

Making Modern Treaties Work – LCAC
Plenary 3: Whole of Government? Challenges and Opportunities

Moderator: Math'ieya Alatini, Chief Strategist, GSD Strategies

SPEAKER 1: Jim Aldridge, Partner, Aldridge + Rosling LLP

- It was 17 years ago that the LCAC was established in 2003. This was the result of a coming together in the nation's capital of all the modern treaty signatories at the time.
- They brought together the multifaceted experiences and perspectives of different peoples, cultures and traditions.
- All had two overriding things in common
- Each had gone through the crucible of negotiating land claim agreements, in most cases over the course of many years, struggling with every issue.
 - o The Indigenous people were told it was necessary to address *all* issues in order to create a comprehensive land claim, even issues that were not immediate. With the knowledge and support of their populations, the Indigenous peoples made courageous compromises.
 - o All parties, including the Canadian government, wanted to achieve certainty. Whenever there is uncertainty, it works against Indigenous people. Certainty was achieved by taking rights that Indigenous people had been asserting and turning them into established and existing rights. Through discussion, pragmatism and compromise, the relationship was set out in detail.
- The second thing they all had in common was that they were encountering problems with getting the federal government to comply with the promises they had made.
 - o Federal officials believed that the objectives of Land Claims Agreements were achieved if the obligations are fulfilled. From the point of view of the coalition, implementing modern treaties is not just about fulfilling obligations, but achieving the parties' objectives. There needs to be a measure of achieving obligations.
 - o The coalition formed with a program and mandate that extended to one thing: working towards a better federal policy with respect to bringing about the implementation of modern treaties.
- After rapid progress with the Martin government, there was no progress for a long time. In 2008, the recommendations from the Senate Committee's Aboriginal Peoples Report fell on deaf ears.
- In 2015, Bernard Valcourt brought about measures to improve treaty implementation. These included an excellent Statement of Principles on Implementation of Modern Treaties that was co-developed with members of the Coalition and CIRNA and the establishment of the Cabinet Directive on Implementation of Modern Treaties, which was not perfect and did not fulfill all of the Coalition's objectives from 2003. Also established was the Deputy Minister's Oversight Committee (DMOC), the Modern Treaty Implementation Office and the Assessment of Modern Treaty Implications (AMTI). This required

- that all federal legislation and policy be reviewed as to how it would affect modern treaty rights before it proceeds to Cabinet for a decision. Thus far, it has not been a success.
- This was described and intended as a ‘whole of government’ approach. Treaty implementation is not just the responsibility of CIRNA, but of all departments.
 - Since 2015 the officials in key roles at CIRNA are first-rate people. They are committed and intelligent. We have our differences, but I do not have a word of criticism for any of their efforts to make the whole of government approach work. But it hasn’t worked. This is peculiar, and it is a question I pose to the room: How is it that we get a great Statement of Principles, a Cabinet Directive, top rate people, understanding at the institutional level that we’ve never had before that implementation be based on a whole of government approach, and 5 years later there are more disputes than before? The relationship with the government as a whole is worse, from my perception, than it has ever been. How does this happen?
 - Everyone will have their theories. I will offer a few possibilities.
 - Trudeau, since 2016, has taken a number of initiatives that have focused on ‘recognition’ and is now under ‘compliance with UNDRIP’.
 - The government is generally motivated to do the right thing with respect to Aboriginal peoples. It appears that the approach has been embraced through the whole of government, but has been lacking in rigor at best. Perhaps even lacking in content – what does it mean?
 - The 2015 Statement of Principles was supplanted by another Statement of Principles in 2016, which was not co-developed. It has been very hard to get attention back to the Principles of 2015.
 - What has been focused on instead is a project described as ‘enacting recognition legislation’. Many of us in the trenches struggled with what this means. It was a legislation that would recognize Section 35 rights. But Section 35 says that rights are recognized and affirmed. This leads to confusion. Does giving constitutional rights legislative recognition make them more or less recognized? We were told that the idea is that Indigenous peoples’ rights in Section 35 should now be recognized with no need for proof. How will that work? That has segued into the UNDRIP discussion.
 - It seems there are three possible approaches:
 - Perhaps this is a legislative approach by the Crown to save people. But what happens when a right that a person asserts is inconsistent with other people’s rights? How do you recognize both? It can’t be a blank check ‘you have whatever you say you have’.
 - Maybe the government is saying ‘we recognize whatever you say you have, as long as it’s on this list’. How do we determine what is on that list without just going back to negotiating?
 - The cynical side of me thought that this is simply a fluffy expression of good will that will not turn into anything on the ground. Maybe that is what this has become.
 - A more useful concept is the one undertaken with an incremental approach to treaty making – instead of staying you have to agree to everything at this time,

- let's work out practical arrangements on the ground that focus on priorities, which works as a good idea but not at the expense of fulfilling the obligations of the groups that had to agree to everything because of the policy of the day.
- The results seem to have been, over the last 40 years, that modern treaties are often outside of the group, and modern treaty rights are forgotten.
 - We will balance with your right with these asserted rights – and that's endemic. That approach to giving equal value to rights that aren't in treaties (asserted rights) underlies many disputes underway.
 - The difficulty is not with the concept that Indigenous people should be respected in their assertions of their rights they've been making, and the courts have set out in some detail the legal bounds for that recognition (DTC&A).
 - A more useful concept is the incremental approach to treaty making, instead of the way modern treaty groups worked until now.
 - I wanted to end with a solution. There is a sense in the Canadian government that 'we cannot tell other departments what to do'. The solution I am going to offer is in the Department of Crown-Indigenous Relations and Northern Affairs Act which in section 7, sets out the ministers' responsibilities. It says: 'the minister is responsible for exercising leadership within the government of Canada, the rights of indigenous people, Section 35 and the implementation of treaties.' The parliament gave the Minister the authority to take leadership on the implementation of modern treaties. I say with respect that this is all the authority the Ministers need to *tell* the other departments that modern treaties must be implemented in favor of other programs and to remind other departments of the Crown's obligations to implement modern treaties.

SPEAKER 2: Daniel Watson, Deputy Minister, Crown-Indigenous Relations and Northern Affairs

- The groups who are represented here today took a difficult leap. These past 5 years have been the first time people know what I'm talking about when I say I work in treaty implementation.
- I got to see from the sidelines how hard it was to convince First Nations and Inuit people that these were worthy objectives. I know many people in leadership paid an enormous price and that none of these Agreements were unanimous. There were significant doubts about whether this was the path forward.
- I take very seriously the responsibility to prove to people that it was the right choice. The way we do this is in what we do with the agreement. I want to recognize all of you who took that step. We know you think that we were difficult. We want you to understand that we know it was a difficult ride within your own communities. As federal servants, it is very important for us to make good on the difficulty of that journey.
- I would like to look at the history of implementation as it provides context. Not context as an excuse for things that haven't gone right, but history as context because it shows the places where we have been our worst, our best and where people want to go in the future.
- In the early stages of this business, we didn't know how to negotiate or implement. This led to some significant disputes and some hard lessons. One

- result of these disputes, we bade farewell to \$1.3 billion, not having delivered on an agreement. One response to these lessons was let's not let that happen again.
- In the past few years we had detailed implementation plans, which are more or less exactly as Jim described, ticking off boxes. The problem with that is that treaties do not set out a shopping list of things to do. More than anything else, the treaties were designed to rebalance the imbalance of power that existed previously. There is no more debate to the central question, who are you? 'We are a government that is entitled to speak on these issues.' This fundamentally resets the power dynamic.
 - We have been at our worst when we haven't known the facts. There are many reasons why we don't know these facts.
 - o Sometimes what we agreed to is different from what we're doing.
 - o For the federal public servants in this room, the first thing I will say is to know each agreement.
 - o We are good at standardizing things. It is the secret to success of every large institution, but can be at the core of its failure. We need standardization; it must be the case that everyone who puts the same information on their income tax should get the same answers.
 - o But you have to understand the individual agreement. You as a public servant need to prepare your successor for that.
 - o We cannot depend on the presence of an individual.
One of the best things you will do is understand every bill that you have a responsibility for, and if you win the 6/49 tomorrow, that Canada's relationship with that First Nation will not suffer. This is another place where uncertainty has done harm to Indigenous peoples.
 - We have been accused of assuming we know the facts. We're pretty good at not pretending to know things if we don't know them. But when we think we know; it is far more dangerous than if we had admitted we don't know. We have also been accused of seeking to revise what was really meant in a treaty.
 - o There have been those instances.
 - o But it is very important to have those conversations internally. What exactly did we really mean here? Some things might be uncomfortable.
 - Where we have focused too much on the transactional, we have lost sight of the big picture. We need understand what's being done and not being done. I am concerned that with the transactional approach we will miss the most important parts of what treaties intended to do, which is to reset the power dynamic to the advantage of indigenous governments.
 - The final area of the biggest challenges is when we have not been able to figure out who is on our side. If you cannot understand who is responsible, the likelihood of it getting done goes down exponentially.
 - What should we do?
 - o Know your agreement.
 - o If you don't know the specifics and the players you are going to deal with, it is going to be problematic.

- If you know of a project coming down the line that is not yet implemented and foresee potential conflict, know who is involved, know who the conflict will be amongst and have a plan.
- Be clear on what we agree to and what we have agreed to in the past. This to me is one of the challenges for any institution: you agree to something in a point in time and life goes on 20-40 years.
- We develop different ways of doing things. The fact that our world changes, that we do things differently, does not stop the black and white of what we agreed to. Our subsequent programs and preferences do not get to undo the rights of Section 35.
- If you are responsible for implementation on the federal side, you should know where is it that what we agreed to is different from our default approach to dealing with it. This will be the source of the biggest problems we will face.
- 2 things:
 - If you are a federal servant and are responsible for implementing agreements, know where your 'who' questions are. If you identify the issues where it is unclear who is doing what, the probability of solving the issues goes up.
 - Finally, remember that the rebalancing of power dynamics was at the core of treaties. If you are engaging on the same basis that you are engaging with everybody else, chances are you have missed the core point of the treaty. It is not simply another group to be consulted. It is a government, which we agreed has the authorities it has and that it has the right that it engages with us in a way that is distinct from everyone else.
- We have done some interesting things, but we have a lot of work to do. I come back to this point: I want you to know that we understand that you made a leap of faith 20, 30, 40 years ago in some cases, 40 months ago in others, that was the source of great controversy in the people that you represent.
- Our job, we recognize, is to demonstrate not only to your communities but to all Canadians that that was the right choice.

Question:

1. I'm wondering if the concept of a Modern Treaty Implementation Review Commission (MTIRC) is completely off the table, or if it will be a part of the dialogue?

Daniel Watson:

- I'm confident that that will be part of the conversation.
- Jim is right to bring up legislation. That is the point of ship.

- It is the mirror image opposite of what we were doing the 70s and 80s, having contractors working on our behalf. To now have it written into the legislation.

Jim Aldridge:

- The conversation is ongoing.
- What we see in the Mandate Letter, it appears to those of us who are not on the that the distinctions-based approach is short hand for ‘we only deal with national organizations.’
- National organizations cannot stand between Nations.
- We see that in a reference to the mandate letter, the MTIRC, the relationship seems to be forced into being mediated by national organizations – that’s just wrong.