

Making Modern Treaties Work – LCAC
Breakout 4D: The 2015 Cabinet Directive: Reflections after 5 years

Moderator: Bertha Rabesca Zoe, Legal Counsel, Th̄ch̄ Government

PANELIST 1: Alastair Campbell, Senior Policy Advisor, Nunavut Tunngavik Incorporated (NTI)

- This is a subject that poses some difficulty for me to speak on, in part because the Cabinet Directive is within the government. For those on the outside it is difficult to know what's going on.
- The LCAC was formed because the various signatories were dissatisfied with the implementation process of the agreements, they had signed that had constitutional status. We assumed that steps could be taken to correct this.
- So, the Coalition put forward 4 main points in the 4 – 10 Declaration:
 - o Treaties are with the Crown in right of Canada. The Government of Canada is the signatory of these agreements. The Department of Indian and Northern Affairs / CIRNAC is not in possession of all the tools required for implementation. As a single department, there is only so much that can be unilaterally accomplished without the full participation of their colleagues.
 - o The Government must be committed to meeting broad objectives of modern treaties as opposed to narrowly defined obligations. The Canadian Government claimed that the best way to meet objectives is to meet obligations. The problem is that you need to look at one in the context of the other. The treaties outline broad goals and purposes of the agreement and they are to be respected.
 - o We need to meet with senior officials. In our implementation discussions we felt that we were dealing with a level of government that had limited authority and which was operating under existing policies. We need attention at the highest level to ensure treaties are carried out.
 - o There must be an implementation review body, separate from from CIRNA that reports directly to parliament. That idea has been developed further by the Coalition, and put forward in the Modern Treaty Implementation Review Commission, adopted by the coalition and sent to the Prime Minister in 2017.
- Over the years, the Coalition's attempts to create an implementation policy with the federal government were large unsuccessful.
- By 2015, the government had adopted the idea of the whole of government approach. Treaties affect the whole of government. Every department is responsible for carrying them out.
- We didn't get an implementation policy, but in 2015 there was the Statement of Principles for Treaty Implementation. The Deputy Minister's Oversight Committee (DMOC) was proposed: deputy ministers meeting on a regular basis to ensure the implementation of modern treaties.
- The Coalition leaders politically stated that they supported it, but there was a sense that it was only part of the answer. At one point, the President of NTI said

to the Minister, 'what about an independent review body'? The Minister said he didn't need anybody looking over his shoulder. The review body is not meant to be a looking over the shoulder exercise. It is an effectiveness of implementation review.

- We are not dealing with one Minister, one department or one government. These treaties are enforced as long as parties agree to have them. Presumably that could be for hundreds of years.
- The Coalition had some meetings with the DMOC. I was involved in the non-derogation amendment to the Interpretation Act. This made it explicit that all federal legislation was to be interpreted as to be upholding the modern treaties, and not derogating from.
- However, there was the Fisheries Act that didn't abide with this wording but still went through. This is an example of something the DMOC could have taken action on, but for some reason did not.
- There seem to be departmental fences that people don't want to jump over, but they have to work together. There is much we don't know from the past 5 years.
- For example, cabinet submissions have to be reviewed for possible infringement on Aboriginal Treaty Rights. We don't see these reviews, how thorough they are and the extent to which they're happening.
- From the point of view of our own modern treaty, Inuit in Nunavut, we have still had implementation problems since 2015, particularly with regards to Articles 23 of the Nunavut Agreement, which deals with government employment and Article 24, which deals with federal contracting.
- It's hard to say if the Cabinet Directive is improving things. I believe it should be kept, but I'm not sure how well it's working.

PANELIST 2: Ross Pattee, Assistant Deputy Minister, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC):

- I am very impressed by the LCAC. 475 people are here talking about such important issues. How we can move forward together in partnership?
- I don't have the history that Alastair has. My background is in human rights. I have only been in the implementation sector for 1 ½ years.
- Alastair is right: processes around Cabinet are somewhat secret. However, as we move forward with the next iteration of implementation, we're hoping to do it more transparently.
- Dave Joe was just an expert at the simulation in negotiation for youth, and he summed up his experience as 'respect'. At the highest level, we must respect each other as we move forward. From my perspective, the relationship should be thought of as nation-to-nation, government-to-government, people to people.
- The Cabinet Directive was an attempt to bind the whole of government, to bring us all together to address the obligations of the federal government. There was a tendency in the past to advocate responsibility to whatever name my department used to have. The obligation is not solely with CIRNAC but with all departments.
- We need a champion for modern treaties. One of the powers I've got is to move files forward that aren't moving appropriately and help other departments understand that they have obligations. I've met with 25 modern and self-

- governing partners. In these meetings I've learned that economic self-sufficiency is absolutely essential to the future of our modern treaty partners.
- Regarding the DMOC – I agree with everything Alastair said, but we can't lose sight of the importance of the obligations of the departments to focus on the issues of the modern treaty partners. Even in a year and a half I've seen a transformation in how the department is working. This year, my team and I will be increasing accountability. When the federal government says they will respond to issues, the DMOC will ensure there is follow through.
 - There is nothing that gets a public servant's attention more than having their file go in front of 24 deputy ministers.
 - The government is committed to a National Treaty Commissioner. This is good, but we need somebody who is going to hold the government accountable under their obligations to 25 modern treaties.
 - At this conference, we had a session on co-development recently. However, there wasn't anybody from the federal or provincial government on the panel. Co-development is getting people in a room where we can work things through together. The LCAC came up with proposals because the federal government was not willing to sit down and talk about it. With the collaborative fiscal process, negotiators had to sit down and think from a fresh slate.
 - The non-derogation amendment in the Interpretation Act is something that has been asked for, for a long time. It is perplexing why it hasn't moved forward as the federal government actually agrees with it.
 - o We don't have an advocate at the senior level. I'm that guy right now and we're looking for a legal conduit to move these files along.
 - Another file I'm involved with is UNDRIP, with the mandate of implementing legislation for UNDRIP within this year.
 - The Cabinet Directive and the whole of government approach is a work in progress. We are open to suggestions for how we can improve it. We have raised the profile of treaty implementation. This relationship with modern treaties is one of the most important. Some of our modern treaties are getting old. We as the federal government have to be cognizant that times and laws are changing. We want more people to sign modern treaties.

PANELIST 3: David Wright, Assistant Professor, University of Calgary, Faculty of Law:

- I hope to place the Cabinet Directive within a broader legal and policy landscape. What is legal nature of a Cabinet Directive? What is the legal force and what is the legal effect?
- What is the Cabinet Directive?
 - o Issued in 2015, it is an operational framework that guides federal departments.
 - o It outlines roles and responsibilities: what departments, Ministers and cabinets are going to do.
 - o This is a good window into how Ottawa works on the inside when it comes to implementing modern treaties.
 - o There is a screening tool for internal evaluation.

- It is quite significant that all Deputy Ministers are present in the DMOC, paying executive attention to the implementation of modern treaties. There are usually only 3 or 4 Deputy Ministers in a meeting.
- It is a potential critique that the Modern Treaty Implementation Office is located in CIRNAC.
- What is the legal nature of a cabinet directive?
 - It is not a formal legal mechanism; it's formal, but not legal. This is government doing what government does.
 - It is an internal bureaucratic tool that tries to mainstream things that are not getting adequate attention.
 - It is not a law.
- What is the legal force of a cabinet directive?
 - It has minimal legal force.
 - No cause of action flows from it.
 - One cannot take the federal government to court for not doing what it said it would in the Cabinet Directive.
 - It doesn't express any legal obligation, but expresses instead a statement of expectations. Again, it's a framework.
- What is the legal effect?
 - It's not law, but it does have effects on law.
 - We can call these indirect legal effects.
 - While there are no legal obligations, it influences and affects how the Crown conduct in the legal sphere.
 - The Cabinet Directive addresses how to engage in consultation, it guides Crown-Indigenous relations in negotiations and looks at budget allocations.
 - As an example, the cabinet can affect whether a policy is put in place or not, which could potentially lead to a lawsuit for failure to satisfy treaty obligations. In that way, the Cabinet Directive can have significant effect.
- From the legal side, would the court use the Cabinet Directive as an interpretive tool to discern whether there is a breach of treaty?
 - There hasn't been great discernable uptake by courts in using the Cabinet Directive to apply obligations of the Crown.
 - They might look to it in their background reading, but would more likely use the constitutional principles of the honor of the Crown instead.
 - In 2018, Indigenous parties argued that the court should use the Cabinet Directive on law making to interpret more constitutional obligations in context. Again, it might be put before the court, but they are unlikely to rely on it any discernable way.
- As an outsider, we have found it difficult to find information pursuant to the Cabinet Directive. There is limited access to the AMTI analyses, whether they're happening, what the content is, etc.
- There is an internal audit and a 5-year evaluation currently taking place. It would be interesting to see if there is any quantitative information about the degree to which government employees have had their awareness increase, although awareness being raised is hard to measure.

- Regarding the internal audit, again, there is no cause of action created by Cabinet Directive.
- To create some horizontal linkages, an independent modern treaty implementation oversight body or commissioner with unfettered access to information could look at areas outside litigation. These offices can shine light on areas that don't get sufficient attention.
- A common theme of the past few days is that there is room to improve the coherence across high-level policy law initiatives. The Cabinet Directive may foreshadow what UNDRIP implementation or an implementation statute might look like.
- Conclusions: there is a dissonance between the mandate letter and the call for a modern treaty specific review commissioner. It comes down to the architecture of that specific legislation. It would be possible for that statute to require some deputy commissioner explicitly focused on modern treaties. Progress will be slow. Overall most can agree that the Cabinet Directive is a step in the right direction, but there's more to do, hopefully with developing more coherence across law and policy initiatives.

Question:

1. I can say a lot has happened since the Cabinet Directive, within my department of National Defense. If you're not seeing results, the focus might not need to be on changing the Cabinet Directive, but on how departments are increasing awareness internally.

Ross Pattee:

- I appreciate that. It does take time for change to be implemented. There is also the issue of departmental churn. We often have to retrain folks, especially so they're not going into communities unaware.

Alistair Campbell:

- In terms of our experience, some of our best relationships have been with National Defense. We were able to negotiate agreements with them in compliance with Article 24 of the Nunavut Agreement. Sometimes I think we were able to collaborate well because there are rules in the army one has to follow, just as is the case in modern treaties.
2. Has there been any successes with the AMTI process? Ross, any success stories from the Cabinet Directive?

Ross Pattee:

- I think the DMOC is a success, as well as the Collaborative Fiscal Framework; getting the federal government to think differently about how to fund our modern treaty partners.
- Procurement has been an issue that affects all government departments.
- My Deputy Minister will always ask each Deputy Minister if they have read the modern treaty agreements. It is each department's obligation.

- Regarding the assessment of modern treaty implications: Federal departments, when developing activities, policies etc. are responsible to do so in accordance with modern treaty provisions and the rights therein. To this end, departments are required to conduct an assessment when proposals are being submitted to cabinet. Because this is a cabinet document, you do not get to see that.
- But AMTI is an obligation, not a choice.

Julie Mugford (Sr Director, Modern Treaty Implementation Office):

- I'd like to build on what Ross has said. We have been working collaboratively with LCAC to develop and deliver training across the federal system.
- This year we're aiming to train 600 people across the federal service on modern treaty implementation and on how to fill out the AMTI form.
- The intent of AMTI is to force federal officials to understand what their proposal is looking to do, and whether it will have an impact on treaties. This gets them reading a modern treaty and getting involved.

3. AMTI was a hook to get involved. I have found it beneficial.

David Wright:

- There is friction present here: we know that one thing lacking in treaty relationships is trust. There is friction between the use of the Cabinet Directive to build awareness internally about what recognition is, and the fact that it's shrouded in secrecy.
- The track record of the government implementing filters on submissions to Cabinet is not great.
- The challenge to the department is to be better than those who came before.
- We live in post-truth post-fact world and truth is at a premium. There are few independent arbitrators that people trust.
- A potential solution is to bring in an independent commissioner trusted by everyone and a system that is co-developed.

Julie Mugford

- For the required Cabinet Directive evaluation that is underway now, the government has hired ORBIS. They are talking to modern treaty holders, LCAC members and Deputy Ministers.
- If anyone wants to provide feedback please do so.

4. What can be shared about the modern treaty implementation tracker? At what level are we going to be able to comment on the evaluation report?

Ross Pattee:

- Let me tell you what I'm allowed to say about to the Modern Treaty Management Environment. The documentation of federal obligations implementation is still a work in progress.
- The first step is to provide a working environment for federal departments to record and track implementation activities. This will provide a fulsome picture of Canadian government's fulfillment of obligations.
- Within the MTME, the federal obligation list will be updated as they are identified.
- We are open to suggestions on how to make the tool as effective as possible.