

Making Modern Treaties Work – LCAC
Breakout 3D: A Modern Treaty Implementation Review Commission

Moderator: Alastair Campbell, Senior Policy Advisor, Nunavut Tunngavik Inc.

- Alastair introduced the panelists and provided a brief overview of the breakout session before welcoming Kirk Cameron to present.
- Alastair noted that the general idea of having a Modern Treaty Implementation Review Commission (MTIRC) is to focus on long-term accountability by having an independent body that would review the implementation of modern treaties.

PANNELIST 1: Kirk Cameron, President, northSense Management Consulting

- Kirk began his presentation by providing a brief background about the MTIRC, noting that in 2006 the 4-10 declaration was adopted by LCAC leadership.
- The MTIRC stems from the fourth change requested to government policy to include the establishment of an independent implementation audit and review body, separate from INAC.
- In May 2016, a proposal was submitted to establish an MTIRC which was reviewed by LCAC officials in June 2016 and received leadership approval in November 2017. The proposal was formally published in November 2017 and submitted to the Crown in December of the same year.
- The proposal was based on the review of a number of existing bodies, including National Defense, the Yukon Ombudsman, Official of the Correctional Investigator, Parliamentary Budget Officer, Commission of Official Languages, Office of the Auditor General, Commissioner of Environment and Sustainable Development, and the Cree Naskapi.
- The proposal assessed a number of variables, including reporting relationships (credibility), extent of authority, capacity to initiate, capacity to direct, ability to acquire requisite information, source of creation, mandate and authority.
- LCAC has called upon Canada to establish an independent body as the MTIRC with primary objectives based on credibility, effectiveness, and independence. The purpose of the MTIRC is to report to parliament on the progress of modern treaty implementation matters. It will examine government actions required by, or in relation to, the implementation of modern treaties.
 - o The structure and reporting would be an adjunct office within the Office of the Auditor General (OAG), reporting directly to parliament, with budgetary and administrative support along with expert advice provided to the commission through the OAG.
 - o Appointments are to be consistent with the procedures for the appointment of other parliamentary officers in consultation with LCAC members and must be seen as fair, credible and independent of modern treaty citizens, parliament and Canada.
- The MTIRC has mandated legislation to set deadlines for appointments as well. The mandate and authority of the MTIRC includes initiating and conducting reviews on implementation matters, foundation documents for all implementation review commissions reviews, and reporting to parliament without interference. The MTIRC will have the capacity to initiate a review of any implementation of strategies, can report to the legislative assembly of a provincial or territorial government, and provides for

citizens, members of First Nations or other Aboriginal parties to modern treaties to call upon the commission with issues affecting them.

- The proposal meets the three primary objectives; it has deep-rooted, long-established relationships and procedures in relation to the government and parliament, it gets a lot of attention publicly/within the media.
- The relationship is like that of the dentist and patient; it is not pleasant, but it is essential.
- There have been alarm bells ringing in recent history. The 2019 Liberal platform ensured that Canada would implement the spirit and intent of treaties and agreements by moving forward with a distinctions-based process. One of the concerns lies with the business of what this entity might be, as there is something different and unique about the modern treaties that not the same with the numbered or historic treaties.
- Conversations over the last year have been worrisome with the notion of a modern treaty body that focuses on the unique issues faced by modern treaty holders. The challenge is now to determine if the Crown's mind can be changed to respect the unique relationship between the Crown and modern treaty holders.

PANNELIST 2: Ronnie Campbell, former Assistant Auditor General

- Ronnie began the presentation by acknowledging there is often misunderstanding around the work that the OAG does and stressed the importance of credibility.
- Ronnie advised whatever this review commission will be, it needs to pass the credibility test because without it, it will fail. The body needs to be trustworthy; need to have the expertise, demonstrated reliability over time, with independence without conflict of interests. In addition to commenting on why a conflict of interest would exist if the Commission was located in a federal government department, Ronnie also mentioned the same would be true if it was located within the LCAC.
- It is important to note that you do not need to act on your interests to have it affect your credibility, noting that if it becomes a part of a federal government department, ministers do not like to criticize other ministers. Ronnie lastly recommends not to accept something that may not be credible.
- Created by an act of parliament, the Auditor General (AG) is appointed to a 10-year term that is non-renewable which adds to independence.
 - o It is a governor in council appointment; consultation with leaders and recognized parties and must be approved by the house of commons and senate.
 - o The AG is seen as an agent of parliament, and reports are distributed once it has been tabled in the House of Commons.
 - o The AG can be fired for cause; it takes a majority in the House of Commons and Senate in order to remove.
 - o The OAG was created by parliament and, as such, cannot be closed down by government.
 - o The AG has strong power of access to information, and can require and receive information, reports, explanations deemed necessary (interviews must be held when the OAG has requested them).
 - o There is also a territorial aspect of the AG put into place in each of the territorial legislatures.
 - o The OAG has approximately 600 staff with particular skill sets based on ungraduated and graduate education.

- There may be other places the MTIRC could be situated, however the AG can already do some of this work. The AG takes on a many reviews, but the MTIRC is looking for reports annually.
- Getting the MTIRC into legislation would mandate the AG to complete the work with financial resources.
- Within the OAG, there are typically two kinds of audits; performance and financial.
- Other alternatives to the OAG may arise and it is important to consider all of the options that are available.
- The OAG could be a good place for this but it is not the only option.
- Canada is blessed with a credibly qualified professional service, non-politicized public service.
- However, when we think back to the James Bay Northern Quebec Agreement being signed in 1975 to present day, it is important to question the government to understand why they do not want to examine how well the modern treaties have been implemented with an independent assessment that provides facts and truth. They'll never say "No, we don't want the facts" but they will say "We'll look into it at another time in another place".
- The AG works with advisory committees outside of the OAG and it would not undertake a review of implementation of a Land Claim without talking to the signatories.
- If the MTIRC were to go to the OAG, the AG would in all probability meet with LCAC to set the priorities and begin the work. The AG would make key decisions with a lot of consultation.

Question:

1. In the 2003 audit in Nunavut and NWT, you referred to the distinction that the Coalition has emphasized quite a bit – objectives of treaties and obligations.

Response

- o The federal government focuses on the letter of the works of the treaty as opposed to the spirit and intent. That distinction was made in the report at the time.
 - o We looked at specific activities; they were supposed to work with the Nunavut government to achieve Article 23 and we found that their answers were little more than "we organized the meetings".
2. Challenge in regard to the proposal no matter what you do even from AG perspective, you do not audit policy or legislation, you audit performance. Likewise, in this proposal, we have to clearly understand that the government created policy and legislation way before modern treaties were thought of, those were developed in isolation of the impact of First Nations people in general. So now that we are moving to modern treaties, we have a huge conflict. Performance cannot be measured in dollars and cents committed across the board.

So, my recommendation and question is, I agree with the concept of the commission being under the portfolio of the AG and furthermore, the terms and conditions need to be expanded on in regard to the proposal to be more inclusive to ensure that every federal department has that responsibility to respond to performance.

Response

- When we looked at models and options, point: how do you assume that no matter what structure is put in place you actually get a part of it?
 - The question of policy did come up, if you are able to move over into the policy domain and have critique of policy you run up against the democratic process that gets your dually appointed making policy choices as well.
 - You don't want to stray there; you may be impacting on governments regime that the First Nation or First Nation organization has created out of its own decision.
3. Interesting point – it's clear about that line in the end. This is about, we have a treaty, we have specificity, we have to worry about the requirements of the treaty being met by government.

Response

- The AG would always say they do not audit policy, but you can get there.
 - If the federal government has something not working in treaty implementation, if the federal government has some policy in place, getting in the way of the AG would mention that, carefully but would still mention it. Keep it focused and sharp.
 - It's called a review commission, not an oversight body which are not to be confused. The idea is this: there's an agreement – how well is the agreement being carried out? Point about different departments having different policies is relevant, however what is important in this particular function is whether the obligations carried out are meeting the objectives which is irrespective of policy. If there is one in the way, that should be pointed out.
 - Whenever you're crafting a memo to cabinet, once it's in your departments satisfaction it's farmed out to every other department. Department should be communicating when they receive these memos and provide feedback stating “we have to amend this policy to comply with the modern treaty” but that is not happening.
4. In BC, a First Nation went to purchase 3000 acres of Crown land, and immediately subjected to property and other forms of taxation. Even though when it was Crown-owned it wasn't taxed. BC mended legislation to remove rural property tax. Dismissive of the Crown, did the government of Canada have the responsibility? They remained silent. Those are the kinds of things that we are expecting the federal government to take our side as part of fiduciary responsibility under modern treaties. Government, still today, is not working on behalf of First Nations in a performance audit due to policy.

Response

- In terms of this particular proposal that has been put forward: LCAC represents only modern treaty signatories that have signed modern treaties to establish a new relationship with the government of Canada.
 - The proposal for the review Commission is whether those treaties have been carried out; it's not meant to address all of the problems, just to see if they have met their obligations in the treaty.
5. From the OAG, what would make it easier is if they looked at us as another government? We're not communities, were not organizations, we are First Nations governments.

Response

- Totally agree, when the AG became the AG of the territories it was because of those governments.
- Recent movement 70-80 for self-government type negotiation going on across the country. There are real, significant elements that relate to self-governance that are way from the future.
- The modern treaties do not all provide for self-government. The NT Inc is not a government, it's an organization.
- Not all cases that the modern treaty signatories are self-governments.