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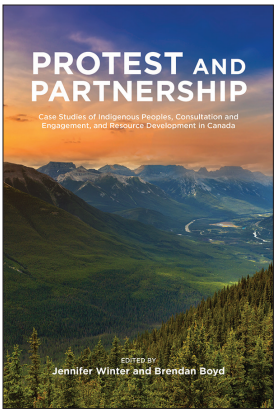

PROTEST AND PARTNERSHIP: CASE STUDIES OF INDIGENOUS PEOPLES, CONSULTATION AND ENGAGEMENT, AND RESOURCE DEVELOPMENT IN CANADA

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2

Honouring Modern Treaty Relationships: Intent and Implementation of Partnerships in Yukon

Kirk Cameron, Emily Martin, and Cody Sharpe

Yukon is home to fourteen First Nations, eleven of which have signed Final Agreements (modern treaties) and Self-Government Agreements (SGAs) with the Government of Canada and the Government of Yukon. These agreements, protected by the Canadian constitution, have created a guaranteed role for First Nations in lands and resources governance in the territory. We argue that the institutionalization and evolving implementation of co-management has significantly impacted the role of mass public opposition to resource development projects. We also suggest that the meaningful implementation of these institutions, and the treaty relationships from which they stem, depend very much on the leaders of the day. Although a thorough evaluation of the success of co-management in Yukon is beyond the scope of this paper (Clark and Joe-Strack 2017), Yukon's experience as an early leader in gradually defining and implementing co-management of lands and resources through land claim settlements may be of practical value to other jurisdictions.

Across Canada, restarting the relationship between Indigenous and non-Indigenous (or public) governments is both a critical task and an unavoidable obligation of each party. John Borrows and Michael Coyle, two of the nation's leading experts on Aboriginal and Indigenous law, argue that "Canadians must come to grips with the reality that treaty-making was more focused on building relationships and much less concerned with cataloging

rights.… Treaties first and foremost are concerned with right relations between First Peoples and settler governments" (Borrows and Coyle 2017, 13).

Publicly, it has been the vision of Yukon's First Nations since the early 1970s to develop a new relationship. This vision drove the development of modern treaties with the territorial and federal governments, and it is the institutionalization of this vision that explains why there have been relatively few incidences of First Nation-exclusive protest over resource development in Yukon. The term co-management has been defined and redefined many times, but generally it describes a relationship where some degree of decision-making power is shared between governments, rights holders, and/or resource/land users to govern specific resources or landscape at a regional scale (Berkes 1991; Natcher and Hickey 2005; Armitage et al. 2011; Clark and Joe-Strack 2017) with the intention to achieve some outcomes which neither can obtain independent of the others involvement. According to the Umbrella Final Agreement (the foundation agreement that these modern treaties are based on), co-management is the intended norm when it comes to natural resource development in Yukon, and the term relates to ideas like covenantal relationship (Newman 2011), and co-equal partnership (Papillon and Rodon 2017).

Co-management structures dominate in Yukon, and these institutions find their genesis in the Umbrella Final Agreement and First Nation-specific Final Agreements reached with eleven Yukon First Nations between 1993 and 2005. Where protest does occur over resource development, we argue it is because one party in the relationship has neglected their obligations; however, because of the constitutionally-protected nature of the treaty and related co-management governance institutions, such abrogation will not generally be tolerated by Canadian courts. An example of this phenomenon in practice is the legal fight over the Peel Land Use Plan, a fight resolved in the Supreme Court of Canada in late 2017. The Peel case, which started as a dispute between the Yukon government and the First Nations of Na-Cho Nyäk Dun and Tr'ondëk Hwëch'in over land use planning, evolved into a debate about ungenerous treaty interpretation that received international attention.

The chapter is organized as follows. We begin with a brief overview of recent Yukon history, including the long series of events that led to the creation of the Umbrella Final Agreement. We then explain the importance of the modern treaties that were negotiated following the Umbrella Final Agreement (UFA) and highlight how their content established co-management

governance of natural resources as the intended norm. Three conflicts related to resource development then are covered, including those that resulted in the recent Supreme Court of Canada decision regarding the Peel Land Use Plan. Our concluding remarks focus on the lessons our observations can offer policy makers in other jurisdictions.

Settler Arrivals and the Call for Treaties in Yukon

Spurred by the negative impacts of the 1890s gold rush in the Dawson City region of Yukon on the traditional lifestyles of many First Nations, Chief Jim Boss of the Ta'an Kwäch'än Council sent a letter to the federal government in 1902 calling for protection of lands and game for Indians. This marked the first written expression of a long period of dissatisfaction among Yukon First Nations' citizens with the federal government. Events between 1902 and 1973 sustained this dissatisfaction, including forced relocations for the sake of administrative convenience, residential schools, the construction of the Alaska Highway and a pipeline from Norman Wells in Northwest Territories through Yukon, placer and hard rock mines across the territory, copper mining in the Whitehorse area, and the massive open-pit Faro Mine site.

In 1973, a delegation of Yukon Chiefs presented Prime Minister Pierre Elliott Trudeau with *Together Today for our Children Tomorrow*, a proposal intended "to find out what kind of Settlement we feel will be 'fair and just' to both our people and to our White Brothers" (CYI 1973, 7). This proposal spoke about collaboration and partnership, arguing that "if we are successful [in negotiations] then the date of our agreement will be a day for all to celebrate… If we are successful, the day will come when ALL Yukoners, will be proud of our Heritage and Culture, and will respect our Indian identity. Only then will we be equal Canadian brothers" (CYI 1973, 17). *Together Today* was critical of existing treaties in place elsewhere in Canada, while also taking a position that relationship-building was inherently valuable:

> When the treaties in the prairies were signed, they were a plan to help the Indian to adjust to the Whiteman's way of life. It was an attempt to change him from a hunter to a farmer… We all know it didn't work. But maybe it was an "honest attempt" by the Whitemen to help the Indian change (CYI 1973, 17).

The year 1973 also saw the passage of the federal Comprehensive Claims Policy, a policy that provided a very different procedural base for modern treaty-making compared to the Historic and Numbered Treaties (see Alcantara 2013). It sparked negotiations between Canada and Yukon First Nations that ultimately resulted in an Agreement-in-Principle (AiP) in the early 1980s. The AiP, however, was rejected at a First Nations gathering at Tagish in 1984 as offering too little on lands, resources, and self-government. In conversations with a former Chief of the Vuntut Gwitchin First Nation who was involved in negotiations on the AiP it was noted how difficult it was to walk away from an agreement worth more than $600 million to Yukon First Nations, but that the 1984 agreement was doomed to failure without recognition of self-government.

Following the 1984 rejection, and subsequent thinking of the unique First Nation-distinct approach, the UFA approach was developed. This framework document defined a collection of common interests while remaining flexible enough to allow for modifications based on the unique interests of each First Nation. In total, eleven of fourteen Yukon First Nations have concluded Final Agreements with the territorial and federal government. These are modern treaties that use the UFA as their foundation and include sections unique to the individual First Nation to which they apply.

By 1993, four Yukon First Nations had negotiated Final Agreements. Parliament enacted legislation in 1995 creating new, constitutionally protected treaties with Champagne & Aishihik First Nations, the First Nation of Na-Cho Nyäk Dun, Teslin Tlingit Council and the Vuntut Gwitchin First Nation. Seven more Final Agreements followed: Selkirk First Nation's and Little Salmon/Carmacks First Nation's were settled in 1997; Tr'ondëk Hwëch'in's was concluded in 1998; Ta'an Kwäch'än Council's was reached in 2002; Kluane First Nation's in 2003; and Kwanlin Dün First Nation's and Carcross/Tagish First Nation's in 2005.

In addition to the Final Agreements, which are the modern treaties protected by the Canadian Constitution, each First Nation negotiated and implemented Self-Government Agreements. These SGAs are not protected by the Canadian constitution but are complementary and supportive of the co-management aspects of the treaties. For instance, self-governing First Nations can pass legislation for their lands and people that reinforce the land rights provisions of the treaties. There are many parts of the SGAs that speak

to the importance of co-ordination and the interrelationship between First Nation and public laws.

White River First Nation, Liard First Nation and Ross River Dena Council do not have signed modern treaties. Though negotiations are ongoing, it is unclear where these discussions will end up. (For a general history of land claims in Yukon and relationship to public government, see Cameron and White, 1995.)

The Importance of Modern Treaties

Why are these modern treaties so fundamental to partnership and co-management governance of Yukon? First, these treaties are a recognized component of Canada's constitutional framework. According to the Supreme Court of Canada, "through s. 35 of the *Constitution Act, 1982*, [the modern treaties] have assumed a vital place in our constitutional fabric. Negotiating modern treaties, and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples" (*First Nation of Nacho Nyak Dun v. Yukon*, 2017, para 1). Unlike the Historic and Numbered Treaties, where implementation was left to the parties to roll out through ongoing relationships, modern treaties provide clearer guidance on institutional structures, processes, and authority. Furthermore, as the Supreme Court of Canada explained in *First Nation of Nacho Nyak Dun v. Yukon* (2017, para. 7*)*, "the Umbrella Final Agreement and the specific Final Agreements that implement its terms are the product of decades of negotiations 'between well-resourced and sophisticated parties' (*Little Salmon,* at para. 9)." In other words, their value is both in their stature as constitutional documents and in their detail, detail that works against incomplete implementation. Both modern treaties and related co-management have also been criticized at various points as a means of maintaining Crown control over Indigenous peoples and lands through the politics of recognition (Coulthard 2014; Charlie 2017) and forced adoption of Euro-Canadian processes (Nadasdy 2004; Irlbacher-Fox 2009; King 2013). Whether First Nations and Crown actors are in fact equally well resourced in modern treaty negotiations is also disputed (Alcantara 2008).

Values of partnership and co-management are ubiquitous throughout the text of the UFA and Final Agreements. These values influence the very fundamentals of land and resource governance in the territory by recognizing First Nation ownership of a portion of Yukon lands. Ownership of

"settlement lands" is split into two classes, with Category A settlement lands including surface and subsurface ownership rights, and Category B settlement lands providing for only surface ownership. Between the eleven Yukon First Nations with signed modern treaties, there is roughly 41,595 square kilometres, or 8.5%, of the territory designated as settlement lands.

As noted in the Supreme Court ruling in the Peel Land Use Planning decision, "in exchange for comparatively smaller settlement areas, the First Nations acquired important rights in both settlement and non-settlement lands, particularly in their traditional territories" (*First Nation of Nacho Nyak Dun v. Yukon,* 2017, para. 46). Barry Stuart, Yukon chief land claims negotiator, is quoted verbatim in the Court's decision:

> It became abundantly clear that [the First Nations'] interests in resources were best served by creatively exploring options for shared responsibility in the management of water, wildlife, forestry, land, and culture. Effective and constitutionally protected First Nation management rights advanced their interests in resource use more effectively than simply acquiring vast tracts of land [as settlement lands]. (*First Nation of Nacho Nyak Dun v. Yukon,* 2017, para. 46)

The trade-off made by Yukon First Nations during treaty negotiations was sacrificing maximum land ownership for the guarantee of significant involvement in management over all resource activities in Yukon. Stuart notes this covers management of "water, wildlife, forestry, land and culture" (*First Nation of Nacho Nyak Dun v. Yukon*, 2017, para. 46). Though the signatories had to "cede, release and surrender" Indigenous title to much of their traditional territory (see Charlie 2017), they also set the foundation for a new concept of Canadian governance based on sharing of values and interests. In this context, ownership of the levers of governance no longer rests completely with a dominant Crown government, but in the institutions set up through the modern treaties. As the Supreme Court's Peel decision explains, "the language of s. 11.6.3.2 must be read in the broader context of the scheme and objectives of Chapter 11 of the Final Agreements, which establishes a comprehensive process for how the territorial and First Nation governments will collectively govern settlement and non-settlement lands, both of which include traditional territories" (*First Nation of Nacho Nyak Dun v. Yukon,* 2017, para.

42). In this instance, the focus is on Chapter 11 (Land Use Planning), but the message applies to the entire governance framework created by the UFA. Protest is often fuelled by a feeling of isolation and distance from the elite who control the forums of governance. Through the spaces of governance created by the UFA, this isolation is reduced; however, this reduction can only be sustained so long as decision-makers respect the process. Failing to do so may, in turn, spark further protests that force leadership to return to following the expectation created by the UFA related to co-management in Yukon.

The Components of Modern Treaties

Co-management is promoted by twelve chapters in the UFA. In our view, these chapters can be divided into four broad thematic categories: chapters addressing balance between protection and use (the "wise stewardship" chapters); those focusing primarily on conservation and protection; a third with attention to specific resource management; and a final category associated with the economy and governance. Some chapters touch on multiple themes, but this categorization is still a useful guide to understanding the UFA.

The first of three chapters under the "wise stewardship" theme, Chapter 11 (Land Use Planning) establishes a Land Use Planning Council with authority over all non-municipal lands in Yukon. This Council is comprised of one nominee from the Council of Yukon Indians (now the Council of Yukon First Nations) and two nominees from the Yukon government. Two objectives of the chapter highlight the co-management intent:

> 11.1.1.1 to encourage the development of a common Yukon land use planning process outside community boundaries; and
>
> 11.1.1.6 to ensure that social, cultural, economic and environment policies are applied to the management, protection and use of land, water and resources in an integrated and coordinated manner so as to ensure Sustainable Development.

Broad regional land use planning processes are provided for, as well as the authority to focus on specific areas through sub-regional and district land use plans. However, planning at the lesser levels must be in conformity with a regional land use plan, by nature a co-managed outcome. More will be said on this point below during our discussion of the Peel Land Use Plan.

Chapter 12 (Development Assessment) can also be counted in the "wise stewardship" theme and creates the Yukon Environmental and Socio-economic Assessment Board (YESAB). An independent body set up through federal legislation, YESAB is responsible for assessing every development project in the territory, whether on Crown, municipal, or a First Nation's Settlement Lands. These assessments must be conducted before any government can provide an authorization for a project to proceed. YESAB's enabling legislation guarantees First Nations representation on the board and its executive committee. This legislation—the Yukon Environmental and Socio-economic Assessment Act (YESAA)—also establishes requirements for First Nations and community consultation as part of the assessment processes including board member appointments.

Chapter 14 (Water Management) is the third "wise stewardship" chapter. Although the territorial Water Board pre-dates the UFA, it is still recognized as a key co-management body in Chapter 14 because of the economic, environmental, and cultural importance of water in the territory. Water rights of Yukon First Nations are described, and the Water Board is to have one-third of its members nominated by Yukon First Nations, reinforcing the principle of co-management (s. 14.4.1).

Under the conservation and protection theme are Chapter 10 (Special Management Areas), Chapter 13 (Heritage), and Chapter 16 (Fish and Wildlife). Special Management Areas are intended "to maintain important features of the Yukon's natural or cultural environment for the benefit of Yukon residents and all Canadians while respecting the rights of Yukon Indian People and Yukon First Nations" (UFA s. 10.1.1). There is considerable interaction among these three chapters, owing to the potential impacts a Special Management Area may have on heritage, fish, and wildlife.

Chapter 13 defines a common interest of Yukon residents "to promote public awareness, appreciation and understanding of all aspects of culture and heritage in Yukon and, in particular, to respect and foster the culture and heritage of Yukon Indian People" (s. 13.1.1.1). The Yukon Heritage Resources Board is established through this chapter and, similar to the Water Board and YESAB, encourages co-management by requiring an equal number of appointees from Yukon First Nations and the Yukon government. Chapter 13 also creates a Yukon Geographical Place Names Board with equal First Nation and public government representation.

Chapter 16 creates a complex institutional structure around fish and wildlife management. The intent is to recognize pan-territorial and regional involvement in resource management. In this case co-management is embedded in the Chapter's objective of "ensur[ing] equal participation of Yukon Indian People with other Yukon residents in Fish and Wildlife management processes and decisions" (s. 16.1.1.4). The territorial Fish and Wildlife Management Board includes protected representation for First Nations, as do the regionally focused Renewable Resource Councils (RRCs), of which there is the right set out in the treaties for each of the eleven First Nations with Final Agreements to establish an RRC.

Specific resource management chapters also exist within the UFA. Chapter 17 (Forest Resources) speaks to the importance of shared values and coordinated management of the resource. As with fish and wildlife, RRCs are empowered through this chapter to make recommendations on "the coordination of Forest Resources Management throughout Yukon and in the relevant Traditional Territory" (s. 17.4.1). Their recommendations must encourage the sustainability of forest resources and demonstrate a watershed-based approach to planning (s. 17.5.5).

Chapter 18 (Non-Renewable Resources) follows with detailed provisions regarding management of non-renewable resources, specifically mineral rights, quarries, and access rights on Crown and Settlement Land. Where the potential for conflict exists between a person holding a mineral right and a First Nation who acquires the land as part of Settlement, Chapter 8 authorizes the Yukon Surface Rights Board to address the dispute. In the spirit of co-management, Yukon First Nations nominate half of this board, and panels set up to hear disputes either favour the First Nation nominees or public government nominees depending on whether the dispute falls on First Nation or Crown-owned property. (Though the Yukon Surface Rights Board exists, it is famously underused.)

The final category of chapters of the UFA relates to the economy and governance. Again, these chapters encourage co-operation, and cover resource royalty-sharing in Chapter 23, and economic development in Chapter 22. Chapter 24 is particularly important because of its focus on self-government. Chapter 24 does not constitute an agreement in-and-of-itself, but instead creates the parameters for the negotiation of SGAs that are external to the UFA. This was the basis for subsequent SGAs that explicitly recognize that Yukon

First Nations can draw down powers to govern their own affairs through passing their own laws.

Self-Government & Overlapping Authorities in Yukon

Reading chapter 24 alongside a SGA provides a sense of the complex relationships among the powers of the First Nation, the contents of the Land Claims Agreement, and public government legislation. For instance, the SGAs make it clear that the Land Claims Agreement is superior to the SGA and associated First Nation legislation; laws passed by the First Nation cannot contravene the Land Claims Agreement. At the same time, the First Nation holds the jurisdiction to "enact laws [for the] management and administration of rights or benefits which are realized pursuant to the Final Agreement…" (see for instance Kwanlin Dün First Nation Self-government Agreement, ss. 13.1 and 13.1.1). Similarly, where a First Nation passes laws that relate to matters covered by its Final Agreement, those laws must be consistent with what is set out in the treaties. For example, when exercising its right to enact laws on Settlement Land relating to "gathering, hunting, trapping or fishing and the protection of fish, wildlife and habitat" or "control or prevention of pollution and protection of the environment" (Kwanlin Dün First Nation 2005, ss. 13.3.4 and 13.3.20) it can only do so in a manner that complements the processes already in place due to the relevant chapters (12 and 16) of the First Nation's Final Agreement.

Where there are matters that present legislative overlap between territorial and First Nation governments, the SGA clarifies that, except in defined areas such as taxation, the First Nation law renders the territorial law inoperative (this applies in all SGAs). Yet, the SGAs are also filled with provisions that encourage co-operation. Section 25 of the Kwalin Dün First Nation SGA, for instance, called "Compatible Land Use," frames the way in which consultation is to happen, in both directions, where a land use on either public land or Settlement Land may impact the neighbouring land. In a similar manner, Section 26 of the same agreement gives the First Nation the authority to "enter into agreements with another Yukon First Nation, a municipality, or Government, to provide for such matters as municipal or local government services, joint planning, zoning or other land use control" (Kwanlin Dün First Nation 2005, s. 26.2.1). Section 28 sets out that "The Parties wish to coordinate Yukon, Kwanlin Dün First Nation and municipal legislative regimes on Settlement Land and Non-Settlement Land within the Community

Boundaries for the City of Whitehorse and the Marsh Lake Local Advisory Area." Clearly, the architects of self-government saw the building of institutional and legal inter-relationships as advantageous to all parties.

This brief description of the UFA, the Land Claims Final Agreements, and the SGAs illustrates an intention to develop a co-managed decision-making regime. One final example not included in these agreements, but that is important in demonstrating the objective of co-management for the territory, is found in the 2001 Devolution Transfer Agreement. The DTA is a tri-party agreement (Canada, Yukon, and First Nations) transferring jurisdiction from Canada to Yukon for land and resources "Administration and Control," which in constitutional parlance is in effect ownership, in 2003. Because of the importance of Yukon's ability to control the legislative regime over Yukon Crown lands and resources post-devolution, agreement was reached that, where there are substantive changes contemplated by Yukon for any of Yukon's successor legislation over land and resources, a Successor Resource Legislation Working Group would be created to provide substantive consultation with First Nations over this work, including: "(a) priorities for development of successor legislation; (b) any opportunities identified for the development of a common or compatible regime in respect of particular successor legislation and First Nations' legislation" (Minister of Public Works and Government Services Canada 2001, Appendix B s. 4.0). At the time of writing, the Working Group has not been formed, which reflects the second conclusion of this essay, that progress to implement the spirit and intent of these visionary agreements depends on leadership of the day to ensure that the principles are respected and acted on.

Examples of Conflict in Yukon

The following are three examples of where, despite the constitutional relationship between First Nations and public government created through the UFA and treaty process, there have been conflicts over land use decisions: *Beckman vs. Little Salmon/Carmacks First Nation*, the five-year review of YESAA, and the case of the Peel Watershed. These examples highlight the importance of co-operative working relationships between leadership in both First Nations' and public governments. Without these leadership relationships, and a willingness to find shared interests, the words of the treaty will not come to life as intended. In many cases, disputes can lead to protracted and expensive

journeys through the courts, and often end on the doorstep of the Supreme Court of Canada.

EXAMPLE #1: *BECKMAN V. LITTLE SALMON/CARMACKS FIRST NATION*

The courts were instrumental in establishing a concrete interpretation of the treaties negotiated based on the UFA. The first notable decision came from the Supreme Court in *Beckman v. Little Salmon/Carmacks First Nation* (2010). The conflict in this case was between the Yukon government (Beckman being its responsible authority) and Little Salmon/Carmacks First Nation. The issue was whether the Crown had properly consulted with the First Nation before authorizing a grant of agricultural land, a grant that had an impact on a trapper who was also a citizen of the First Nation. Ultimately, the Supreme Court decided that the government had fulfilled its consultation obligations, but in the decision made some important comments on the nature of the treaties and the relationship between the Crown and First Nations.

At the heart of the Court's decision was whether the Little Salmon/Carmacks First Nation Final Agreement precluded the duty of the Yukon government to consult the First Nation. The Yukon government argued that the treaty was the full expression of the relationship, and because there was no language in the treaty requiring consultation, the obligation did not exist. The Supreme Court rejected this argument, with Justice Binnie writing for the majority of the Court:

> While consultation may be shaped by agreement of the parties, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people—it is a doctrine that applies independently of the intention of the parties as expressed or implied in the treaty itself. (*Beckman v. LS/CFN*, 2010, para. 5)

In other words, although the treaty holds great sway in determining procedures to give effect to the general intentions of the partners to the treaty, the treaty is still only one aspect of the ongoing relationship. Binnie also spoke to the relational nature of governance established by the treaties:

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act, 1982. The modern treaties, including those at issue here, attempt to further the objective

> of reconciliation not only by addressing grievances over the land claims, but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstanding and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is **interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract**. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards" (*Beckman v. LS/CFN,* para. 10, emphasis ours).

The treaty is not a simple contract intended to remedy past wrongs but is an expression of the will of the parties in framing the relationship of the future (Borrows and Coyle, 2017). Narrow or "ungenerous" interpretation of the treaty does not meet the test fulfilling the honour of the Crown. Personalities of those presently in leadership positions matter a great deal in treaty relationships and are fundamental to the success of treaty implementation.

Another key point from *Beckman* is that the Supreme Court is reinforcing a recurring theme that treaties are not about only one party but are about a relationship between the interests and rights of both Indigenous and non-Indigenous Canadians. Therefore, obligations and interests must be considered from both perspectives, and both must be considered in government decision-making. Binnie notes that "Underlying the present appeal is not only the need to respect the rights and reasonable expectations of Johnny Sam [trapper and LS/CFN citizen] and other members of his community, but the rights and expectations of other Yukon residents, including both Aboriginal people and Larry Paulsen [Yukon resident who applied for the offending land grant], to good government" (para. 34).

EXAMPLE #2: THE FIVE-YEAR REVIEW OF YESAA

The second example of dispute between the parties on interpretation of the treaties and their underlying intent to provide for co-management of Yukon land and resources, relates to the review of the Yukon Environmental and Socio-economic Assessment Act (YESAA), which was designed to occur

every five years. As noted earlier, the YESA process is a critical co-management institution set up through the UFA and treaties (Chapter 12) to ensure that there is thorough examination of potential environmental and socio-economic impacts of projects in Yukon. YESA is a cornerstone of the complex matrix of institutions based in the modern treaties that is intended to balance conservation and development interests within the context of a society where First Nations' and non-First Nations' rights must be upheld.

In 2015 and 2016 the federal and territorial governments attempted to push through amendments to YESAA without adequate consultation with the other treaty-holder, Yukon First Nations. Four particular amendments to the Act were not part of an all-party five-year review that was wrapped up in 2012, and it is to these four amendments that Yukon First Nations took exception both on substance and process. Briefly, the four objectionable changes related to: giving binding policy direction to the Government of Canada over the YESA Board; allowing the federal minister to delegate authority to a territorial minister; setting maximum timelines for assessments, and; dropping the requirement for an assessment on the renewal of projects.

Ultimately the four changes erode the intended independent nature of the assessment process, which is a fundamental principle captured in Chapter 12 (Development Assessment) of the UFA. Through one change, the federal minister would be authorized to issue binding policy directives to the YESA Board and with no requirement to consult with the other treaty partners. Finally, regarding the tightening of timelines, First Nations had long argued that there should be more time allotted given sheer volume of projects coming to them for review as part of the YESA process, and the limited resources available to First Nations to take on this review adequately.

On process, due to the fact that the Final Agreements under the UFA are treaties, any changes to them, or instruments used to implement them, require agreement from all parties. The four amendments were imposed by Canada on First Nations without appropriate consultation, which is required where fundamental change to the treaties' underlying principles is concerned.

Chapter 12 of the UFA outlines the values the signing parties agreed to. Among these values are particular objectives relating to the co-management aspects of the unique institution that is YESA. The objectives of Chapter 12 set out the importance of "the traditional economy of Yukon Indian People and their special relationship with the wilderness Environment" (s. 12.1.1.1) and goes on to emphasize that YESAB is to protect and promote "the well-being of

Yukon Indian People and of their communities and of other Yukon residents and the interests of other Canadians" (s. 12.1.1.3). Again, the theme of sharing among *all* residents—First Nations and non-First Nations—is clearly expressed. In effect, the YESA process was set up at arm's length from all governments (federal, territorial and First Nations), and framed to ensure that care and attention would be given to the comprehensive management of Yukon lands and resources. Over a decade passed between the signing of the UFA and the date when YESAB started its work as the overarching assessment body for all Yukon (November 28, 2005). A considerable amount of effort was expended by all parties to get the mechanics worked out to implement the process.

The parties reached agreement on a wide range of adjustments to the Act, but despite this progress, there remained three matters where Yukon First Nations' positions were not resolved. No agreement was reached on adequacy of funding, a subsequent mandated review of the YESA process was not accepted by Canada, and no agreement was reached to require engagement between a Decision Body (set up in the Act as federal departments and agencies, the territorial government, or a First Nation if a project is on Settlement Land) and a First Nation whose Treaty Rights might be affected by a project in advance of issuance of a Decision Document (a critical stage in the overall regulatory process that can set conditions on environmental and socio-economic matters before a project can commence). Despite these unresolved differences, the review was concluded.

Changes to YESAA entered the Parliamentary system through the Senate in June 2014 as Bill S-6, "An Act to amend the Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act." At the Senate Energy, Environment and Natural Resources Committee hearings, both First Nation and non-First Nation Yukoners expressed strong displeasure that unilateral action had been taken by governments without the approval of the third treaty partner. Note that this was not just First Nations protest, but an expression from a broad range of Yukoners that unilateral action by government to affect the underlying co-management rights captured in the institutions created through the modern treaty is unacceptable. This protest was of First Nations and non-First Nations citizens unified against a Crown government, not a disaffected Indigenous population resisting against the settler population. In short, the resistance to Bill S-6 was a demonstration of shared acceptance of the treaty

relationship responsibilities that one party had spurned. More and more, as we will see in the examination of the Peel Land Use Planning process, this is the form of protest most recently found in the Yukon context.

First Nations' leaders (including Council of Yukon First Nations Grand Chief Ruth Massie, Little Salmon/Carmacks First Nation Chief Eric Fairclough and Champagne and Aishihik First Nations Councillor Mary Jane Jim) who appeared before the Senate Committee reinforced a number of key points regarding the treaty relationship. To Yukon First Nations, the YESA process is considered a cornerstone of the treaties. It is a reflection of the principle of shared management between public and Indigenous governments for all environmental, social, and economic assessment matters in Yukon. As noted earlier, a good portion of land in traditional territories throughout Yukon were given up in the treaty negotiations in favour of a trust relationship through co-management of all lands. This agreement saw First Nations retaining Indigenous title to only ~9% of Yukon in exchange for this co-management framework over the full territory. The unilateral amendments dictated by Canada were viewed by leadership as fundamentally undermining the principles of the treaties.

An interesting aside to this story is that Yukon First Nations were not given individual standing before the Senate Committee. This amalgamation happened despite their protest that this ignored the fact that the eleven Yukon First Nations have independent treaty relationships with Canada. This was seen as either a demonstration of the ignorance of Ottawa as to the nature of the treaties, or worse, a blatant disregard for the fundamental nature of the distinct treaty relationship.

Despite overtures by Yukon First Nations to recommence discussions on the amendments that did not benefit from consultation, Canada ignored the offer. Bill S-6 with the offending provisions received Royal Assent June 18, 2015. In October of that year, the Teslin Tlingit Council, Little Salmon/Carmacks First Nation, and Champagne and Aishihik First Nations filed suit against the federal government in the Yukon Supreme Court, calling for the repeal of those amendments that had not been the subject of adequate consultation. Subsequently, and following the 2015 election which saw a change in government in Ottawa, the repeal of the four concerning provisions of YESAA was brought forth through Bill C-17, "An Act to amend the Yukon Environmental and Socio-economic Assessment Act and to make a consequential amendment to another Act."

Underscoring the point that leadership can make or break the treaty relationship, the change in government in Ottawa in October 2015 changed much regarding the fate of the amended Act. The new government and its minister of Indigenous and Northern Affairs committed to reversing the offending provisions and to a dialogue with Yukon First Nations on how to finalize the changes agreed to during the five-year review. In 2016 this turnaround was echoed in Yukon when a new majority Liberal government took power with an anchor platform commitment to resolve long-standing disputes between First Nations and the Yukon government, and an agenda to engage with First Nations so as to implement the spirit and intent of the treaties. Needless to say, the new territorial government strongly supported Canada's work to repeal the offending provisions of Bill S-6. Bill C-17, repealing the four offending amendments of Bill S-6, received Royal Assent December 14, 2017.

EXAMPLE #3: THE PEEL WATERSHED LAND USE PLAN

Our third example of conflict in Yukon involved the Peel Land Use Plan and the related Supreme Court of Canada case (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58). The appellants included the First Nation of Na-Cho Nyäk Dun, Tr'ondëk Hwëch'in, the Yukon Chapter of the Canadian Parks and Wilderness Society, the Yukon Conservation Society, Gill Cracknell, Karen Baltgailis, and Vuntut Gwitchin First Nation. Interveners included the Attorney General of Canada, Gwich'in Tribal Council, and the Council of Yukon First Nations, while the Yukon government served as the respondent.

Thomas Berger, legal counsel for the appellants, noted that engagement on the Peel Land Use Plan was substantial. There were 10,000 submissions to the Commission on the recommended regional land use plan, including 2,000 from Yukoners and 8,000 from outside the territory. The planning process set out in the UFA was designed to find resolution and balance among competing and (potentially) conflicting values. In an area more than twice the size of Belgium, one containing significant iron and coal deposits, environmental and cultural values were pitted against mineral interests. In the absence of a planning process perceived as legitimate by all stakeholders, the Peel region would become the centre of considerable public protest.

Much of the discussion focused on whether the courts were being asked, in the words of the Supreme Court's Chief Justice Beverley McLachlin, to interject through a "micromanaging Judicial kind of supervision" in the business of the parties to the treaties. Specifically, given the Yukon government's

failure to follow the process outlined in Chapter 11 of the UFA, at what stage of the process should the Court instruct the parties to go back to so that the process could be properly followed? At the Supreme Court of Yukon, Justice Veale directed the parties to go back to the point where the Peel Land Use Planning Commission had finalized its draft Plan. The reasons for decision are complicated, and not relevant to the main points raised here surrounding public protest. Suffice it to say, returning to the point in the process identified by Veale as appropriate would prevent the government from rewriting the plan, which was what they had in fact done, and in doing so effectively ignoring Chapter 11 altogether. Given the significant loss by the Yukon government at the trial level, Justice Veale's decision was appealed to the Yukon Court of Appeal, where Justice Bauman ruled to send the parties back to an even earlier stage in the Chapter 11 process. In reality, this would have meant a complete retread of the planning process. This became the subject considered by the Supreme Court of Canada.

There are a number of points in the Peel decision that are relevant to the future of co-management. First, it is critical that all parties respect the details of the treaties. In the case of Peel, "[Yukon] did not respect the land use planning process in the Final Agreements and its conduct was not becoming of the honour of the Crown" (*First Nation of Nacho Nyak Dun v. Yukon,* 2017, para. 7). The time leading up to the Supreme Court of Canada case saw the premier of Yukon framing co-management institutions, in this case the Land Use Planning Commission, as unaccountable and a threat to democracy in the territory (CBC 2016). Such statements serve to delegitimize co-management institutions in the public view (Clark and Joe-Strack 2017). Here we see the magnitude of influence and consequence that the behaviour of leaders of the day can have on a treaty relationship and the realization of co-management promised therein. Reflecting on this strained relationship, Tr'ondëk Hwëch'in Chief Roberta Joseph said at a press conference immediately following the release of the Peel decision: "We've been on a long, twisting journey to hold the Yukon government accountable for promises made during the land claims process," (Blewett 2017).

Second, the Supreme Court clarified the boundaries of judicial authority when it comes to interpreting the treaties: "It was not open to the Court of Appeal to return the parties to an earlier stage of the planning process… The Court of Appeal improperly inserted itself into the heart of the ongoing treaty relationship between Yukon and the First Nations" (*First Nation of Nacho*

Nyak Dun v. Yukon, 2017, para.7). The decision of the Supreme Court notes, "Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right [provided in the treaty] to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time" (para. 61). In other words, it is critical to respect the procedures described in the treaty, and not engage in outcome-shopping.

Third, Justice Karakatsanis noted in the Supreme Court decision that "in a judicial review concerning the implementation of modern treaties, a court should simply assess whether the challenged decision is legal, rather than closely supervise the conduct of the parties at each stage of the treaty relationship" (para. 4). This is another boundary on judicial authority, one that is reiterated at paragraph 33 while also recognizing that modern treaties "in this case… set out in precise terms a co-operative governance model."

It is of little value to describe here the motives that may have driven the Yukon government to ignore clearly set out provisions of the modern treaty, which resulted in a protracted conflict leading ultimately to the Supreme Court of Canada for resolution. There are many theories on this question, and no clarification from the political leadership of the territorial government of the day as to why they chose the course they did. The fact is that, for whatever reason, the Yukon government as one of the parties ignored the clearly defined requirements set out in the modern treaty. This resulted in substantial conflict and protest, not between Indigenous and non-Indigenous Yukoners, but between a strong representative group of both Indigenous and non-Indigenous parties (from a wide cross-section of Yukon, Canada and indeed the world) who protested the actions of the territorial government and what appeared to be a blatant disregard for the provisions of the treaty.

Conclusion

The Yukon's constitutionally protected co-management governance model provides numerous avenues for Yukon residents to influence decision-making. It is an institutional arrangement that has worked against conflict in the form of protest between First Nations people and non-First Nation governing structures by bringing the two together through management institutions. Where conflict does occur, it has been sparked in our examples by one party in the relationship neglecting their clearly defined obligations. Through the treaty mechanisms—YESAB, Water Board, Land Use Planning Council,

Renewable Resource Councils and Heritage Resources Board to name the key ones that affect resource management in the territory—citizens have many avenues to bring their perspectives to the governance elite. Only where governments ignore the co-management processes and relationships set up through the treaty partnership does protest result, and that in today's treaty context is usually First Nation and non-First Nation citizens rallying to oppose directions taken or decisions made by Crown governments.

Yukon's recent history since the 1960s has seen very little protest where Indigenous citizenry, alienated from the decision-making elite, has found itself at odds with a predominantly non-Indigenous governing populace. We suggest this is because of the development of a co-management approach to governance in Yukon that occurred through the negotiation of treaties, the subsequent operation of co-management institutions, and the decisions of courts that have given definition to the interpretation of the treaties. We also suggest that, regardless of what is written down, fully realizing these co-management intentions depends greatly on the leadership of the day. Yukon's experience can offer lessons on building relationships between multiple First Nations governments and public governments through shared co-management bodies that may be valuable elsewhere in Canada.

First, Yukon's experience suggests that a precondition of positive relationships is the creation of stable and accepted institutional spaces that govern the processes of decision-making. The form, function, and leadership of these spaces ought to be negotiated between equal partners, rather than dictated by one to the other. Ultimately all citizens, Indigenous and non-Indigenous, should be able to see themselves in the makeup of the institutional bodies. If Indigenous and public governments are both owners of the co-management institutions, they will both be more inclined to view the decisions of these bodies as legitimate, and as the proper forum for debate over critical land and resources decision options. This point is critical so that groups within society who have a rightful place in the decision-making process (in this instance, the Indigenous population) are not alienated from that process.

Second, Canadian governments must be willing to accept, within mandates to negotiate new treaty and self-government arrangements with Indigenous Nations, the incorporation of the Indigenous Nations' values, particularly so where co-management institutions are concerned. These values must have a direct influence over the process of governance, particularly in regard to engagement and consultation with the Nations over resource

development proposals. Although not discussed in detail in this chapter, it is this values foundation in the UFA and modern treaties that is so critical to Yukon First Nations, thus driving several First Nations to press the issues of Bill S-6 and the Peel Watershed Land Use Plan through the Canadian courts system to preserve the values that are fundamentally important to their success. These changes—relative to the status quo of existing institutions of governance—will increase public legitimacy of decisions made by these institutions. It ought to be stressed that this legitimacy will only be granted by both Indigenous and non-Indigenous governments and publics where these new decision-making institutions are guided by leadership appointed from each community.

Third, the creation of mutually beneficial institutional partnerships can be a lengthy process, fraught with missteps and stalled negotiations, as demonstrated in the ongoing negotiations processes starting in the early 1970s for three of the fourteen Yukon First Nations. There are concrete benefits to remaining committed, specifically in terms creating mutually legitimate decision-making bodies. Relationship-damaging conflict that can lead to protest can be avoided by proactively developing institutions that are legitimate to all parties. In the case of First Nations, this requires sustained negotiation that gradually builds agreement on practical issues like ownership of land, self-government, and the devolution of authority over service delivery. Ink drying on new treaties and SGAs is not the end point in development of a co-management relationship, but the starting point.

Co-management is the intent of the modern treaties in Yukon and the institutions designed to realize those treaties. Implementation of these institutions has been ongoing for the last two decades. Yukon's experience in constructing this approach to the governance of lands and resources presents a model of relationship-building between First Nations and Canadian governments that ought to inform decision-makers across Canada. (Indeed we are seeing progress in British Columbia where the province has set up tables to discuss appropriate forms of regional co-management). It is a demonstration of the possibility of finding a way forward that not only respects the autonomy of First Nations, but creates a formal, systematic role for First Nations' governments as real partners in governing in this region of Canada. Ultimately what Yukon has experienced over this same period is not the protest of Indigenous people alienated from the decision-making instruments of public government, but coalitions of Indigenous and non-Indigenous

Yukoners with the shared interests and aims to bring to account public government that either does not understand or rejects its treaty obligations and the co-management governance framework resulting from modern treaties.

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