

Making Modern Treaties Work – LCAC
BREAKOUT 3B: Collaborative Federal Fiscal Policy Development Process

Moderated by Bertha Rabesca Zoe, Legal Counsel, Tlicho Government.

PANELIST 1: Mark Nelson, Little Salmon/Carmacks First Nation

(Yukon context; policy development and implementation; gaps-closing annex; etc)

- Combination of Indigenous government representatives on the panel to walk us through
- Going to start by talking about the recent history and how the mandate came to be, and specifically the backstory from a Yukon perspective leading up to the policy process. I will also go over what the initial outcomes are and look at what has been achieved and what still lies ahead.
- This process started following the last federal election (2015). Canada's commitment to revise its fiscal policy or to replace it in collaboration with affected Self-governing Indigenous governments (SGIGs).
- Mandate started in 2016 with about 26 different SGIGs who can participate and there was good participation from the majority of SGIGs.
- It took some time for the group to find footing and representatives to work together and get momentum. For the first months a lot of effort was put into creating guiding principles. Those found their way into the final policy document.
- What would the framework for policy look like? It includes areas of expenditure that need to be address, different revenue sources to be considered and socioeconomic variables to be considered.
- There were 8 technical working groups at one point (e.g. heritage, infrastructure, service class, revenue)
- The background context from a Yukon perspective: for YFNs, the fiscal policy process is a continuation of unfinished business that started over 10 years before.
- Yukon has 11 final agreements. There was a trilateral review of first 7 completed in 2007 and final 4 participated as observers.
- The implementation review group found 2 overarching challenges with proper implementation:
 - o Inadequate funding for FN to carry out responsibilities and,
 - o Many Federal policies and practices were inconsistent with the treaties.
- Canada had certain fiscal policies that meant that the funding levels were insufficient (Example: where population a factor in transfer calculations, used registered Status Indians rather than all FN Citizens the community had responsibility for as per the treaties)
- 9-year review lead to a commitment to do a thorough, systematic review of the FN's gross expenditure base and assess expenditure needs using a "model gov't" approach
- In the subsequent renewal of the Financial Transfer Agreement (FTA), there was a commitment of new resources to support governance but not in other areas; there was an increase in governance funding but other areas were left to be fully addressed (e.g. lands & natural resources, heritage, programs & services)
- By 2015, the first 7 YFNs FTAs were once again up for renewal, and were being extended pending a negotiation mandate from Canada. LSCFN see the current fiscal policy process as a twin track approach where processes should inform each other.

- In December of 2018, the participants in the policy process came to agreement on draft policy structure and language - new document appropriately called “the Green Book” owing to the colour of the cover page when first printed
 - o Said that SGIGs should be resourced at levels that provide them the ability to carry out their treaty responsibilities, and to provide services for their citizens at comparable levels to other Canadians
 - o The policy also recognizes the need to support SGIGs to address socio-economic inequities resulting from decades of colonial policy and practices
 - o The policy acknowledges culture, language and heritage as a foundation of self-governance and that SGIGs should be supported to build their governments on this foundation
- Key policy principles and concepts:
 - o Expenditure need: costs is based on need, not historical INAC funding.
 - o Transparency: how methodologies to develop need should be developed
 - o Comparability: access to programs and services like other Canadians
 - o Fiscal federalism: SGIGs recognized as governments within the federation (similar to provinces and territorial governments).
 - o Citizenship: IGs provide services to all, not just status members

PANELIST 2: Jake Kennedy, A/ Senior Director, Fiscal Policy, CIRNAC

(Collaborative process within the federal system; milestones; challenges; next steps)

- Bio: part of the collaborative fiscal policy process for several years now. Had the responsibility of bringing policy through federal approvals, once through the framework and once bringing the actual policy through
- There have been interesting challenges and opportunities bringing policy forward for approval through the system (collaboratively)
- A large step forward was to come through with a policy for funding that could apply to all the different scenarios of self-government:
 - o have expanded to 25 groups over the years
 - o geographically diverse, population sizes are diverse, different forms of governments
- Self-governing groups try to reflect their language and culture through structure
- The pre- 2015 system was more secretive, costly, time consuming and resulted in agreements where it was hard to have comparability because the same activities for 2 groups could be fiscally different.
- In 2015, we had first move towards transparency. The fiscal approach policy was announced but was short-lived, with a change of government. When the current government came in, we were directed to work directly with self-governments in collaborative fashion which reflect the concerns of SGIGs.
- Looking back, success of the collaborative policy came because of certain characteristics:
 - o An incremental approach to policy advances (i.e. OSR moratorium, interim approach around land and resources; etc.)
 - o Developing and getting approval for a framework while still developing individual methodologies.
 - o Include federal partners in policy process and,

- Have consistent national approach which left room to have a system that more accurately reflected the expenditure needs of SGIGs while tailoring to unique circumstances of each group.
- This drove forward the 3 big policy shifts in Canada:
 - Expenditure need (move into a system where we look at how much need there was from SGs and how Canada can fulfill that capacity),
 - Moving towards citizen-based funding versus status funding, and
 - moving beyond reserve lands.
- This was not just CIRNAC but a full Government of Canada project involving Ministries such as Heritage, Finance and Treasury Board from the start.
- Moving forward, there is one big challenge of the collaborative process, which is the expansion of its application to other types of governance arrangements (e.g. sectorals, core governance, Métis, etc). We also need to understand how it will impact other groups (e.g. land claim organizations, negotiation groups etc.)

PANELIST 3: Mike Haberl, Manager of Implementation BC, CIRNAC

(Implementation and negotiation; milestones/challenges; process forward)

- Bio: works out of Vancouver office on implementation for BC treaties and fiscal arrangements in western Canada.
- The Green Book is available on website for those interested.
- We brought streams together to collaborate (fiscal federalism and Indigenous governments). People behind the policy are trying to get the Government of Canada to rethink the approach for funding support of Indigenous Governments; these are governments in the same frame as territories and provinces.
- Getting everyone into one room allowed for this policy to happen (all 25 Indigenous governments together). This was completely innovative. Previously, it was divided by province. This model changed everything by talking to everyone at once and developing a common framework. This was done while respecting the individual nature of governments, their unique agreements and meeting obligations to those treaties
- Milestones during process;
 - It took a year and a half to get to policy framework in Dec 2017
 - There was a vote of confidence
 - Government funding through Budget 2018, which led to \$189.2 million over 3 years for the collaborative process to initiate work to close socio-economic gaps in SGIG communities.
 - In May 2018, the government approved the policy but took another year to develop framework.
 - In August 2019 the policy officially announced
 - And in August 2019, Canada completed 24 fiscal renewals
- Key developments:
 - Equitable approach based on expenditure need
 - Collaborative forum for policy development with SGIGs; these groups to affirm or discuss policy
 - Co-ordinated fiscal renewal negotiations with 25 groups simultaneously
- Prior to this policy, it was very difficult to renew negotiations in an organized and timely manner, but now scheduled at the same time every 5 years.

- Some lessons learned:
 - o Patience; slow progress is probable especially early when trust is being build
 - o Interest based approaches to explore interests and ideas which creates solutions
 - o Transparency- methodologies in back of policy document
 - o Risk taking; exploration involves taking risk; no guarantee ideas will be supported but that is ok
 - o Collaboration- Canada and SGIGs can work together in a different way to address contentious issues (e.g. fiscal). This demonstrates that we can make this work.
- Process forward:
 - o More expenditure needs to come;
 - o Focused on infrastructure and culture, heritage and language
 - o Working on how to make the most of the \$189.2M from Budget 2018
 - o Looking at how we continue make the process work in future without scaring people off with structures, and
 - o Continued meetings.

PANELIST 4: Colin Salter, Partner, Pape Salter Teillet LLP

(NWT and BC context; governance model development; etc.)

- The collaborative process is absolutely unique as far as I know.
- We did this in a totally different way which required a huge amount of trust from people who supported the process. The Government of Canada deserves respect for letting federal representatives have the freedom to let go of their rules and enable them to have conversations without knowing where it will end.
- What is it we are trying to do in a new fiscal relationship?
 - o Expenditure need had nothing to do with how SGs were funded or to what it actually costed.
 - o This was a recipe for failure not success.
 - o But broke free from the Indian Act, and this could have been a recipe for stagnation and failure to not increase funding for new responsibilities for SGIGs
- There was an earlier Blue Book, which was under the Harper Government, and did not work.
- The Green Book was co-written by SGIGs; every concept was worked through together
- The approval process meant sitting side by side with SGIGs and explaining why policy needed approval
- Collaboration has to be super brave and kick off constraints, that being said, we still disagree on things, but we found places where collaboration works.
- There is some worry about the resilience of these policies, they are not constitutional agreement but policy. This means that Canada has ability to change them.
- There is no authorship or control for SGIGs on what happens to this work over time.
- In 5 years, there will be a review and revision of the work and there is still work on more pieces to the policy.
- What certainty do SGIGs have? That being said, the world has moved forward, so unsure if you could cram the ideas back into the cupboard. Expenditure need is so obvious when it comes to financing and we have done the work behind expenditure need.

- If there was a push to revert back to the old way of determining funding numbers, we can say no we have already established what this activity costs. What are you relying on that is not this data? We brought facts to back up our policy.
- Work at collaborative table has proliferated to people who are negotiating agreements or arriving at agreements; some policies on expenditure need are showing up in other agreements, as new groups move forward and enter into treaties.
- Now when groups ask, if enter into a treaty or self-government, are we going to be able to afford it? The Government of Canada can say I think you can, let us take you through how we support SGIGs.
- I personally like constitutionally-protected agreements, because I don't trust the whims of governments. Things can change quickly and elected governments call shots.
- Constitutional protected agreements are really that protection against time;
- There is also the concern around the interpretation of pieces in the policy that are not explicit. We need to have conversation of how we have security.
- Supporting arrangements that make fiscal policy work have to have same kind of resilience because it is a fiscal federation and one those pillars cannot be made insecure or left to the whim of governments.
- Overall want to compliment federal counterparts and the collaborative process as a whole

Moderator

- Bertha Rebesca Zoe

1. What are some of the obstacles to treaty negotiations?

Mike Haberl

- o Collaborative process will develop methodology in near future (months). This means going through federal approval process and getting instructions to be able to apply policy at individual groups in form of amendments to existing FFAs.
 - o This would allow negotiations to more rapid and they could be done in a matter of days or weeks.
2. How to entrench Green Book into treaty and constitutional protection? What are the levels for what is appropriate for constitutional protection?

Response:

- o Challenging because this goes deep in agreements for what gets constitution protection.
- o Commitment in Constitution to have equalization more or less; but methodologies and approaches that are left to federal legislation developed with provincial partners is left to be flexible over time; be cautious to leave flexibility that we require to adapt to circumstances over time
- o This is a different scenario in minority government. The availability of funds is not the same as before, so we need solid data and support from groups when bringing stuff forward

Colin Salter:

- o When we talk about fiscal policy, we need to talk with all governments (including Self-Governing ones) and the Green Book is the mechanism. What we are missing is the guarantee with the document.

- Equalization includes Self-Governing Indigenous Governments.
 - Every Nation was given a sum of that money to close the gap they addressed, some built housing, some infrastructure and some language, which vary quite substantially.
 - Canada agreed in the allocation of that money that Nations were in the best position to choose what tools were best to close their gaps.

Response

- We can't acknowledge the fiscal picture without looking at social costs (health, education, etc)
- Methodology to close gaps in policy:
 - Provide action plan and show how it matches policy requirement
 - There was no approval process but needed to show due diligence for the Treasury Board
- Collaboration, not consultation is key, which includes meetings, daily telephone conference calls, hundreds of meetings amongst representatives from IGs and Canada.
- The amount of time and energy the group was given meant that there could be more opportunities for frequent discussion, all kinds of expertise in the room, objectives after meetings to work on before next meetings
- The political side came in when we needed to get approval of Treasury Board submission, which can take months.