to submit the disputes to arbitration, as was required under then-article 38.2.1. The 2014 Court of Appeal decision found that the Government of Canada had breached its implementation obligations under 12.7.6 and sent the matter of damages resulting from this breach back for a full trial of the issues. The parties were able to reach a settlement before this trial in 2015, including a multi-stage dispute resolution process implemented in 2017 that allows disputes to be sent to arbitration without all parties' consent (for details, see Settlement Agreement: Moving Forward in Nunavut, signed between Nunavut Tunngavik Incorporated, Government of Nunavut, and the Government of Canada, 5 March 2015).

More recently, Teslin Tlingit Council v Canada (2019) (TTC) marks a victory for the TTC in their longstanding dispute regarding the negotiation of financial transfer agreements under Chapter 16 of their self-government agreement

(for more information about financing modern treaty implementation, please see the articles in this issue by Abele, Ahmad, and Grady, and Nicol et al.). The negotiation obligations include reference to the demographics of the TTC (16.3.5), which the Government of Canada continued to measure in relation to status under the Indian Act. The TTC, by contrast, sought to have their demographics understood in relation to the citizenship provisions of the TTC Final Agreement (which are the same as in the Yukon Umbrella Final Agreement [YUFA]). These provisions eliminated the divide between status and non-status Yukon First Nations individuals and created a larger citizenship base, a move that the judge in the case called a "monumental achievement" for ending the "colonial and divisive status versus non-status distinction" (at para 13). This issue had been identified and went unresolved through over 15 years of negotiations and joint implementation review processes. The TTC finally brought the dispute to the courts in 2018, seeking a statement by the courts to clarify the parameters of the Government of Canada's obligation to negotiate under Chapter 16. The Government of Canada argued that it was satisfying its legal obligation through a collaborative process it established in 2015 (please see Abele, Ahmad, and Grady, this issue). The process is aimed at creating a new fiscal relationship and national policy that will apply to all self-governing Indigenous groups. Not all modern treaty nations are participating in this process, however, and the TTC withdrew from it in 2016. The judge agreed with the TTC that its demographics had to be understood in relation to the definition of citizenship established by the Agreement, even if this principle did not extend to an "express legal obligation to fund every TTC Citizen." (at para 49). The judge also agreed that the federal collaborative process – a policy choice – could not be "conflated" with or "trump" legal obligations under the Self-Government Agreement (at paras 52, 58) and that a declaration from the court is "appropriate given the years of failing to negotiate the demographic issue" (at para 60).

With regards to the interpretive principles applied, both of these cases demonstrate that strict attention to text is important in animating living treaties and strong treaty relationships. The approach taken by the majority of the Nunavut Court of Appeal was close to treating the Agreement as a "complete code" approach, highlighting the Agreement as one between well-resourced and sophisticated parties and rejecting arguments that fiduciary duties applied to supplement or inform express covenants (at para 59). The Yukon Supreme Court also reached its conclusion in the TTC case by focussing on the text of the Self-Government Agreement but took care to consider the whole context for the Chapter 16 language, including bringing definitions of eligibility and enrollment (from Chapter 3 of the TTC Final Agreement) to bear on the interpretation of Canada's obligations to negotiate financial transfer agreements in issue. In reaching his conclusion, the judge stated that "it is not honourable to agree to a blood quantum definition of TTC Citizenship and continue to apply funding based on ... the Indian Act" (at para 44).

A further issue in TTC was the relationship between treaties protected by section 35 of the Constitution Act, 1982 and the implementation of self-government arrangements that are not constitutionally protected. Although the TTC Final Agreement is protected as a treaty under section 35, section 24.12.1 of this Final Agreement indicates that self-government agreements do not create treaty rights under section 35.[4] The judge rejected the Government of Canada's arguments that section 24.12.1 means that the legal obligation to negotiate the financial transfer agreements does not have constitutional dimensions because this approach "ignores or downplays the constitutional obligation that flows from the eligibility and enrolment provisions of Chapter 3 [of the YUFA]" (at para 44). The honour of the Crown that applies to constitutional questions of interpretation thus flows into the "sub-constitutional" agreements upon which implementation of modern treaties depends.[5]

This theme of where the constitutional character of treaty principles and remedies begin and end was equally important in Tlicho Government v Canada (Attorney General) (2015). The federal government had introduced devolution legislation that would merge regional land and water boards under the Mackenzie Valley co-management regime into a "superboard" (for further discussion of this case, see David Wright's article in this issue). The Tłı̨chǫ Government brought the case before this legislation was implemented, arguing that the legislation was unconstitutional because it violated their treaty rights. While the Tłı̨chǫ Agreement contemplates the possibility of federal legislation to restructure the regional land and water boards into a potentially larger co-management board (under Article 22.4.1), the Tłı̨chǫ Government pointed out the Agreement's mandatory language

establishing the regional boards (Article 22.3.2) and challenged the adequacy of federal consultation on the legislation. The Tłı̨chǫ Government asked for an injunction to prevent the legislation from being implemented, arguing that the Tłı̨chǫ would suffer irreparable damage if their regional land and water board was dismantled in favour of the superboard while the full trial of the constitutionality of the legislation was pending. In granting the injunction, the judge demonstrated a keen understanding of the constitutional nature of the treaty relationships and decisions at stake, and a willingness to intervene in the face of government policy intransigence that threatened to derail positive working relationships between the treaty parties. The pursuit of both the superboard and the trial were set aside following the election of a new federal government in 2015.

Conclusion

The cases surveyed here demonstrate that in spite of interpretive principles that prefer negotiated solutions to court interventions in treaty disputes, courts have also understood the need for judicial intervention to support living treaties and strong treaty relationships. The interpretive principles established and reinforced in NND allow for a contextual approach to respond to the particular disputes brought before the courts. Such disputes will variously demand closer attention to the text of particular provisions or broader attention to the purpose of the whole agreement, the interaction of different provisions in the agreement, and the limits on interpretive possibilities imposed by the honour of the Crown.

What is remarkable in this survey is the success of the Indigenous litigants in modern treaty disputes in the years following the 2010 Supreme Court decisions. Each of the four cases noted demonstrates multiple attempts by the Indigenous parties to find resolutions with their government treaty partners, whether through consultations processes (Corp. Makivik v Québec [Procureur général] [2011] and Tłı̨chǫ Government v Canada [Attorney General]) or through dispute resolution processes under the agreements. The multi-year efforts to negotiate solutions are particularly obvious in the implementation disputes litigated in NTI and TTC. Against these efforts, it is less surprising that the courts have intervened to provide principled interpretations of the agreements and strong remedies to redirect inter-governmental relationships. The need and case to intervene may be bolstered even further if courts understood the failure of the dispute resolution mechanisms within the agreements, a failure noted by the Auditor General (Auditor General, 2003 at 8) and highlighted in the Nunavut litigation above. With the amendments to the Nunavut Agreement following the NTI case, there are still only three agreements with provisions that allow matters to go to arbitration without requiring all parties' consent to get there, in most situations (Government of Canada, 2012, Annex B). With these four cases on the books, the Government of Canada may finally be convinced of the need to let go of outdated and unilateral policy approaches and instead rely on alternative dispute resolutions processes to continue strengthening modern treaty relationships. ◉

Authors

Dr. Janna Promislow is Associate Professor at Thompson Rivers University Faculty of Law and Visiting Scholar at Victoria University of Wellington. She is co-leading the law theme of the Modern Treaties Implementation Research Project.

Alain Verrier is a graduating JD student at Thompson Rivers University Faculty of Law.

Notes

1. The language of "living treaties" in the context of modern treaties dates to at least 1985 and the publication of Murray Coolican's task force report on the comprehensive land claims agreement policy: Murray Coolican. (1985). Living Treaties, Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy. Ottawa, ON: Department of Indian Affairs and Northern Development.
2. For commentary on Moses v Quebec and Beckman v Little Salmon/Carmacks First Nation, see Julie Jai, "The interpretation of modern treaties and the honour of the crown: Why modern treaties deserve judicial deference" (2009) 26:1 NJCL 25; E Ria Tzimas, "To what end the dialogue?" (2011) 54 SCLR (2d) 493; Dwight Newman, "Contractual and covenantal conceptions of modern treaty interpretation" (2011) 54 SCLR (2d) 475; Thomas Isaac, Aboriginal law, Fourth Edition: Commentary and analysis (Saskatoon: Purich Publishing Ltd., 2012) 170-171.
3. Nunavut Tunngavik Inc. (n.d.). A Summary of the 2015 Settlement Agreement. Retrieved from https://www.tunngavik.com/files/2015/05/2015-Settlement-Agreement.pdf
4. Section 24.12.1 states: "Agreements entered into pursuant to this chapter and any Legislation enacted to implement such agreements shall not be construed to be treaty rights within the meaning of section 35 of the Constitution Act, 1982."
5. Manitoba Métis Federation v Canada, 2013 SCC 14 indicates that the honour of the Crown gives rise to distinct duties of treaty implementation and also to Crown action "in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples" (at para 73). While the application of the honour of the Crown in TTC has an anchor in a treaty provision, it also suggests the importance of further exploration of how the honour of the Crown informs the implementation of sub-constitutional agreements. Such explorations may be particularly relevant in light of federal

policy directions that support the evolution of modern treaties towards a series of agreements, some of which will be protected under s. 35 and some of which will not: See Douglas R Eyford, "A New direction: Advancing Aboriginal and Treaty Rights A report " Report of the Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy (20 February 2015) at 45, online: https://www.rcaanc-cirnac.gc.ca/eng/1426169199009/1529420750631

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Corp. Makivik v Québec (Procureur général), 2014 QCCA 145

First Nation of Nacho Nyak Dun v Yukon, 2017 SCC 58

Nunavut Tunngavik Inc v Canada, 2014 NUCA 2

Quebec (AG) v Moses, 2010 SCC 17

Teslin Tlingit Council v Canada, 2019 YKSC 3

Tlicho Government v Canada (Attorney General), 2015 NWTSC 9

Government-to-government relationships support modern treaty implementation

Angela Wesley, Lakshmi Lochan, Odette Wilson, & Stephanie Gustin

Strong relationships between modern treaty nations and federal, provincial, territorial, and local governments are critical to the successful implementation of modern treaties in Canada. Modern treaties recognize and protect Indigenous rights and title. They also provide a vehicle to operationalize the United Nation Declaration on the Rights of Indigenous Peoples (UN Declaration) by formalizing government-to-government-government relationships. These relationships establish a robust foundation for the implementation of Indigenous rights by ensuring modern treaty nations have a voice at decision-making tables. Decision-making is critical to self-government within a context of free, prior and informed consent (FPIC), which is a core element of the UN Declaration. As Grand Chief Edward John, from the Tl'azt'en Nation, former North American Representative to the United Nations Permanent Forum on Indigenous Issues, stated:

> "Free, prior and informed consent is about decision-making. The right to make decisions. You exercise that authority in many ways, but it's a decision-making right. The ability to make decisions really underscores free, prior and informed consent."[1]

This paper draws attention to multiple levels of intergovernmental relationships forged by modern treaty nations in British Columbia. Two case studies examine how pre- and post-treaty relationship building at the local level positively contributes to modern treaty implementation and regional prosperity.[2] A third case study discusses how modern treaty First Nations in BC created the Alliance of British Columbia Modern Treaty Nations (the Alliance), a joint advocacy body that collaborates on areas of mutual interests related to treaty implementation issues unique in the province.

Building relationships at the local level

Tla'amin Nation and the City of Powell River, located on the Sunshine Coast of British Columbia, have not always shared a collaborative relationship. In 2002, tensions rose when the city began constructing a sea walk without sharing their plans with Tla'amin, unknowingly disturbing, destroying, and burying significant cultural sites. This incident, while negative, became the starting point of a new relationship and way of working together. Powell River entered into a $1.6M contract with Tla'amin to build the sea walk. Tla'amin had a direct role in the decision-making for the protection of its cultural heritage sites. Through its involvement in infrastructure development it provided employment and training for Tla'amin citizens.[3]

The positive response by both the city and First Nation to address infrastructure goals in a mutually beneficial manner was the start of deeper conversations and tangible steps toward reconciliation. The two communities rallied around a common future and less than a year later they signed the Community Accord.[4] Through the Accord, the two governments now share a relationship that exemplifies how government-to-government collaboration leads to vibrant communities and shared regional prosperity. The agreement solidifies mutual recognition, cooperation, continuity, openness and inclusion, and a means to resolve disputes.

This strong relationship also proved beneficial when the Tla'amin treaty negotiations stalled. Together Powell River and Tla'amin leaderships engaged and lobbied governments for the completion of the treaty, with the shared message that the treaty benefits the entire region. This advocacy by local government for First Nations self-determination demonstrates how communities can support reconciliation and implement the UN Declaration at the local level. On April 5, 2016, the Tla'amin treaty took effect, and the relationship between Tla'amin Nation and Powell River evolved – at the same time, Tla'amin's relationship with Canada and British Columbia became a true government-to-government-to-government partnership.

All levels of leadership in Tla'amin and Powell River take pride in their relationship. In 2018, 15

years after Tla'amin and Powell River first signed their Community Accord, the two communities renewed the Accord and their commitments to mutual recognition and cooperation. That same year, Powell River Regional District, in consultation with Tla'amin, formally changed its name to qathet (pronounced KA-thet) Regional District (qRD), which means "working together" in the Tla'amin language.

Today, Tla'amin Nation, the City of Powell River and the qRD meet quarterly at their Three Community Forum (3C), where all elected officials from their respective jurisdictions come together to discuss issues of common concern. Though not a decision-making body, numerous initiatives have come out of the 3C discussions. These include the creation of regional emergency disaster plans and response committees, a social planning committee, and a working group on transportation for the region. The 3C forum is hosted by each community on a rotating basis.

Building relationships at the regional level

In British Columbia, regional districts are a unique form of local governance established under the provincial Local Government Act. They operate as federations of municipalities and electoral areas. They are governed by a board of directors to coordinate services and resources across a region. These boards adopt zoning by-laws and create official community plans and regional growth strategies to manage important local matters, such as environmental protection, transportation, resource preservation, and economic development.

First Nations can be involved in regional districts as observers or through consultation, however Indian Act bands cannot formally join regional district boards as voting members. This can result in a lack of formal information sharing and service delivery coverage for the region. Treaties include provisions for full and effective participation of First Nations – if the First Nation chooses – with an equal seat and vote on regional district boards, resulting in stronger Indigenous voices in local politics and decision-making. The participation of First Nations in regional governments broadens local representation, empowers Indigenous governments, and is an example of how reconciliation can begin. However, there are currently only four modern treaties in British Columbia, representing 11 former Indian Act bands. For the other approximately 190 Indian Act bands in BC, the colonial restrictions of the Indian Act continue to prohibit First Nations from fully participating in local decision-making.

The Alberni Clayoquot Regional District (ACRD) operates on Vancouver Island, in the traditional territories of four of the five First Nation governments implementing the Maa-nulth treaty: Huu-ay-aht, Toquaht, Uchucklesaht, and Yuułuʔiłʔatḥ First Nations. In 2016, Huu-ay-aht Executive Councillor John Jack was elected chair of the ACRD, becoming its first Indigenous chair. In a 2017 interview with the Treaty Commission, Councillor Jack recalled how the ACRD's first steps towards relationship building came when the former chair admitted to not knowing where to start. Steps towards better understanding included hiring a facilitator to discuss the Truth and Reconciliation Commission's (TRC) Calls to Action and the UN Declaration. The ACRD has since adopted a resolution and made a commitment for the Board of Governors to become further engaged in reconciliation.

Prior to joining the ACRD, the regional district and local First Nations had a strained relationship. At the time, the five Maa-nulth First Nations were still under the Indian Act, only able to observe ACRD meetings and not legally entitled to vote or to participate in board decision-making. Councillor Jack says when you are a member of the board, "you have unfettered access to all the information that you might not have otherwise. That is what FPIC is all about – how do we include as many voices as possible in a way that benefits everyone."[5]

Full participation on regional district boards can result in increased levels of information sharing (e.g. on proposed projects). First Nations' meaningful participation in decision-making processes cultivates trust and the opportunity to address concerns and considerations. Early engagement from all community and government representatives can alleviate time pressures on projects, shifting discussions from time-sensitivities to solutions-oriented dialogue. These actions lead to effective implementation of FPIC and other rights in the UN Declaration. Today, the ACRD makes decisions that benefit all residents in the region by understanding the ways the different communities live and are linked to one another. The ACRD has spent time, money, and effort to understand how the UN Declaration and the TRC's Calls to Action can be implemented at the regional level.

Emerging joint advocacy among BC modern treaty nations

Collaboration between modern treaty nations at the national level through the Land Claims Agree-

ments Coalition (LCAC) assists with modern treaties and associated self-government agreements being respected, honoured, and implemented. Much of the focus of the LCAC is on federal treaty partners. To strengthen and unify their voices, seven modern treaty nations in BC signed a Memorandum of Cooperation (MOC) in July 2018 to jointly advocate shared concerns and to establish the Alliance of British Columbia Modern Treaty Nations (the Alliance). An eighth nation (Nisga'a) joined in November 2019. In addition to Nisga'a, the member nations include: Huu-ay-aht, Ka:'yu:'k't'h'/ Chek'tles7et'h', Tla'amin, Toquaht, Tsawwassen, Uchucklesaht, and Yuułu?ił?ath First Nations.

The Alliance began as informal conversations between modern treaty nations during larger collaborative forums on federal fiscal policies. Leadership from modern treaty nations in BC recognized the value of collaborating on shared interests at the provincial level. Subsequent organic, issues-driven conversations laid the early foundations for the Alliance.

One of the Alliance's guiding principles is that modern treaty nations are stronger when they work together. In sharing information and experiences related to modern treaty development amongst themselves and other nations, Alliance members are more easily able to hold governments accountable. These nations urge the recognition, protection and implementation of Indigenous rights, and more broadly, the implementation of the UN Declaration. Priority issues identified by the Alliance for joint advocacy work include: the future of government-to-government relations; policing; fiscal relations; and co-management of fisheries, lands, and resources. The Alliance provides an avenue through which modern treaty nations can pool their resources and collaboratively work to resolve these issues, many of which were not anticipated during their treaty negotiations. Membership is open to all First Nations governments in British Columbia who have ratified a modern treaty with Canada and BC.

The Alliance has already demonstrated early work on collaborative initiatives by submitting two discussion papers to Canada and BC, titled "The Need to Transform the Fiscal Relationship," and "Position Paper in Response to BC's Proposed Approach to Treaty Transformation." The focus of the papers is on both treaty implementation issues specific to BC and on broader constitutional, legislative, and policy developments. These include fiscal relations, policing, and co-management of lands and resources. At the time of writing, the Alliance is waiting for a response to both papers.

The Alliance advocates a "whole of government" approach to implementation of modern treaties. The Alliance has recommended a shift of Crown signing authority from the BC Minister of Indigenous Relations and Reconciliation to the Premier of British Columbia. This would demonstrate that the level of commitment to modern treaty implementation is not only made by a single ministry, but by the provincial Crown as a whole. This means that all ministries, including those that are more directly involved in implementation (e.g. the Ministry of Forest, Lands, Natural Resource Operations and Rural Development), will more clearly understand the direct obligation they have as a part of the larger Crown to implement and uphold the treaty. The goal is that these other departments will make greater efforts to educate their own officials to ensure they are working on behalf of the Crown to implement modern treaties.

Conclusion

The opening of the Summary of the Final Report of the Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future states, "For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada."

Overcoming this colonial legacy and moving to more positive relationships between First Nation governments and other governments in Canada will take time. Dedicated leadership supporting the recognition of First Nations rights and self-determination can begin this change. Modern treaties are one tool for reconciliation. They legislate and formalize government-to-government-to-government relationships at all levels in Canada: national, provincial or territorial, regional, and local. First Nations' effective participation in decision-making processes as demonstrated by Tla'amin, the City of Powell River and qRD, and Huu-ay-aht and ACRD, are examples of how to operationalize the UN Declaration, FPIC, and the TRC's Calls to Action.

The Alliance demonstrates joint advocacy initiatives, and emerging government-to-government-to-government engagement specific to BC modern treaty nations. Collaboration among modern treaty nations is intended to strengthen relationships with Canada, BC and local governments,

in the context of modern treaty implementation.

As the examples above highlight, strong relationships result from partnerships based on respect and equality, and on that basis result in better decision-making and regional prosperity. When First Nations regain control of their governance, get out from under the constraints of the Indian Act, and re-build their nationhood, economic success also follows. This benefits the entire region.

Both the current federal government and the provincial government in British Columbia are committed to implementing the UN Declaration.[6] Recently the Principals of the BC treaty negotiations process, the governments of Canada, British Columbia, and the First Nations Summit, signed the Principals' Accord on Transforming Treaty Negotiations in British Columbia. This accord further strengthens the goals of treaty negotiations: recognition and protection of Aboriginal title and rights, nation-building, and establishing a government-to-government relationship. The Accord also acknowledges that treaty negotiations must reflect the UN Declaration. As other provinces and territories pursue similar efforts, governments can consider some of these BC initiatives with First Nations, when considering how to operationalize the UN Declaration in their regions. ◉

Authors

Angela Wesley is citizen of Huu-ay-aht First Nations, one of five First Nations implementing the Maa-nulth Treaty on the west coast of Vancouver Island. She is an active participant in implementing the treaty and was appointed as a Commissioner to the BC Treaty Commission in 2018.

Lakshmi Lochan was born in Burnaby, BC. Lakshmi has a BA in Anthropology/Sociology from Simon Fraser University. She works as a Process Advisor at the BC Treaty Commission.

Odette Wilson was born in Delta, BC. Odette is x̱ʷməθkʷəy̓əm (Musqueam), Mamalilikulla, and Irish. She is working on an MA in Intercultural and International Communication at Royal Roads University. She works as the Communications Advisor at the BC Treaty Commission.

Stephanie Gustin was born in Vancouver, BC. She has an MA in Dispute Resolution from the University of Victoria. She works as a Process Analyst at the BC Treaty Commission.

Notes

1. BC Treaty Commission, "UNPFII Expert Member Edward John," Annual Report (2016), 16. Retrieved from http://www.bctreaty.ca/sites/default/files/BCTC-AR2016-WEB.pdf.
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5. BC Treaty Commission, Annual Report (2017), 18. Retrieved from http://www.bctreaty.ca/sites/default/files/BCTreatyCommission-AR2017.pdf
6. See for example Bill C-262, United Nations Declaration on the Rights of Indigenous Peoples Act; see also the BC government's February 12, 2019 Throne Speech: "This year … B.C. will be the first province in Canada to introduce legislation to implement the [UN Declaration], legislation co-developed with the First Nations Leadership Council and other Indigenous organizations." (the Honourable Judith Guichon, OBC Lieutenant-Governor) https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/throne-speech

Bill C-88 elimination of the MVRMA "superboard": Small step or start of big leaps in modern treaty implementation?

David V. Wright

In late 2018, the Trudeau government tabled Bill C-88, An Act to amend the Mackenzie Valley Resource Management Act and the Canada Petroleum Resources Act and to make consequential amendments to other Acts. The primary purpose of the portion of the bill dealing with the Mackenzie Valley Resource Management Act (MVRMA) is to reverse several recent controversial amendments that would have reformed regional co-management boards in the Northwest Territories (NWT) to create a single "superboard." The Harper government enacted those changes in 2014 as part of a broader suite of reforms to implement devolution in the NWT. The litigation discussed below stymied those plans. More recently, the Trudeau government committed to a broader review of the MVRMA regime. That review is now imminent, but will be happening in a context where the government has committed to "full implementation" of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and where Indigenous communities are driving revitalization of Indigenous laws and governance (Borrows, 2010, pp. 23-24). This context could drive major changes to the MVRMA regime.

This article provides context around Bill C-88, including the superboard litigation, then comments on the to-date unfulfilled government commitment to conduct a broader review of northern assessment regimes. The article then discusses the present juncture as a basis for significant changes to the MVRMA regime on at least two levels. On one level, the broad review of the MVRMA could explore whether any of the recent changes to the federal impact assessment regime south of 60° ought to be adopted in the Mackenzie Valley regime. On another, more fundamental level, the review could consider changes to the MVRMA impact assessment regime to ensure that it is keeping pace with recent and ongoing work to revitalize Indigenous laws and governance. Overall, recent events and potential next steps in the MVRMA story represent an instance of the challenging nature of modern treaty implementation in general, and the reality that implementation will be an ongoing, long-term endeavor. The Modern Treaties Implementation Research Project, funded by the Social Sciences and Humanities Research Council (SSHRC), stands to make a significant contribution to the research and thinking needed to support potentially significant changes to the MVRMA impact assessment regime.

2014 amendments & Tlicho lawsuit

The 2014 amendments, included as part of the Northwest Territories Devolution Act (Devolution Act), were part of a broader law reform package to legislate devolution in the NWT. An important part of the reforms sought to modify the process for review and approval of major resource projects in the Mackenzie Valley Region by creating a "superboard" and eliminating the land and water boards in each of the NWT land claim agreement areas (Gwich'in, Sahtu and Tlicho). These amendments were part of the federal and territorial governments' attempt to selectively implement the recommendations of the "McCrank Report" (formally entitled "Road to improvement") that came out of the "Northern Regulatory Improvement Initiative" (McCrank, 2008). The Devolution Act received Royal Assent in March 2014.

Throughout the consultation process for these amendments, the Tlicho, Sahtu and Gwich'in objected to the elimination of their respective land and water boards. Soon after the Devolution Act passed, the Tlicho brought an action in the Supreme Court of the Northwest Territories requesting that certain portions of the Devolution Act be declared by the court to be of no force or effect, and that the court grant an interim injunction to enjoin Canada from taking steps to implement the provisions of the Devolution Act that would affect the Wek'èezhìi Land and Water Board (and the Sahtu eventually took a similar step). The court was persuaded by a number

of the Tlicho arguments, including the assertion that eliminating the Wek'èezhìi Land and Water Board (and, by extension, those under the other NWT modern treaties) would be unconstitutional because it would violate treaty rights in the Tłı̨chǫ Agreement. Specifically, the Tłı̨chǫ government argued that the amendments violated Tlicho rights to effective and guaranteed participation in the NWT co-management regime in Wek'èezhìi through the structure set up by the Tłı̨chǫ Agreement and implemented through the MVRMA.

On February 27, 2015 the Court released its decision in Tłı̨chǫ Government v. Canada (Attorney General), granting the injunction and ordering suspension of the contentious amendments (paras. 105-106). In March 2015, the Harper government appealed that decision. Owing to the court order, however, no changes took place to the structure of the land and water boards.

Overall, the government's push for the superboard amendments can quite clearly be seen as a step backward in the broader context of modern treaty implementation.

Post-litigation developments and Bill C-88

Soon after the 2015 election, the Trudeau government indicated that it would put the appeal on hold and work with NWT First Nations to remove the disputed amendments from the MVRMA (Quenneville, 2015). Part I of Bill C-88 is the product of that recent work, though progress has been slow. Reasons for the slower pace are not clear; but, in any event, the Bill was finally tabled and received first reading on November 8, 2018, and was the focus of hearings before the Standing Committee on Indigenous and Northern Affairs on May 16, 2019. The Bill was finally passed and received Royal Assent in June 2019. In short, Bill C-88 repeals the provisions of the Devolution Act that would have restructured the land and water boards in the Mackenzie Valley. This retains the current board structure consisting of the Mackenzie Valley Land and Water Board and the modern treaty groups' respective land and water boards. The Bill also re-introduced regulatory provisions that were included in the Devolution Act, including a new Administrative Monetary Penalties regime, but did not come into force following the court injunction (Crown-Indigenous Relations and Northern Affairs Canada, 2018).

This is likely welcome news for land claim groups and helpful certainty for government and industry alike. It also represents a step forward in modern treaty implementation, albeit a small one. However, more change is foreseeable.

The case of the missing reviews of northern assessment regimes

Bill C-88 does not contain the full extent of changes expected for the MVRMA; it is a set of relatively narrow and targeted amendments (and as such will likely proceed quickly through the House of Commons). The federal government actually committed to broader review of northern assessment legislation. In summer 2016, when the federal government was initiating the "Review of Environmental and Regulatory Processes," which dealt with reforming key federal environmental statutes (Canadian Environmental Assessment Act, 2012, Fisheries Act, Navigation Protection Act, and the National Energy Board Act), there was commitment to this broader review. At the very start of that process, the government explicitly committed to more. The Draft Terms of Reference for the Expert Panel reviewing the environmental assessment regime indicated the following:

> The Minister of Indigenous and Northern Affairs has launched a process to amend northern environmental assessment regimes. As CEAA [Canadian Environmental Assessment Act], 2012 has limited application in the north, matters related to northern environmental assessment regimes will be redirected as appropriate to the process launched by the Minister of Indigenous and Northern Affairs to amend northern regimes. Matters relating to northern environmental assessment regimes are outside the mandate of this Panel (On file with author. Internet link no longer available.). (emphasis added)

The Final Expert Panel Terms of Reference included a similar statement:

> Proposed amendments to the Yukon Environmental and Socio-economic Assessment Act have already been introduced in Parliament. Indigenous and Northern Affairs Canada will continue to work with Aboriginal and territorial governments on this front. The Minister of Indigenous and Northern Affairs intends to launch a process soon to work with all applicable First Nations and the territorial government in Northwest Territories to identify possible solutions related to the Mackenzie Valley Resource Management Act (Canada. Environment and Natural Resources, 2017). (emphasis added)

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Ferry on the River Crossing

Now, almost three years later, the government has taken few, if any, steps beyond the targeted reversal of the litigated amendments. Put another way, to date the government could be seen as acting in accordance with the floor set by the courts, rather than taking further steps toward the "renewed nation-to-nation relationship" envisioned in the early days of the Trudeau government.

However, there are at least two developments now likely to push this review into motion. First, there is Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts (2018). Now passed as of June 2019, Bill C-69 revamps the federal assessment regime and shift it from environmental assessment to "impact assessment." Though changes brought in through Bill C-69 are not as dramatic as the changes brought in during the 2012 overhaul, particularly after the set of changes put forward by the Senate in May 2019, the Bill still contains a number of important shifts, including explicit consideration of climate change, reference to sustainability as a guiding concept, and a number of procedural changes (e.g. an expanded "planning phase" with more guideposts for engagement with Indigenous communities). While the northern assessment regimes are distinct and different from the federal regime (indeed, for the most part the Canadian Environmental Assessment Act, 2012 does not apply north of 60°, though the Inuvialuit Settlement Region is a clear exception), the federal statute has traditionally cast a long shadow northward. For example, soon after the Harper government's overhaul of the federal assessment regime in 2012, the Yukon Environmental and Socio-economic Assessment Act was amended to include tighter timelines that mimicked the new federal approach. As such, with the passage of Bill C-69, there may be some motivation, particularly on the part of the federal government, to review the MVRMA with an eye to achieving some consistency with the new statute.

Second, it has been five years since finalizing the NWT Devolution Agreement, meaning 2019

is the year parties committed to review the MVRMA-related provisions of the Agreement. Periodic review is also required under s.50 of the Act. Perhaps more than Bill C-69, this should finally move the government to act on its commitment to a broader MVRMA review.

Opportunities for further steps – or leaps – forward

Taken together, the five-year devolution review, the statutorily required periodic review, the government's commitment to a broader MVRMA review, and the proposed overhaul of the federal assessment regime present an opportunity for perhaps the most significant changes to the MVRMA regime since its inception. This is particularly the case if one considers the broader context of the federal government's commitment to "full implementation" of UNDRIP, and Indigenous communities' efforts to revitalize Indigenous laws and governance. Potential changes can be viewed along at least two levels. First, at a more technical level, the review of the MVRMA could explore whether any of the changes proposed in the Impact Assessment Act for the regime south of 60° ought to be adopted in the NWT. Second, on a more fundamental level, the review could consider changes to the MVRMA impact assessment regime to ensure that it is keeping pace with the push to revitalize Indigenous laws and governance. These are briefly discussed in turn below, primarily by putting forward questions that could serve as starting points for the MVRMA review and as starting points for further research projects, including those under the SSHRC-funded Modern Treaty Implementation Research Project.

Changes flowing from the proposed Impact Assessment Act

While the proposed federal Impact Assessment Act retains the basic architecture of CEAA, 2012, it introduces a number of concepts not explicitly present in the existing regime. Several IAA changes stand out as potentially relevant in the MVRMA context: an expanded "planning phase" at the start of an assessment process, (re) expanded participation rules, new factors to consider in the assessment phase, new parameters for final decision-making (including sustainability and climate change considerations), and a requirement for "detailed reasons" (i.e. enhanced transparency) to accompany final decisions.

These changes to the primary federal assessment regime raise a number of questions that could be considered through review of the MVRMA or by interested researchers. How do such changes compare to the existing MVRMA regime? To what extent might it make sense to modify and introduce equivalent changes in the MVRMA? To what extent would importing some of these changes be another instance of imposing legal "solutions" from the south? What advantages and disadvantages might there be in aligning the MVRMA with the new IAA? Which new assessment factors and decision-making considerations explicitly set out in the IAA (e.g. climate change, gender-based analysis, sustainability), if any, would be of value in the MVRMA regime? How do "regional assessments" and "strategic assessments" relate to mechanisms already in place under MVRMA (e.g. land-use planning) or other post-devolution arrangements?

For the most part, these questions are best left to be answered by Indigenous governments in the NWT through a collaborative legislative review (one in which Indigenous governments design, or at least co-design, the process). After all, the MVRMA is a product of collaboration between Indigenous modern treaty groups, Canada, and the Government of the Northwest Territories to implement the constitutionally protected commitments in the land claims agreements. In many ways, the MVRMA review could at least benefit from the significant amount of work that was put into development of the IAA, which included numerous submissions by Indigenous communities and experts in impact assessment.

Changes flowing from UNDRIP and revitalization of Indigenous Laws

While the MVRMA regime has been recognized by some as a model for facilitating participation of Indigenous peoples in decision-making (see e.g. Armitage, 2005, p. 239), Canada's broader legal landscape is evolving from a paradigm predicated on Indigenous "participation" to one rooted in legal pluralism, revitalized Indigenous laws, and Indigenous Peoples' inherent right to self-government. In some ways the land claims approach may be seen as leading the way on this, but the present context offers an important opportunity. Fundamental questions ought to be asked by Indigenous communities, governments, industry and other stakeholders about whether the MVRMA regime is poised to keep pace with recent and ongoing work to revitalize Indigenous laws and governance. Related, it is also prudent

to ask what changes may be needed to ensure the MVRMA regime is consistent with "full implementation" of UNDRIP. For example, is it still (or was it ever) appropriate that the federal Minister of Indigenous and Northern Affairs has unilateral power to reject a recommendation of a review panel under s.135? How might the regime provide a stronger basis for Indigenous-led impact assessment beyond what is currently available to the land and water boards? What does the concept of Free, Prior, Informed Consent, as set out in UNDRIP, look like in the modern treaty context? How effective is the MVRMA regime at facilitating nation-to-nation relationships between the Crown and Indigenous governments? What would the MVRMA look like in a context of revitalized Gwich'in, Sahtu and Tlicho laws?

Certainly, the MVRMA amendments introduced in 2005 with Tlicho self-government represent steps in the right direction. For example, the Tlicho government has significant decision-making power under s.137(1) in an environmental impact review situation. However, now, almost 15 years later, the context has evolved further. It may be time to consider how the MVRMA can be modified to facilitate not just next steps, but leaps forward in modern treaty implementation and Crown-Indigenous relations in the NWT and across the North. At a high level, the present juncture is an opportunity for the federal, territorial and Indigenous governments to make significant strides toward accomplishing a key purpose of modern treaties, as stated by the Supreme Court of Canada: "to foster a positive and mutually respectful long-term relationships between the signatories" (First Nation of Nacho Nyak Dun v Yukon, 2017). Time will tell whether governments seize this opportunity. One would hope that at the very least the federal and territorial governments work with Indigenous governments and communities with more sensitivity, creativity and respect than has the process leading to the 2014 superboard changes. ◉

David V. Wright is an assistant professor and member of the Natural Resources, Energy and Environmental Law research group in the Faculty of Law at the University of Calgary. He holds an MA and JD from Dalhousie University and an LLM from Stanford University. He has been called to the bars of the Northwest Territories, Nunavut and Nova Scotia.

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It is worth noting that at the same time, the federal government also began working with Yukon First Nations to remove contested reforms to the Yukon Environment and Socio-Economic Assessment Act, SC 2003, c 7 by the Harper Government and litigated by Yukon First Nations. This led to Bill C-17, which received Royal Assent on December 14, 2017 and rescinded those reforms.

Tłı̨chǫ Government v Canada (Attorney General), 2015 NWTSC 9 (paras. 105-106).

Measuring well-being in the context of modern treaties: Challenges and opportunities

Karen Bouchard, Adam Perry, Bobby Clark, & Thierry Rodon

Modern treaties are tripartite agreements between Canada, an Indigenous Nation or people, and a province or territory. These agreements can be negotiated wherever Aboriginal title has not already been ceded through historic treaties or addressed by other legal means. Once signed, they provide for the transfer of financial resources from the state to the Indigenous signatories, the entrenchment of specific rights, including surface and mineral rights, as well as self-government arrangements in certain cases. While the content of modern treaties varies according to diverse historical and contextual factors, they consistently aim to secure the political and legal recognition of the rights and title of Indigenous Peoples by clarifying uncertainties surrounding land ownership (Helis, 2019). To date, 26 modern treaties have been concluded, yet very few studies have studied their impacts on the lives of Indigenous people.

Academics have scrutinized the impacts of modern treaties on income, as well as on land and resource governance. However, we have yet to develop a suitable method for systematically evaluating and reporting on the ways in which modern treaties reduce socio-economic disparities and enhance the lives of Indigenous Peoples across Canada (Office of the Auditor General of Canada, 2018a).

In 2013, the Department of Aboriginal Affairs and Northern Development Canada (AANDC)[1] used the Community Well-Being Index[2] (CWB) to explore the impacts of treaties on First Nations. Research by Guimond et al. (2013) revealed that, on average, both modern treaty and non-treaty First Nations displayed higher well-being scores than historic treaty First Nations[3]. While causality was not established, their analysis highlighted difficulties in distinguishing the impact of treaties from the impact of regional factors and the likelihood of First Nations with greater resources to engage in and successfully conclude modern treaty negotiations. Another study conducted by Aboriginal Affairs and Northern Development Canada[4] with the Inuvialuit Regional Corporation in 2013 found that the inadequate implementation of modern treaty obligations appeared to compromise the ability of Indigenous signatories to fully benefit from the socio-economic opportunities these treaties were intended to provide (AANDC, 2013). This echoed the conclusions of Martin Papillon (2008) who studied the impacts of the James Bay and Northern Quebec Agreement, and argued that modern treaties "do not change the socioeconomic conditions and overall well-being of communities," but with proactive leadership and collaboration between parties "can become the instruments whereby Aboriginal Peoples establish a governance relationship that better reflects their social, economic and political aspirations" (p. 5).

While the CWB provides a straightforward methodology founded on consistent socio-economic indicators and compatible with other types of community-level data, this measure was not designed or intended to fully represent the complex interactions and connections of social, economic, cultural, environmental, and political factors that impact the health of Indigenous Peoples (O'Sullivan & McHardy, 2004). Due to significant data limitations, it excludes important well-being dimensions, including health, land-based relationships, language (Office of the Auditor General of Canada, 2018b). Well-being scores cannot, additionally, be disaggregated by identity, age and sex, and do not account for Indigenous people living off reserve. The CWB cannot, therefore, comprehensively measure the impacts of modern treaties, or fully represent their impacts on Indigenous quality of life.

Conceptualizing Indigenous well-being

There have been increasing efforts to develop well-being measures that reflect the commonalities and differences of Indigenous Peoples. Much of the literature associates Indigenous well-being with the capabilities required for people to lead healthy and meaningful lives (Sen, 1999), as well as the numerous interdependent factors that positively or negatively influence these capabilities, called determinants of health. While there is no definitive list of determi-

nants, there is a general consensus that colonialism is an active and ongoing force impacting the health and well-being of Indigenous Peoples and communities (Greenwood, De Leeuw, & Lindsay, 2018).

Self-determination, too, is considered a critical determinant of Indigenous well-being. Self-determination is often conceptualized as a strength-based, counteracting force or capability that diminishes the ongoing impacts of colonialism, including Indigenous Peoples' lack of social, economic and political sovereignty (Auger, Howell, & Gomes, 2016). For Yap and Yu (2016), self-determination encompasses "autonomy over one's life and how individuals choose to live their life, but also about people's autonomy over the decisions and responsibility to care for and manage their country and land as part of their existing and enduring well-being" (p. 317).

In Canada, Indigenous well-being has been described as holistic, multidimensional, and based on community-centred experiences (Denis, Duhaime, & Newhouse, 2017). It underlies the medicine wheel approach used in the First Nations Holistic Policy and Planning Model, the Integrated Life Course and Social Determinants Model of Aboriginal Health, as well as the Misipawistik Cree notion of "E-Opinitowak," meaning the act of "lifting ourselves up, empowering the community and promoting self-reliance" (Assembly of First Nations, 2013; Reading & Wien, 2013; Wien et al., 2019, p. 19).

Applying the well-being concept, particularly through the lens of capabilities, draws the focus on the conditions and circumstances that enable people to live the kinds of lives they value, and ultimately how Indigenous Peoples are able to pursue and realize self-determination through the signing and implementation of modern treaties (Bockstael & Watene, 2016).

The Nisga'a Nation

The Nisga'a Nation of northwestern British Columbia, as represented by the Nisga'a Lisims Government (NLG), launched the Quality of Life Strategy to enhance the living conditions of Nisga'a citizens. The strategy consists of a framework outlining a holistic understanding of sustainability and quality of life for the development and implementation of effective government programs and services. It also includes a survey designed to gather relevant baseline data on "how well a person is living their daily life." The strategy provides a case study of a culturally adapted way for acquiring baseline data which assists governments in evaluating the impacts of the Nisga'a Final Agreement, a comprehensive land claims agreement and British Columbia's first modern treaty.

The Quality of Life Strategy was initiated to reflect how NLG defines successful governance and public policy, considered as the degree to which government actions produce demonstrable improvements in the quality of life of Nisga'a citizens. The strategy includes key performance indicators (either quantitative or qualitative) that reflect how Nisga'a citizens view and describe the relationships among governance, public policy, and quality of life. Ultimately, by measuring indicators over time, engaging Nisga'a citizens, and aligning governance and public policy-making to improve quality of life for individuals, families and communities, the NLG aims to develop a long-term approach to understanding the quality of life for Nisga'a citizens.

The Quality of Life Framework (QoLF) was developed under a participatory research process that convened a Nisga'a working group. The resulting framework encompasses eight quality of life themes and 35 subthemes. The QoLF was presented to Nisga'a citizens at a Special Assembly of the Nisga'a Nation held in 2014. In their feedback to the NLG administration, attendees requested meaningful and tangible quality of life improvements based on the expansion and implementation of the QoLF. The NLG adjusted the QoL strategy accordingly and undertook a comprehensive household survey in the fall and spring of 2018/2019, respectively. The survey, known as the Nisga'a Nation Household Survey (NNHS), linked the QoLF themes to measurable indicators, as well as culturally adapted and contextually relevant questions.

The survey is a practical way of monitoring the social and economic changes over time affecting the various subgroups of the Nation's population, such as Elders, children, urban dwellers and women. As such, it provides a means of establishing baseline criteria and data to support NLG's understanding of and responses to the impact of the Nisga'a Final Agreement on the living conditions and quality of life of Nisga'a citizens.

With fieldwork complete and the analysis of findings from the NNHS underway, the QoL departmental staff have been holding community engagement sessions to share certain key preliminary results and findings, such as those regarding food security, housing and transportation challenges.[5] The conclusions of the NNHS are intended to provide Nisga'a individuals and communities with factual information and data to raise funds for programs and local initiatives, to help determine critical areas that require attention, as well as to disseminate knowledge that can foster constructive dialogues and

positive change. Nisga'a Village Governments, Urban Locals, and Nisga'a citizens can use the NNHS process and results to engage in meaningful conversations among themselves and with public officials about the factors, conditions and situations that define their well-being, and thus highlight ways of uplifting and empowering their communities.

Conclusion

Effective governance, whether for small or large nations, means being capable of "future-oriented planning, problem solving, evaluating outcomes, developing strategies and taking remedial action" (Smith, 2016, p. 124). This requires demographic facts and contextual knowledge of the strengths, assets, resources, and expertise a nation, community, or organization already has and can bring to bear (ibid.). It also means knowing a community's existing infrastructure, technology, funding sources and base, among other things.

The development of a transparent, consistent, and contextual measurement of well-being relevant to the cultural realities of modern treaty citizens could offer a holistic way of evaluating whether, and under what conditions, such agreements can effectively reduce socio-economic disparities and improve the quality of life of Indigenous communities.

NLG's example offers a hybrid approach to survey collection and methods that highlights how different epistemologies can be shared, particularly when engaging with Indigenous ways of knowing, to develop "relevant, reciprocal, respectful, and responsible research" by, with, and for Indigenous Peoples (Peltier 2018, p.1). NLG's administrators also stress the importance of developing primary data collection strategies and methods that reflect the context and culture of the people under study.

Several challenges remain. We must consider how well-being indicators can be used for longitudinal and inter-cultural comparisons (between Indigenous and non-Indigenous populations), but also at what scale and frequency data should be gathered and analyzed. These decisions will necessarily depend on the objectives served by the data collection process, as well as the peoples and functions ultimately targeted by their use. Well-being indicators should not only be culturally relevant, but also provide Indigenous governments with the capacity to efficiently respond to local priorities and concerns (Smith, 2016).

Moving forward, as argued by Smylie and Firestone (2015, p. 84), we should encourage and actively work towards meaningful partnerships to govern and manage data with modern treaty holders to support their self-governance. At the heart of public service and governance is the need to collect data that captures the values, priorities and beliefs that determine people's well-being experiences, and which explain how government policies and programs can enhance quality of life and effectively respond to the needs, aspirations and interests of its constituents.

The measurement of the impact of modern treaties and self-government on Indigenous Peoples through longitudinal studies based on mixed-method surveys can significantly benefit from a participatory approach that incorporates and builds on Indigenous knowledge. The engagement of a nation's citizenry in developing culturally adapted and contextually relevant methodologies, as well as in analyzing preliminary results offers a productive way of accounting for the factors (determinants) that contribute to a person or people's ability to lead meaningful lives. Ultimately, this approach may help to reduce socio-economic disparities and improve the quality of life of Indigenous Nations and Peoples with modern treaties. ◉

Karen Bouchard is a PhD candidate in political science at Université Laval. She holds a three-year Joseph-Armand Bombardier CGS Doctoral Scholarship (SSHRC) and works as research affiliate for ISC-CIRNAC. Her research examines the impacts of modern treaties on Indigenous well-being in Northern Canada. The opinions expressed in this paper do not necessarily represent the official view of ISC-CIRNAC.

Adam Perry has a PhD in social anthropology and works for the Nisga'a Lisims Government as a data analyst. His academic interests include understanding societal and cultural change, aspects of rural social and economic development, and the political and social processes that exist in and between formal institutions.

Bobby Clark is the Director of Communications and Intergovernmental Relations with Nisga'a Lisims Government. He is the Chair for the Nisga'a Museum Advisory Committee and is a board member representing his home community of Laxgalts'ap on the Wilp Wilxo'oskwhl Nisga'a Institute (WWNI). He has a Bachelor of Arts in First Nations Studies from WWNI and the University of Northern British Columbia.

Thierry Rodon is Associate Professor in the Political Science Department at Université Laval, the chairholder of the Northern Sustainable Development Research Chair and the director of the Interuniversity Centre for Aboriginal Studies and Research (CIERA). Professor Rodon specializes in Northern policy and Arctic governance.

Notes

1. On July 15, 2019, Indigenous and Northern Affairs Canada was dissolved and two new departments, Indigenous Services Canada (ISC) and Crown-Indigenous Relations and Northern Affairs (CIRNAC) were established to replace it.
2. The CWB is a numerical score ranging from 0 to 100, which is calculated by adding four equally-weighted components and a total of seven indicators: 1) total income per capita, 2) education (high school and post-secondary graduation), 3) housing (overcrowding and need for major repairs), and 4) labour force (participation and employment)(Cooke & O'Sullivan, 2015).
3. Historic treaties refer to the 70 treaties signed between 1701 and 1923 by the British Crown and Indigenous groups, which were intended to support peaceful economic and military relations. These involve 364 First Nations, representing over 600,000 First Nation peoples (CIRNAC, 2008).
4. Currently ISC-CIRNAC.
5. The survey was test-piloted by several Nisga'a citizens of varying ages and experiences, literacy ranges, and genders in order to gain feedback on the grouping, wording and content of its questions. The verification of the data is an important part of participatory research undertaken by the NLG.

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Enhancing fisheries co-management in the Eastern Arctic

Jamie Snook, Jason Akearok, & Tommy Palliser, with Ashlee Cunsolo, Carie Hoover, & Megan Bailey

In January 2019, the three co-management boards from Nunavut, Nunavik, and Nunatsiavut gathered together in Happy Valley-Goose Bay, Labrador, for an unprecedented opportunity to discuss commercial fisheries in the Eastern Arctic, and decision-making responsibilities of the Nunavut Wildlife Management Board (NWMB), Nunavik Marine Region Wildlife Board, and the Torngat Joint Fisheries Board (TJFB)[1]. This was the first gathering of its kind, and was driven by the boards' individual recognition of the essential need to collaborate across land claim regions in the Eastern Arctic, to work together for shared species, and to learn from each other in order to improve how land claims are implemented throughout Inuit Nunangat (Inuit homelands).

Access to fisheries is a critical necessity and a determinant of health and wellbeing for Inuit throughout the four regions of Inuit Nunangat – Inuvialuit Settlement Region, Nunavut, Nunavik, and Nunatsiavut (Figure 1) – and Inuit access to fisheries is a fundamental concern and major policy issue. Yet, inequitable policies have limited the extent to which Inuit peoples and communities benefit from commercial fishing opportunities in Canada, both within and adjacent to their respective territories. For example, Inuit currently experience inequitable access limitations, depending on geographic location, provisions of land claims agreements, and species of interest, both within Inuit Nunangat and when compared to southern interests and access. Current commercial fisheries access for Inuit is also not well documented, creating the need for North-to-North dialogue and for interjurisdictional learning about shared challenges and shared opportunities.

Within this context, participants at this gathering were brought together to discuss strategies for the implementation of land claims through co-management boards, to share experiences with implementation and fisheries access, and to learn from the challenges and successes of the Eastern Arctic co-management boards. Three key themes were discussed: the spirit and intent of co-management as negotiated in land claim agreements, benefits of the fishery in Inuit Nunangat, and responsibilities in research. (See https://www.youtube.com/watch?v=2m5OUP49Tbo for a video of the event.)

Theme 1: What is the spirit and intent of co-management as negotiated in land claim agreements?

A. A renewed commitment to co-management: "This is important because we all have common interests."

It was clear from the gathering of the three Eastern Arctic co-management boards that more productive opportunities between co-managers would be possible if more time was spent focusing on the intent of land claim agreements. Inuit co-managers at the gathering repeatedly made comments about this, with one person remarking on the need to "pay more attention to the land claim agreements that have been signed. Pay more attention to the spirit and not just the words and interpretation," and another saying that co-management is "a good process and the government of Canada should honour the spirit and intent of why the boards were set up and not be so literal in their interpretations of these processes."

These interpretational challenges were generally discussed in situations where it was felt that advice provided by a co-management board was not thoughtfully considered by the responsible minister. For example, as one participant shared, "What we have seen to date is the minister seldom heeds the advice of the board, and the board rarely hears from the minister on why a decision was made. To me

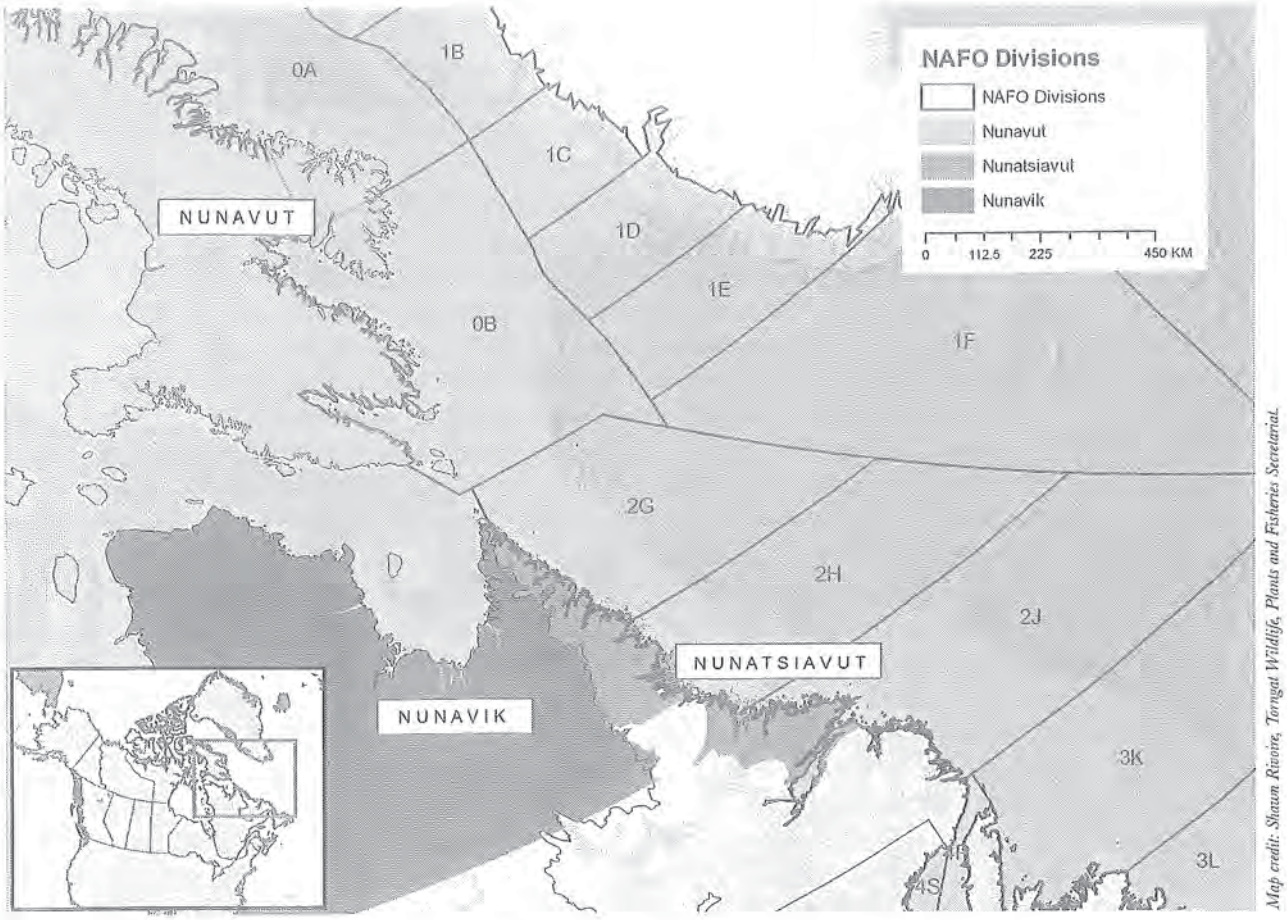

Figure 1: Inuit regions in the Canadian Eastern Arctic and NAFO fishing areas.

that is not co-management." Another participant echoed this sentiment, and explained: "When someone acts honourably you don't question it. You know it. There is a lot of questioning [of co-management board decisions and recommendations] and still uncertainty years after the agreement is signed."

There was also a sense on the part of some co-managers at the gathering that, as one person said, "Any good that has come for Indigenous fisheries has come from the Supreme Court." While recent court cases (Clark & Joe-Strack, 2017) have suggested that the courts remain an option to settle disputes related to land claim implementation and treaty rights, it would be more proactive, cost-efficient and respectful if a renewed commitment to co-management was demonstrated through tangible policy statements and implementation of co-management advice. A participant provided an example of this desire by explaining:

> Co-management is about trust and it is about agreements that have been made. In the context of fisheries co-management in our region, I believe we have matured enough to the point now that the Minister of DFO [Fisheries and Oceans Canada] and others need to trust that the advice we are giving is well founded and well researched and a lot of people have been involved and allow our decisions to stand. This, to me, is what co-management is: trusting and having faith that the decisions will work out for the betterment of those that signed the agreements.

B. Responding to substance with substance: "Canada set up these boards and should heed advice that comes from these boards."

There was consistent dialogue at our gathering about the responses received by the co-management boards when their recommendations and/or decisions are provided to the Federal Minister of Fisheries, Oceans and the Canadian Coast Guard. There was an overall feeling that well-founded, quality advice was being provided to the minister, but equally substantive responses were not being received. This lack of "responding to substance with substance" prevents an understanding of ministerial decisions, limits shared learning opportunities, and diminishes an authentic sense of co-management. One co-manager explained that it is important to have "the federal minister give thoughtful consideration

and merit to decisions and recommendations that come from boards that are established through land claim agreements," and that this is essential to support continued relationships between the co-management boards and the federal minister. Going further, another participant indicated that "it's very important to understand the underlying concerns and issues and try to resolve them together."

C. Having confidence and trust in co-management: "Trust the wisdom of the people who have been appointed to these boards."

The Fisheries Act (2018) in Canada is clear that the minister has absolute discretion. This creates challenges for Inuit co-management boards when recommendations submitted to the minister are not implemented by the DFO. As one participant explained, "Canada has the ultimate responsibility to manage commercial fish resources. They haven't relinquished that authority." Another individual shared that "ultimately the minister has all the authority, if the minister doesn't like our decision. We have a feedback loop for the minister to reject our decisions, so is that co-management?" Going further, one of the participants at the gathering articulated:

> There is an exceptional depth of knowledge amongst the people who have been appointed and trust that when they do make advice it's good advice, it's gone through a very thorough process, and in the end following the recommendations will be to the betterment of those that have negotiated modern day land claim agreements.

Even with such an understanding of jurisdictional powers, there is nothing in the Fisheries Act that prevents the minister from expressing confidence in the network of co-management boards that have matured and are established in Inuit Nunangat. In other words, just because the minister has discretionary power, he or she does not need to use it.

Participants at this gathering agreed that confidence can be expressed by the Minister of Fisheries, Oceans and the Canadian Coast Guard by allowing the advice and/or decisions from the NWMB, NMRWB, and the TJFB to be implemented by departmental officials, or at least provide a sound rationale for not following a board decision and/or recommendation. This step would show openness and transparency and could be a learning opportunity for all parties involved. Implementing co-management decisions/recommendations would be the most tangible action possible.

Theme 2: Benefits of the fishery in Inuit Nunangat.

There was a clear understanding on the part of co-managers and Inuit representative organizations in this gathering that Inuit should be the primary beneficiaries, benefitting fully from fish within and adjacent to Inuit lands and waters, as represented by this clear explanation from one of the participants: "When he [the federal Minister of Fisheries, Oceans and the Canadian Coast Guard] is allocating resources in an Inuit region…Inuit [should] be given priority consideration over other interests. We are talking about regions that are adjacent and Inuit should be given priority in these areas." Discussion of these issues with all meeting participants considered a number of regulations and polices such as the land claim agreements themselves, the limited socio-economic opportunities in Inuit Nunangat coastal and remote communities, and DFO policies that support concepts such as adjacency and facilitating Indigenous involvement in commercial fisheries (Department of Fisheries and Oceans, 2008; 2012).

The co-management process for each of the three regions highlights similarities in the co-management systems, as well as substantive differences in processes, fishery development histories, current fisheries status, and approaches to planning for future allocations in each region. Yet all agreed that, as one participant said, "The opportunity for Inuit in the commercial fishery is pretty significant. Greater access, a greater share."

There were also many comments shared about viable communities, and the importance of remembering, as one person remarked, "that all those resources that are available [to communities] are necessary to make the communities sustainable and [it's important to] work with the organizations to improve access and the standards of living. If not, they [the communities] can't exist." These sentiments highlight the connection to the social determinants of health and how fish resources can play a vital role in the health and wellbeing (and food security) of Inuit communities and individuals.

Theme 3: Responsibilities in research.

Dialogue about research responsibilities was intertwined with discussions related to honouring

the spirit and intent of co-management agreements contained within land claims agreements. There were many discussions about the essential role of research to support evidence-based decision-making related to fisheries in Inuit Nunangat, but there were a number of questions about who funds, leads, and benefits from fisheries research. Successful co-management requires access to all types of knowledge if co-learning is going to occur in order to make accurate and meaningful decisions and or recommendations. Yet co-management boards are often struggling to gain access to the needed research to support their decision-making processes in timely, reliable, and transparent ways.

Participants made it clear that there is a funding and resources gap in Northern science and, as one attendee explained, the "North is always served last." As mentioned above, the DFO has not relinquished its authority for the management of fisheries in Canada. Many participants argued that, as one put it, "Canada has management responsibility, so it needs to have science responsibility," meaning that DFO needs to fund research in the North to support decision-making by federal and territorial co-managers. Participants explained that there were examples of DFO-funded research being discontinued after the settlement of land claims, despite the continued need for fisheries data, including a long-standing Arctic char research program in the Nain Bay region of Nunatsiavut. Perspectives from the meeting included discussing DFO's responsibility for funding fisheries science and conducting research related to Northern needs and priorities. In some cases, the commercial fishing industry is providing data to fill science gaps; for example, funds raised from shrimp allocations are currently used by DFO to fund northern shrimp science, rather than using government funds. In response, the Torngat Joint Fisheries Board have continued to recommend that this shrimp research be funded by DFO, and the fish allocations be made available to support and sustain Inuit fishing entities.

In examples where DFO conducted research, there were concerns raised about the timeliness of information, accessibility of the information to co-management boards, and the resources required for the boards to engage and review the science for decision-making purposes. Yet fisheries management in Inuit Nunangat is not just about science, with all land claim agreements making reference to the use of traditional Inuit knowledge or Inuit Qaujimajatuqangit (IQ) in decision-making. Financial support should also be considered to strengthen Inuit traditional knowledge research initiatives.

It was clear that, as one participant said, the "boards need science to do their work" and the co-management boards can play a role in bridging the gap in Northern fisheries research. There were benefits associated with co-management-led research, as one participant pointed out: "Whoever needs the information from our area, if they come to us and ask, they will get a lot more information than they would on their own." These points illustrate the role that co-management boards may play in research. They highlight that the "shared space" of co-management is an opportunity to enhance the quality and quantity of research that is conducted. It can ensure that a single treaty signatory does not hold responsibility for all facets of research required to sustainably manage fisheries in the North. Co-management boards have community connections, experience integrating different knowledge systems into fisheries decisions and recommendations, and familiarity navigating bureaucracy. They provide transparent decision processes, based on treaty mandates to make decisions, and/or provide advice to the Minister of Fisheries, Oceans and the Canadian Coast Guard (Snook, Cunsolo, & Dale, 2018).

Discussion and opportunities

The gathering's success highlights what is possible when co-management boards meet to share perspectives, co-learn, and discuss collective options that support Inuit livelihoods, self-determination, and wellness. As one participant said, the gathering was "unique in bringing all the co-management boards together for a topic like commercial fisheries...I think the fact all the boards can come together and talk together coming from a somewhat unified stance is unique and really interesting."

Participants viewed establishment of a new Arctic Region of the Department of Fisheries and Oceans as a potential catalyst to repeat a meeting of all the Inuit co-management boards. In the fall of 2018, the Government of Canada and Inuit Tapiriit Kanatami announced that the new Arctic administrative region of DFO would be created, which would focus on the regions covered by Inuit land claims and their respective co-management boards (Department of Fisheries and Oceans, 2018). There were many perspectives shared on this news. While some par-

ticipants acknowledged that the co-management board network had not been engaged prior to the announcement, there was hope for future opportunities for Inuit co-management boards to fully participate in shaping the approach to the new regional administration's design.

Anticipating these changes, co-managers at this gathering thought it would be important that a DFO Arctic administration have resources comparable with the existing regional administrations in terms of powers, staffing, and budgets for research. It was important to participants that an extra level of bureaucracy not be created if it would not facilitate co-management in Inuit Nunangat, and further burden the existing system.

There are opportunities to enhance fisheries co-management in the Eastern Arctic and more dialogue and collaboration may be the first step in that direction. As one co-manager explained:

> I hope that the future includes a lot more trust on behalf of the mature co-management network that is there and people will look to these boards in the future to see what their advice and decisions are going to be, and everyone can have confidence that these decisions went through good process and whatever they end up being they went through a process that everyone agreed to and trust[s] and we can move forward together.

As co-management boards in Inuit Nunangat continue to evolve and mature, they become capable of handling more responsibilities and further leading co-management decision-making and policy implementation in commercial fisheries (Inuit Tapiriit Kanatami, 2017). With decades of practical co-management experience, each board is well positioned to play a governance leadership role in Inuit Nunangat and the Arctic. During a time when building nation-to-nation relationships in Canada is of increasing importance (ibid), all sectors of government may contribute more. Co-management boards are uniquely positioned to model innovative relationship building, given their community connection and frameworks to understand and respect multiple knowledge systems. ◉

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Jamie Snook is Executive Director, Torngat Joint Fisheries Board.

Jason Akearok is Executive Director, Nunavut Wildlife Management Board.

Tommy Palliser is Executive Director, Nunavik Marine Region Wildlife Board.

Ashlee Cunsolo is Director, Labrador Institute of Memorial University.

Carie Hoover is Postdoctoral Fellow, Dalhousie University.

Megan Bailey is Canada Research Chair in Integrated Ocean and Coastal Governance & Assistant Professor, Dalhousie University.

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Notes

1. These three boards provide advice to the Minister of Fisheries, Oceans and the Canadian Coast Guard, and in the case of the NWMB and the NMRWB, they make co-jurisdictional decisions with Fisheries and Oceans Canada (DFO) within their respective land claim settlement regions. The boards have many fish species in common such as Greenland halibut, northern shrimp, snow crab, and Arctic char, and each of these fish stocks have significant impacts on the economy and local livelihoods in each Inuit region.

Engaging the next generation of treaty negotiators and implementers

Sherry Campbell

"Modern treaties allow the Crown and First Nations to have a discussion about how to crystallize and represent the rights, titles and interests that First Nations citizens generally speaking in Canada have. It allows them to negotiate what they consider to be a fair understanding and adopt a set of principles and processes that is entrenched within a treaty right. Once it's entrenched under section 35 of the Constitution Act, 1982 it's clear that no other laws of Canada, including the Constitution of Canada, could be in conflict with that, so it adopts certainly a supremacy that's required and I think that's why they have been important and will continue to be important."

— *Dave Joe, Negotiator (Yukon Umbrella Final Agreement)*

"Youth are inheriting these land claims and agreements. A lot of people always say youth are the future, but we're here right now and we're willing and able to contribute to the betterment of our society."

— *Cecile Lyall, participant at The Gordon Foundation's Treaty Negotiation and Implementation Simulation*

This article is a reflection on the Treaty Negotiation and Implementation Simulation, an event organized by The Gordon Foundation, in collaboration with the Land Claims Agreements Coalition and other partners, aimed at engaging emerging Indigenous leaders in their modern treaties.

Modern treaties are playing an important role in shaping the relationships between Indigenous Peoples and Canada. Since 1975, 26 modern treaties have been successfully negotiated, providing Indigenous ownership of more than 600,000 km² of land. Many more modern treaties will be signed in the coming years, defining land rights of many more Indigenous Peoples and creating paths toward self-determination.

Modern treaties are binding reciprocal commitments between Indigenous, federal, and provincial or territorial governments. For Dave Joe, who negotiated the Yukon Umbrella Final Agreement, they are important in resetting the nation-to-nation relationship between Indigenous Peoples and Canadian governments:

> These are not just concepts that float up there. They are constitutional concepts that are enshrined and entrenched. If there's a breach in that, it allows the First Nations parties to proceed to court in the event that it's not resolved through mediation or other processes. It keeps the parties more or less honest with respect to what their intentions were when they crystallized those rights in a modern treaty context.

Signing a modern treaty is a tremendous feat. Negotiations often take decades, and their completion is followed by a challenging implementation process intended to ensure that an agreed upon vision becomes reality. There are many lessons to be learned from negotiators, Elders, and

others who worked for years on their treaties. Many modern treaty negotiators came of age in the 1970s and 1980s and are retiring or passing away. Their knowledge is at risk of being lost unless it is preserved and transferred to future generations.

In 2017, The Gordon Foundation responded to concerns of former and current negotiators and Northern experts working on modern treaty implementation that Indigenous youth were not engaging in modern treaties to the extent possible, and that something needed to be done. With a significantly large and growing young population, Indigenous youth have an important role to play in implementing their modern treaties.

Photo credit: The Gordon Foundation

Participants in the Modern Treaty Negotiation and Implementation simulation.

John B. Zoe, who negotiated the Tlicho Land Claims and Self-Government Agreement, believes that if youth do not get involved, the spirit and intent of the hard-fought treaties will be lost. Such a loss could have unintended effects on the gains modern treaties are intended to make in areas such as resource rights, self-governance and environmental stewardship.

According to Dave Joe, treaty rights and the negotiation process are important for youth to learn because "this is going to be the world that circumscribes their rights, titles and interest...to maximize it, certainly to protect it, and to advance it they certainly will have to learn what those values are and what their rights are and how to best protect them in a fashion they understand."

For over 30 years, The Gordon Foundation has been working with the North to amplify Northern voices. As a longstanding partner, The Foundation was asked to document existing programs, curricula and initiatives that engage and teach Indigenous youth and Canadians about historic and modern treaties. This led to the development of a report, Treaty Negotiators of the Future, which was informed by discussions with Northern experts, a consultation with participants at the 2017 Land Claims Agreement Coalition (LCAC) conference, and a three-month mapping exercise. Over 50 educational initiatives were documented, including courses for students from kindergarten to university, radio shows, games and films. The resources are now available as a portal that can be added to on the LCAC website.

The report also listed knowledge transfer as a gap and recommended that creating simulations for youth is an effective way to engage Indigenous emerging leaders in modern and historical treaties. Other innovative ideas include podcasts and internships.

Podcasts allow knowledge to be shared in a way that is accessible to a wider audience. A podcast series on treaties could facilitate pan-Canadian discussion on the overarching importance of treaties, while still allowing for regional nuances. It would provide insight and analysis of the potential for treaties to further self-determination, its limitations, and complementary strategies.

Internships would also provide an opportuni-

ty for emerging leaders to be present at the table, partake in conversations, be active in research and have access to the entire negotiation process. Internships would allow first-hand learning on the creation of a land claims agreement.

In response to these innovative ideas, The Gordon Foundation, in collaboration with the LCAC and other partners, organized the first Canada-wide Treaty Negotiation and Implementation Simulation for emerging Indigenous leaders. From February 28 to March 2, 2019, 17 next generation Indigenous leaders met with experts and former negotiators to expand knowledge and skills in the modern treaty process. Participants came from across the country, including Tsawwassen First Nation, Ka:'yu:'k't'h'/Chek'tles7et'h' First Nation, Ucluelet First Nation, Nisga'a First Nation, Taloyoak, Nunavut, Tłı̨chǫ First Nation, James Bay and Northern Quebec Cree, Gwich'in First Nation, Little Salmon Carmacks First Nation, Tr'ondëk Hwëch'in First Nation, Champagne and Aishihik First Nation, Ta'an Kwäch'än First Nation, and Selkirk First Nation. They ranged from 17 to 35 years of age and brought with them strong visions for their communities.

Throughout the simulation, the participants were guided by John B. Zoe, Dave Joe, Dr. Joseph Gosnell (Negotiator, Nisga'a Final Agreement) and Danny Gaudet (Negotiator, Deline Final Self-Government Agreement). Between the 1970s and 2000s, these individuals played pioneering roles in the development of modern treaties or self-government agreements for their nations.

The simulation was designed to build inter-generational connections and transfer knowledge from negotiators to new leaders who will play crucial roles in redefining the relationship between Canada and their communities and nations. It aimed to increase Indigenous emerging leaders' interest in their respective modern treaties, and introduce them to treaty implementation and negotiation practices, issues, dynamics, and implications as one tool among others for self-determination.

Dave Joe believes the simulation "reflected the realities that First Nations live with when the Crown imposes constraints in a modern treaty context." On the first day of the simulation, participants engaged in insightful discussion with the negotiators, representatives from the federal government and legal experts. They spent the second day negotiating a section of a wildlife harvesting and management chapter of a mock modern treaty. On the third day, they negotiated the implementation plan for the section negotiated by a

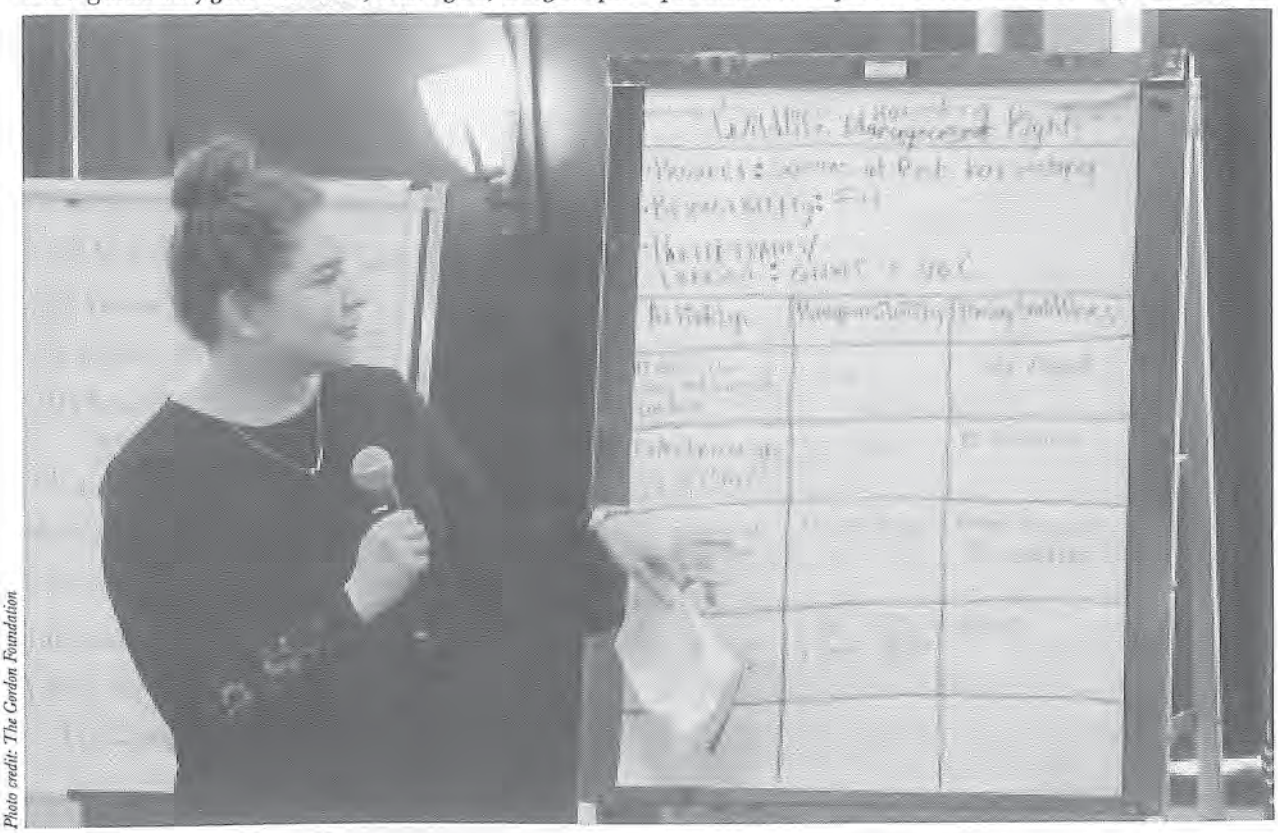

Photo credit: The Gordon Foundation

Asya Touchie from Ucluelet First Nation, B.C. explains her group's ideas for a section of a fictitious land claims agreement.

different group. Everyone had a turn representing a negotiator from an Indigenous organization and the federal or territorial government.

Twenty-six-year-old Cecile Lyall from Nunavut said she found the simulation very helpful, especially in terms of seeing treaty negotiations from all perspectives. "During the simulation, you sat on both sides. You can't always just be the Indigenous group, so I found it very conflicting but enlightening to see it from the other perspective," she said of her experience being a Canadian government representative. "I struggled with it because I thought, 'Oh you're the Indigenous group, I'll just give you everything you want,' but that's not how it works."

According to the participants, the simulation piqued their interest in their modern treaties and motivated them to get involved in implementation. It also built their skills in negotiation, public speaking, working in teams, and critical thinking. It provided knowledge transfer from the negotiators, and offered learning about different perspectives on negotiating. They also built connections across Canada. According to Lyall, the simulation was "very motivating" and having access to veteran negotiators was inspiring.

The simulation was historic: it was the first of its kind, and, according to John B. Zoe, offered much needed knowledge transfer that has been ignored for too long. "Anything we do in knowledge transfer is needed," he said, adding that his generation was a quiet one and he sees less encumbrances on today's Indigenous youth born under self-government. "There are better opportunities and potential for economic development, and not having everything administered from the outside. The simulation gave people experience."

Lyall said, "It was very inspiring as a young person to try to foster the rights we have now and also fight for more political power within our regions...I'm from Nunavut, so I'm a Nunavut beneficiary and it really inspired me and gave me a sense of understanding of how hard it must've been. Nunavut turned 20 but the negotiations were not only 20 years ago – it was 50 years ago that they started negotiations. It was a very different time. I really envisioned their sheer determination to power through all those prejudices of the time and to really fight for what they believed in."

For his part, Dave Joe believes that it is integral for Elders and people with experience to reach out directly to youth. "It's incumbent upon people like myself to reach out to them, speak at colleges and impress upon them the importance."

Lyall believes that it is a very important time to start these conversations around knowledge transfer. "A lot of the large comprehensive claims took quite awhile and the individuals that sat at the negotiation tables are aging and a lot of them are passing on, so right now it's a really important time to ensure that the transmission of knowledge is happening and is passed down to younger generations...The Gordon Foundation is playing a key role in making sure that knowledge survives."

Since the first simulation, The Foundation has received growing interest to run others in specific regions, to organize annual Canada-wide simulations, and to produce a toolkit of the simulation curriculum. There is also interest in other recommendations identified in the report, "Treaty Negotiators of the Future," including a podcast on treaties across Canada, and internships for next generation Indigenous negotiators and implementers. The Foundation hopes to continue to work with Indigenous Nations interested in this work, and is currently exploring partnerships to ensure that knowledge-transfer and experiential learning tools on treaties are available and impactful across Canada. ◉

Sherry Campbell is President and CEO of The Gordon Foundation.

Notes

1. Government of Canada. "Treaties and agreements." September 11, 2018. Accessed April 01, 2019. https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231
2. The report can be found on The Gordon Foundation's website: http://gordonfoundation.ca/resource/treaty-negotiators-of-the-future/
3. The portal can be found on the LCAC website: http://landclaimscoalition.ca/treaty-resources-portal/

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Modern Treaty Implementation

Bull's Eye Certainty Clause and Arrows, by Lianne Marie Leda Charlie