

Making Modern Treaties Work – LCAC  
Breakout 2B: What should Co-Development Look Like? Modern Treaty Perspectives

**Moderator (round table discussion): Martin Papillon, Associate Professor & Director of the Centre de Recherche sur les Politiques et le Développement Social**

**Panelists:**

Frank Dragon, Advisor, Ka:yu:'k't'h' / Che:k'tles7et'h' First Nations

Mark Smith, General Counsel & Director of Process, BC Treaty Commission

Nuri Frame, Partner, Pape Salter Teillet LLP

**Roundtable:**

**Martin Papillon:** We talk a lot of co-development, but we don't exactly agree on what it means. How do you define co-development for you and your experiences?

**Nuri Frame:**

- Should we define co-development? From my perspective effective co-development is a function of effectiveness and intent.
- We are seeing exciting developments.
- But as we unpack this new idea and give it meaning, we have a duty to consult. "Duty to consult" has failed in our history, it is still important. Consultation is a trend and a trick.
- Co-development with effective consultation in mind, driven by relationships and driven by intent.
- Understand what we're doing before we try to define it.
- Consultation spreadsheets encapsulate that opportunities become adversary. Mediate through collaboration for shared outcomes.

**Frank Dragon:**

- Canada's duty to consult, the 30-40 examples of Canada's failed court cases never make it to media.
- "The big white word: Negotiation", now we talk about the duty to consult, collaboration.
- All these buzz words are part of the language, but no one is listening.
- The relationship only goes further by what you involve and what you want to make of it.
- "It's a 2-way street, not negotiations".
- Shared decision-making is co-development.

**Mark Smith:**

- Last September the latest policy to develop the treaty process of the 3 principles "The reconciliation policy of BC".
- Policy that government will engage with Indigenous processes and develop processes jointly to develop mandates that reflect both interests and ensure flexibility of agreements over time.
- Difference in federal and provincial government responsibilities and the representatives.
- Call for agreed upon language from all three levels: federal, provincial, and Indigenous.

**Martin Papillon:** When do we know we are involved in co-development? Give examples

**Nuri Frame:**

- The Devolution Act was a central focus of the GNWT.
- Consultation plays a crucial role in legislation.
- Elected leaders are drivers, and judges/courts are often lagging.
- The development of the Mineral Resources Act. Process began as common negotiations with Ministers having clear matching orders and clear mandates. Public government admitted to two opposing ideas with the government and Indigenous communities.
- Presumption of not a commonality of goal or success this is an old school style negotiation. This approach failed miserably- as expected. Near walk-outs on both sides.
- Need to start understanding negotiating as a shared understanding of goals.
- In reality we have more common ground than anticipates - nobody is truly a bad actor.
- We should do away with our negotiations playbook because we should build mutual trust.
- The result was a comprehensive Mineral Resources Act, to take pride in. "Solve a common problem in a co-operative way - that is co-development"

**Frank Dragon:**

- Disagrees with Mark.
- There are 8 modern treaties in BC, but none were developed with consultation with Indigenous peoples.
- Nuri discussed building trust. Co-development should involve all of the parties, and both BC and Canada did not have that discussion.
- AFN fiscal policy result was the 10-year grants in the United Nations.
- The Green Book describes our new fiscal relationship with Canada under the Trudeau government. This describes the new expenditure model of government needs. After we developed the Green Book policies, it went to all the cabinet members and modern treaty holders/SGIGs. These policies target heritage and land management.
- This co-development was possible through collaboration with Canada.

**Mark Nelson:**

- The BC policy is an example that needs improvement.
- Such as the United Nations Declaration on Indigenous Rights (UNDRIP), had no consultation with Indigenous peoples.
- Multilateral engagement approach and the treaty commission assessed the challenge of the loan debt.
- Co-development is possible when done right and must include everyone

**Martin Papillon:** What are the obstacles/hurdles to a stall in the process of co-development?

**Mark Nelson:**

- There is an analogy of consent.
- Certainly, in BC there is the issue of consent and negotiations over land agreements and overlap disputes.

- Nations have to be supported by government by resources.
- “First Nations are best suited to solve these issues, not government”.
- There is also the issue of representation. Is a lack of co-development a failure? No because there are other options.

**Nuri Frame:**

- When you feel like most of ideas and suggestions are off the table before being heard - that is a toxic relationship.
- You go in with objectives and boundaries, but the development of positions/mandates cannot happen before the process begins. This must happen within the relationship of collaboration.
- This makes what was attainable now unattainable.
- I’ll admit “lawyers don’t help an awful lot of the time”. It’s incredibly unhelpful because it “disempowered the table... Identify ways to empower the table to do the work the table needs to do”.

**Frank Dragon:**

- SGIGs can be obstacles in themselves.
- Collaboration goes both ways, both must be open with one another.
- Another obstacle is when the province is not in accordance with the policy, ex. Fiscal policy.
- SGIGs must isolate their main demands. Too many responsibilities can scare/hinder negotiations.
- Collaborative fiscal policy under a minority government also causes issues and delays

**Martin:** Follow up question (Consultation vs Consent): Is it the process of co-development that’s important or the end result or both? Do we all need to agree in the end if it’s co-development? Where does it stop to be a collaborative process?

**Nuri Frame:**

- Consensus but not unanimity.
- You need a space that no one has the final say.
- If a party believes that, that obstructs the consensus from developing. It’s hard to articulate.
- This creates the risk of people fearing the word “veto”.
- If we try too hard to prescribe it, we might be setting the process up for failure.

**Mark Smith:**

- Free prior and informed consent is not necessarily a veto, but can be a veto. It’s not a good word but has to be there.
- It should be possible for Indigenous communities to say no

**Frank:**

- No comment.

**Martin:** Are you an optimist or pessimist? Are we headed into a direction of more co-development or is this just circumstantial? Is this possible to make this more of a systematic/institutionalized process?

**Mark Nelson:**

- I'm an optimist. It's an important tool.
- Time is another challenge.
- You can't co-develop with everyone at the table.
- We've seen it in operation in BC, in the language of new land negotiations. Explicitly no extinguishment.

**Frank Dragon:**

- I'm an optimist. It took us 3 and a half years to get to the green book. It took 6 months to re-negotiation 25-26 Modern Treaty FFA/FTS's before the end of the fiscal year.
- These are great examples, but they are challenging. We still have progress to make.
- "This is the life we chose and I wouldn't change it for anything".

**Nuri Frame:**

- I'm cautiously optimistic. Some of the most challenging problems are being dealt with now.
- As we have successes around the country under a collective belt, the more we reassure the public service that this is a big win.
- This will make Indigenous leaders happy and advance your policy agenda. The hardest problem is actually confronting if this is possible.
- Constantly vigilant to avoid "spreadsheet consultation". Gains can be lost if we turn this relationship into checks and boxes.

Questions:

1. Nuri I'm intrigued of your lack of definition for co-development. How do you allow space to move forward, with all the right things in mind (long term relationship of trust/respect) but we also need to provide a definition? How do we assess fatigue in decision making?

**Nuri Frame:**

- o This is an unavoidable tension. There needs to be special attention to intent and what's animating the agreement/relationship.
- o Defining the role, objective, process must be done in a collective way and not defined by competing interests.
- o "This is scary for everybody...handbooks are better than being outside the box".

**Mark Smith:**

- o On the issue of representation, the best approach is supporting First Nations own Nation-building and their own governance. There is also the issue of direction. There are many plans but need to have the tools to set the priority

2. Can Indigenous contact be made before consultation happens?

**Mark Smith:**

- The Ministry of Indigenous Relations rarely performs this. There are still some departments that lack a mandate, or have the same mandate that's been installed for over 20 years.
- Once we decide that these are legal obligations not just aspirations, it will make it more effective

**Frank Dragon:**

- I was asked to be an expert on youth assimilation, and there was a lot of old-style negotiations.
- I wanted to change the dynamic. I demanded to change the dynamic and thought as if we assumed the acceptance of certain treaties and this established shared goals and decision making.

3. There is frustration over legal interpretations, and places the intent of the Crown. Is this not an issue?

**Nuri Frame:**

- Would not pine over what carries weight in the eyes of justice. The Crown is a critical concept. Since the MMF case, this was understood as a soft idea but is developing as a crucial idea to understanding the Crown and Indigenous governance.
- It's hard to determine what's implicated. Do these terms have weight in a legal vitality? To know if it's an old or modern treaty definitely determines how we interpret the treaty.
- It's not just a nice idea it has to shape legal interpretations.

**Mark Smith:**

- I think we will see interesting developments in new faith negotiations. We should start to define it. We won't be arbiters but we will limit if people are acting in bad faith.