Making Modern Treaties Work – LCAC
Breakout 3E: Resolving Basic Differences: Dispute Resolution, Litigation and Other Options

Moderator: David Wright, Assistant Professor, University of Calgary Faculty of Law

- I am going to give a succinct overview of the Modern Treaty Implementation Research Project and talk about one of our projects. This is a partnership grant between SHHRC and the LCAC. It engages academics to develop a basis of evidence to inform modern treaty relationships and develop an empirical basis documenting challenges in modern treaty implementation.
- One of our projects looks at the use and non-use of dispute resolution mechanisms set out in modern treaties.
- The objective is to attain an evidence-based understanding of modern treaty dispute resolution.
- There are four main areas of information:
    - Dispute resolution mechanisms laid out in treaty provisions.
    - The types of disputes that have arisen.
    - When the dispute resolution mechanisms have been accessed and not accessed.
    - Qualitative account of challenges associated with modern treaty dispute resolution. The research method is primarily desktop research and semi-structured interviews with officials in Indigenous treaty party organizations and government.
- The modern treaty dispute resolution mechanisms differ between treaties. Generally, there are 2 main processes.
    - Board/panel approach.
    - Staged approach.
    - There are a few hybrid mechanisms. These can be asked about in the question and answer period if desired.
- We have developed lists of disputes where dispute resolution mechanisms have been use and have not been used. These lists are still under development. Numbers are still changing.
- Overall, there is a relatively small amount of use of the formal dispute resolution mechanisms. There have been about 15 uses, out of 25 or 26 treaties being implemented.
- The disputes themselves are very context specific. A wide variety of subject-matter: land access, fishing, economic development, self-government, etc. If there is a common theme to these disputes it is around funding/fiscal arrangements. Federal policy is told not to engage in formal dispute mechanisms, especially when it comes to fiscal matters.
- In all situations, it is Indigenous treaty parties who have initiated the use of the formal dispute resolution mechanisms, never the Canadian government.
- There are certain barriers to using the formal dispute resolution mechanisms, some of which are out of the control of Indigenous parties.

    - For example, sometimes agreements require the consent of all parties. In the Nunavut context, consent was withheld by the federal government 17 times.
    - Other times, the board dispute resolution body is not functioning, perhaps due to staffing resourcing issues or due to the body not having requisite appointees/quorum.
- If there is nowhere for dispute to go within the treaty, it must go elsewhere. There may also be cultural dimensions - that the dispute resolution mechanism does not reflect the desired outcome/process.
- There may be a reluctance to lose control of the file by handing it to a third-party decision maker, and a preference for more informal approaches, such as going to a political leader to handle the issue.
- Parties that have accessed formal dispute resolution mechanisms once see to be more likely to do it again. Perhaps these are in contexts where consent is not required, or parties are more comfortable using them after a first time.
- Interestingly, none of the formal dispute resolution mechanisms are rooted in Indigenous laws and governance for dispute resolution. Nisga'a is a partial exception to this, with the option to involve an Elder's council.
- In conclusion, stay tuned for the report. A draft is currently being internally circulated. Feedback being sought from individuals and groups involved in the project.
- Seeing the lack of mechanisms that reflect Indigenous laws, this report sows the seeds for community level research for traditional Indigenous dispute resolution techniques.

PANELIST 1: Laurie Pelly, Legal Counsel, Nunavut Tunngavik Inc.:

- I am going to speak about a dispute between the Crown and the Inuit of Nunavut, which has been going on for over 20 years. It implicates one of the Nunavut Agreement's most important obligations –the federal and territorial government's commitment to train, recruit, hire and maintain a civil service in Nunavut, which is representative of the Inuit population in Nunavut –85%.
- In 1976, when Inuit negotiators tabled their first Nunavut land claim settlement proposal, they had a number of strategic objectives. Probably the most important one was political self-determination for the Inuit of Nunavut.
- The Inuit believed that if Nunavut Inuit had their own territory recognized in the Treaty, it would lead to Inuktitut language education, services, and workplaces; economic self-reliance; and social and cultural well-being. For years, however, Canada resisted division of the territories in the Treaty, which they saw as a land claims settlement only.
- But eventually the timing was right, and Article 4 contains the promise of Nunavut.
- On April 1, 1999, the Nunavut Territory became a reality. It's a public government, but since the Inuit are 85% of the population, the expectation was that the Inuit would effectively control the Legislative Assembly and government.
- However, the Inuit also negotiated Treaty provisions to ensure that the civil service would reflect the Inuit population.

- Article 23 contains detail on how this is to be done, including Inuit Employment Plans, with a phased approach for achieving representative levels of Inuit staff, as well as detailed recruitment, training and retention initiatives. Pre-employment training plans are required to prepare Inuit for the workplace.
- From 1993, planning for the Nunavut Government proceeded with an agreed goal of 50% Inuit employment by 1999, with 85% Inuit employment expected by 2021.
- As part of the planning process, Indian Affairs commissioned the 1993 Atii Report, which estimated the costs of training Inuit over 15 years. It stated: "This report is based on meeting target levels of Inuit employment in accordance with the Nunavut Land Claims Agreement."
- A training strategy followed in 1996, with $39.8 Million to meet the goal of 50% Inuit employment by 1999. The parties anticipated expenditures after 1999 would achieve representative Inuit employment levels by 2021.
- The importance of this Treaty obligation was widely acknowledged in many shared documents and by successive Ministers of Indian Affairs, Jane Stewart and Ron Irwin. But after April 1, 1999, federal funding for Inuit training dried up.
- Inuit Employment Plans became largely meaningless, with no sense of ambition, priorities, assessment of training needs, timelines, or resources.
- Inuit employment levels have stagnated at or below 50%. Inuit fill only about 20% of management, and fewer professional positions. Pre-employment Training Plans have not been prepared.
- If Article 23's promises had been kept, Inuit children would today be taught by close to 85% Inuit teachers, and their language and culture would be vibrant in the schools, the government, and other workplaces.
- Instead, today you have 75% non-Inuit teachers, teaching about 90% Inuit schoolchildren, flown in from southern Canada, initially knowing little about the culture, and being housed in scarce Nunavut housing, while many Inuit remain unemployed and living in overcrowded conditions.
- This cultural disconnect leaves many youth feeling alienated with school, and around 70% of youth leave school by Grade 10 – with obvious effects on employment prospects.
- The Article 23 dispute over funding for training Inuit, crystalized in the negotiations for renewal of the *Implementation Contract* for the 2nd planning period, 2003 to 2013.
- Treasury Board took the view that no new funding would be allocated for any items that were not funded in the *first* 10 years. Since the $39 Million training monies were not Implementation Contract funding, there would be no new money to train and hire Inuit for the next 10 years – notwithstanding the obligations that were contained in Article 23.
- In 2005, the parties agreed to Justice Thomas Berger as Conciliator. Berger's main recommendation was an education program of majority Inuktitut Language of Instruction with funding to be negotiated between Governments.
- He also recommended six pre-employment training measures at $100 Million over 5 years. His report was not implemented.

- PriceWaterhouseCooper next analyzed the costs of not implementing Article 23 at $137 million a year, to import southern workers into Nunavut, and in lost wages and social costs to Inuit.
- In 2006, the Inuit sued the Crown. Canada fought this lawsuit for close to 10 years. In May 2015, on the eve of trial, a Settlement was reached.
- Canada agreed to pay the Inuit $255 Million in compensation, a $50 Million Fund over 10 years for Article 23 training, and both Governments renewed their Article 23 commitments, expressly promising very precise and specific Inuit Employment Plans and Pre-Employment Training Plans. Since May 2015, the $50 Million Fund has been used only on ad hoc basis, with no coordinated training strategy or very precise and specific plans. And no Pre-Employment Training Plans.
- The May 2015 Settlement Agreement also brought in a new dispute resolution process.
- To digress, NTI had first invoked these new Dispute Resolution provisions in 2018 in connection with a longstanding breach of Article 24.
- What broke the logjam in 2018 was, in part, the appointment of Canada's Comptroller General to lead the Canadian delegation. With the direct and consistent involvement of a very senior government official, what had been impossible for years was suddenly achievable, and Treasury Board now has a Nunavut-specific Procurement Policy.
- In contrast, in the Dispute Resolution negotiations over Inuit employment and training, there has been backward movement.
- Both Governments are now taking the position that Article 23 does not require Inuit Employment Plans to plan to achieve representative levels of Inuit employment, although section 23.4.1 of the Agreement states the contrary.
- So given this Government position, negotiations gave way to mediation, which ended in stalemate. Arbitration under the new Dispute Resolution provisions is the likely next step.
- From NTI's point of view, all this goes against everything the Inuit had negotiated, agreed to and expected in 1993. The Supreme Court of Canada has ruled repeatedly that modern treaties must be implemented with due diligence and in ways that reflect well on the Honour of the Crown. The promises in Article 23, in which the Inuit placed their hopes of self-determination, demand nothing less.

PANELIST 2: Jessica Orkin, Partner, Goldblatt Partners LLP:

- I will speak about the James Bay and Northern Quebec Agreement and some tools that have emerged under that agreement in relation to dispute resolution. It was signed in 1975, in part due to the will to emphasize the Cree Nation's presence as Quebec planned an expansion of hydroelectric activity.
- The agreement is between the Cree, the Inuit of Nunavik, the Government of Quebec and Canada, and the Crown Corporation responsible for the planning of hydroelectric activity.
- It was an out of court settlement. Canada's position up until 1973 and the Calder case was that no one had any right to these lands other than Canada. The background to the JBNQA was a series of appeals that brought the government to the table to negotiate.

- It is the first modern treaty in Canada and the only one before the entrenchment of treaties as constitutionally protected instruments in 1982.
- As it was settled out of court there was no plan for implementation and no machinery for implementation within governmental institutions.
- The portions that dealt with hydroelectric activity could be implemented quickly, but the portions that dealt with new institutions, new ways of doing things, employment, and education all received much less attention.
- There were no mechanisms within the agreement to deal with disputes other than intending to enforce it as a contract. Interestingly, the first time this agreement came before the Supreme Court, someone says in passing, 'This is of course a treaty protected by Section 35". The government of Canada and Quebec never conceded that it was a treaty as it was settled out of court and before 1982.
- As the 90s came to a close, the James Bay Crees had many litigation files open related to various aspects of non-implementation by both the federal and provincial government.
- A breakthrough came in 2002 with the agreement '*Paix des braves'* between Quebec and the Crees. It was another out of court settlement that covered a dozen pieces of litigation. It established the principle of a nation-to-nation partnership, created and adapted a forestry regime, provided the requirement of Cree consent for hydroelectric projects and outlined a 50 year long financial responsibility of Quebec under the JBNQA.
- In 2008, a similar agreement was reached with Canada in regards to its implementation obligations. It was also an out of court settlement.
- Both of these agreements included the creation of standing liaison committees. Not many other treaties have this.
- These standing liaison committees provide a permanent forum for exchange between ADM level or higher. It is a venue for implementation follow up and early dispute resolution.
- To steal Jim's line, modern treaties are marriages, not divorces. The idea of creating a space where people can come together to identify their issues and talk about them should not be radical. This is saying that it is a relationship, not about finalizing a divorce.
- I'm not trying to sugar coat. Many disputes arise. Having a space is a powerful and simple aspect of how these relationships ought to be working, and aren't.

PANELIST 3: Jim Aldridge, Aldridge + Rosling and Legal Counsel, Nisga'a Nation

- **'**Resolving basic differences' is an interesting title. Sometimes there are very particular differences. The applicability of the dispute resolution procedures set out in the treaties varies depending on the dispute.
- Laurie and Jessica have spoken about modern treaties that have relatively unique dispute resolution processes.
- The compulsory arbitration on the side of any party is an interesting difference of the NTI. In virtually all other agreements, one can only go to arbitration with the consent with all parties. This is something to consider if other modern treaties want to move to the NTI model.

- I speak from the Nisga'a experience. The effective date of the Nisga'a Treaty was May 11th, 2000.
- They have had to take recourse on dispute resolution on 3 separate occasions.
    - The first time dealt with a legal terminology mistake on the part of the provincial government. They took a step that was clearly in disaccord with the treaty. There was no argument. Everything worked well.
    - The second time was with federal and provincial governments in 2012 surrounding the establishment of a mine in the northern part of Nisga'a territory. The provincial government issued an environmental assessment different from the treaty environment assessment, and wanted the mine to proceed. Nisga'a commenced a judicial review against the federal government. It was not resolved at stage 1 so proceeded to mediation. Underlying this was a change in executive direction at the company. Often there is another party involved, in this case, the mining company. Once an agreement was reached, much of the dispute was unnecessary.
    - Last fall, Nisga'a commenced an omnibus dispute resolution. There were eleven separate disputes against the federal and provincial government, focusing on 2 different kinds of disputes:
        - Government departments giving equal or greater weight to assertive rights than to treaty rights, thereby breaching treaty. The defended themselves with UNDRIP or the 2016 asserted rights.
        - An underlying basic disagreement about what the words of the treaty say. Collaborative negotiation and mediation are of limited value when it comes to questions of basic interpretation. It is very difficult to proceed a) when you don't know what the other parties' interpretation is and b) more importantly, it isn't something that lends itself to negotiation and compromise. Our view is that the compromise was made when we made the treaty. We are not interested in a mediation process in order to find a solution less than what we entered into. It's a difference in interpretation. Reasonable people can disagree. Once that disagreement is explored, what's needed is a ruling, as opposed to a compromise. If parties reach arbitration or not, one might consider if the courts are a better venue. Basic differences are not always best served by alternate dispute resolution mechanisms. For the more minor technical differences, alternative structures may be more successful, but sometimes you just need a ruling.
- I want to remind everyone that the question of the application of the UNDRIP in the modern treaty context is settled by Article 37: "Indigenous people have right to implementation of treaties". Let's get on with our treaties.
- There's a sense that it is a failure to resort to formal dispute resolution. Having been through them, I'd like to suggest that it's not a failure. It is part of the process built into the treaty and part of the implementation of the relationship.
- The other thing that we've found is that once a treaty signatory does move towards dispute resolution, it elevates the amount of interest that the Canadian Government has in the question, and committees of ADM are meeting about it.

- Sometimes people forget that the resolution of disputes, even if it has to get a ruling, doesn't have to be done only in the context of 'public law or judicial review'. Modern treaties, which are constitutionally protected list of rights; they are contracts.
- The standard remedy for breach of contract will often include damages. People should consider not only asking some authority to keep their promise, but it is available in some circumstances that the Indigenous party is entitled to the receipt of damages to compensate for the suffering they have endured.
- People should bear in mind even if they're going into an alternative dispute resolution that it is not unreasonable to pursue damages.

Question:

1. On the theme of marriage, is there a reason that we cannot create a pre-nup with our government and hold them to what they have promised?

   Jim Aldridge:
   - The longer the process lasts, the longer people are going without their needs being met. Although not always ideal, sometime the best thing to do is to remind the other side that at the end of the day, they will have to pay damages.
   - In an alternative dispute resolution process, people should negotiate an interlocutory aid and take measures to alleviate suffering in the meantime.

2. In most of the agreements and recommendations, at the end of the day, a Minister can override and ultimately make the decision. I often wonder what the point is. Are there examples of co-management boards taking government to court?

   Jessica Orkin:
   - When these processes are working properly, even if the recommendation is not followed in the end, it does change the process and the way things unfold. The committee providing recommendations can elucidate information from the communities, and ensure the process includes a participatory element that does not take place in other dispute resolution processes.
   - In answer to your second question, I don't know about co-management boards taking the government to court. I feel like that wouldn't happen. With regards to the Cree, the government accepted the recommendation to refuse a uranium project. The uranium company challenged the decision and went to court. This sets a powerful precedent to show that the government can listen to co-management boards even if it's an unpopular decision.
   - In Nunavut, we found that it wasn't very satisfying to challenge Ministerial decisions, because even if you overturn the Minister's decision, the question is still put back it to the Minister and another unsatisfactory decision is made.
   - So, we brought it on a breach of contract basis. The breach of contract theory of liability is perhaps a more satisfying way of getting a result, going to the issue of damages.

3. How often do the standing liaison committees meet? Has implementation progressed because of them?

Jessica Orkin:

- 2 to 3 times a year is the minimum number of meetings and is generally exceeded.
- In 2008, after a period of non-implementation challenges, implementation greatly improved due to a contract that transferred obligations to the Cree, with fixed financial obligations outlined in the beginning of the contract.

4. What were specific factors that led you to get the standing liaison committees?

Jessica Orkin:

- I didn't get them but I can suggest some of the factors. It became clear to Quebec that development in that territory was going to be challenged at every turn, so I think there was an opening for a different model.
- The politics of Quebec are also a factor, as negotiations happen quite separately from the government in Quebec.
- This was a very particular situation and dispute resolutions are very context specific.