

## Academic Views on Modern Treaty Implementation

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### Martin Papillon – The State of Scholarly Research: What are the Gaps?

For my presentation, I was asked to look at the gaps in the literature. What I am going over the next few minutes is to do is raise questions about what it means to do research on modern treaties. This will be more to offer some thinking about what are the next steps, or what can we do in partnerships in research, between researchers and practitioners. One challenge we have – for both researchers and practitioners – is to manage the information that is out there. We have to be able to make it legible and intelligible in order to build understanding about treaties in Canada.

In order to give a starting point to this presentation, I conducted a literature review of modern treaties in Canada, based on the literature produced from 1995 to 2015. In doing this review, I was very strict on criteria. The search was limited to academic papers on implementation, and explicitly about modern treaty implementation. There is a lot that is related to, but not explicitly focused on, implementation. The result was 108 scientific articles, and 28 books on modern treaties.

Based on this search, there are a couple of important themes that came out. Some of these themes overlapped, or the papers addressed multiple themes. But generally speaking, much of the literature addressed environmental and land management in context of modern treaties. The next most frequent category of research was on self-government, and in particular implementing the self-government aspects of modern treaties. The next most frequently covered topic was on culture and traditional knowledge (both of which have strong associations with environment and land management.). Next came articles focused on quality of life and economic development. This I found quite interesting, as I expected that economic development would have attracted more of a focus, both with respect to what the economic development outcomes of modern treaties are, but also with respect to questions of how treaties facilitate economic development). Research on social policies, intergovernmental relations, and questions of funding followed. Funding attracted very little (less than 10%) of the research focus, which is also surprising, as you would expect funding to be more important for research especially as it applies to questions of implementation. Finally, one topic that is quite minimal is citizenship: how people relate to the land claim and how we structure citizenship.

Why do we study modern treaties? From an academic perspective, the questions tend to be very broad. They question the meaning of modern treaties (from indigenous perspectives) with regards to

transforming the relationship between Indigenous peoples and the state, or making the relationship more equal. These are some of the questions that motivate modern treaty research: do modern treaties foster more equal or just relationships? Do they foster better environmental management practices? Are they conducive to ensuring better quality of life, or better relationship with traditional knowledge? And finally, how are provincial and federal governments adapting to the new modern treaty paradigm?

A lot of the answers to these questions appear in the research. However, in reviewing the literature, what I found is that there is a lot of research that is highly optimistic, and there is also a lot of research that is highly critical. The middle ground of necessary and nuanced is often not there. Though treaties may be truly transformative (or have the potential to be), there are many constraints. There are legal, fiscal, and political constraints – including a lack of willingness of treaty partners for mutually agreeable implementation.

Another recurring topic addresses the meaning of treaties. There are important gaps in how different partners are interpreting the treaties, and these gaps are often seen as an impediment to successful implementation. Establishing a nation-to-nation relationship that moves beyond the discourse is important for implementation. The practice of implementation is often misunderstood, or when it comes to negotiated funding agreements, often those agreements are not there.

In land and environmental management, the general conclusion is that the treaties are useful in providing some control for Indigenous peoples over the management of environmental and wildlife resources. One key limitation, however, is the relationship of Indigenous groups with provincial and territorial governments (which are increasingly becoming more important than the relationship that Indigenous governments and/or land claims groups have with the federal government). Research about how provincial and territorial governments see their role in implementation, especially with respect to land management and resource development, remains under-studied and under-developed.

Another common theme in the literature approaches the idea of treaties as Trojan horses. When a group signs a treaty, interpretation varies. Nonetheless, the treaty recognizes the legitimacy of the Canadian state, and there is some agreement to operate under that framework. While these treaties open the door for greater control by Indigenous peoples of their land, it also creates an opening for non-Indigenous practices to have greater penetration into communities. This is a cautionary in treaty implementation: the idea that treaties can have negative impact on self-determination by leaving little opportunity to choose different paths for economic development.

Finally, on the socioeconomic impact of treaties, the research is very divided. Some research finds that there is very little impact in long run, while some research says that treaties result in big economic impact in the long run. In either case, however, one thing remains constant: treaties introduce further class differentiation within communities and create (or exacerbate) the production of economic gaps.

In terms of the gaps in the academic research agenda, there is surprisingly a fair bit of research that measures the impact of treaties. However, there remains very little on the processes of implementing treaties. In research, we tend to focus on measurable impacts; processes are harder to understand and harder to translate. I would suggest that a new research agenda should really focus on treaties as

learning process for all partners. We can look at treaties as spaces for innovation, something that (currently) the academic literature does not focus on. There are a number of spaces and venues we can draw learning from, to broadcast in a public research venue.

Additionally, comparative work is very limited. There are very few examples of comparisons between different treaty experiences. If we want to be able to draw generalizations, that sort of comparative research is crucial. However, a challenge to this is that data on implementation processes is difficult to create. We have to think creatively about how to measure one treaty against another, not just in terms of outcomes but also in terms of processes.

So at the end of this discussion, the question turns to: where do we go from here? I think there is room for a comprehensive study (or, indeed, many comprehensive studies) on treaty implementation in Canada. Research projects could work to identifying key common challenges in the politics of implementation. Implementation is a political process. Not only is the negotiation of the treaty, its implementation political as it is primarily about establishing power relationships, or transforming power relationships. Nonetheless, there is very little systematic work on this. As we move forward, we can think about what the key factors are that have resulted in positive experiences, draw lessons from practice, and use practical experience as it is a guide for action. Finally, collaborative research extremely important for this research agenda. Without something like the next two days, it is impossible to make that research relevant, for practitioners to share their experiences, and for academics to work to redistribute that knowledge.

### **Graham White – Research on Co-Management Boards**

I am happy to acknowledge we are on un-ceded Algonquin land. Also, I have flyers about my most recent book, with Jack Hicks, though I would like to note that Jack and I have nothing to do about the pricing of the book.

My presentation is going to take a narrower view, in looking only at northern claims boards. The program for this conference talks about co-management boards, but what I am talking about is claims boards. There is an important differentiation here, and I will come to talk about the reason for the language.

What kinds of questions drive this research? They are the same kind of questions that academics interested in. In this presentation, I'll only be talking about boards in the three territories. The final overview point, again and again, when I speak to those who negotiated the treaties to end up with co-management boards (or claims boards), is that these boards represent fundamental compromise. Aboriginal negotiators want as much control over land, wildlife, etc. as possible. Meanwhile, the government negotiators say that there's a fundamental public interest. As such, the boards that come from these processes are fundamentally a compromise in vision.

There are several types of boards. There are wildlife management boards, there are land use planning boards (i.e. the Gwich'in have one), there are environmental regulation boards (environmental assessment boards in Yukon [YESSA], and licensing boards [Mackenzie Valley]), there are surface rights boards, and arbitration boards (though there is a debate over whether these are co-management claims boards; also I don't know much about them). When James Eetolook talked about non-implementation – federal government agreed they would stop doing what they were doing (refusing to accept any issue going to arbitration that NTI wanted).

To speak to this co-management vs. claims boards question mark: in some respects this is an academic distinction. But, I would put forward that—with the exception of in the Inuvialuit Settlement Region—boards in other regions are not really co-management boards. In the Inuvialuit Final Agreement, it states explicitly that those members appointed to boards are there as representatives of the Government of Canada, of the Government of the Northwest Territories, or as representatives of the Inuvialuit. In all other cases (all other boards), members are appointed as independent advisory boards. Perhaps this comes down to different definitions what co-management is. And I think it is fair to say that each of these boards has a co-management spirit. Nonetheless, they are not formally co-management boards.

So here's a profound academic statement: funding is really important. Despite this, from an academic perspective, funding is often over looked. We need to understand what funding exists for core operations. Some boards have very unpredictable financial arrangements. There may be conditions for funding (can they roll it over, what about excess funds?), or there may be requirements to return unspent funds. This raises the important question, that if funding is inadequate, what options are there for more funding?

Another important question has to do with board appointments: who appoints board members and on what basis? In most cases, the federal government makes the appointments, but Aboriginal governments put forward nominees (as do territorial governments, depending on board makeup). In some cases Aboriginal governments can make appointments directly to the boards. There are also questions of board makeup: Who are the board chairs? How many board members are aboriginal? How many are women? How many are public servants? In what capacity do board members serve? How competent are board members? (and I don't mean formal credentials – I mean are they up to the job, have they had a lot of experience on the land?)

One big (and perennial) problem is that there can be long delays in the appointment process (usually a fault of the federal government). In some cases, it has gotten to the point that boards don't have a quorum, and thus can't operate. These process-oriented questions are important for understanding the effectiveness of boards. Some other questions on effectiveness necessarily include: when boards make decisions or recommendations, who can be involved? Who must be involved? And who actually is involved? It's all well and good to say communities and Aboriginal organizations are being involved in the decisions, but are they really?

Are processes open and transparent? Are they welcoming? (or do you enter a room full of lawyers in suits). To what degree are Aboriginal languages supported in this process (and does this restrict access)?

Is there intervener funding? (And if not, can people really access these processes?) And, how independent are the members from their appointing organizations?

Funding: he who has the gold rules. The federal government provides almost all the funding to these boards. Does this threaten board independence? Does that make it possible for government to make proposals over the claimant groups? For example, the Mackenzie Valley Land and Water Board was created as a side deal to NWT devolution agreement. The fed government insisted that the regional boards be consolidated into one. And—though there is a large question here about whether even if legally possible—it certainly offends the spirit of the treaties.

There is a huge range in board processes – recommendations can be accepted, modified, or rejected. Some boards can make final decisions, others cannot. In cases of final decision, what are the appeal mechanisms, how many cases go for appeal? For many boards, their decisions are based on the negative option: the report will go to the minister, and unless the minister explicitly overturns it (in a defined period of time), the decision automatically comes into effect.

TK/IQ: all the boards claim to have a commitment to TK/IQ, but what's the reality and how can we do it better? Are boards colonizing agents? Some have severely criticized the boards, and described them as highly problematic institutions. Marc Stevenson is quoted as saying that “it would be difficult to conceive a more insidious form of cultural assimilation than co-management as currently practiced in northern Canada.” He has also written “Aboriginal peoples’ participation in state-sponsored projects of co-management has served to disempower them by creating virtually insurmountable barriers to the inclusion of their values, understandings, knowledge and institutions into these processes.

Paul Nadasy, another highly respected academic has written: “rather than empowering local Aboriginal communities... co-management may actually be preventing the kind of change proponents desire. Indeed co-management may actually be serving to extend state power into the very communities that it is supposedly empowering...to participate in co-management...[Aboriginal people] have had to accept the rules and assumptions of the state management game.

These are certainly not positive views of their ability of co-management boards respond to or reflect Aboriginal priorities and knowledge. Is part of the compromise buying into the state management game? And if so, has that been outweighed by the benefits that have come with co-management? These are not questions for me to answer, but to put to those engaging in those processes.

**Heather Castleden, Karen Haugen, John Jack, Vanessa Sloan Morgan**

### **Case Study: Current Research with the Maanulth Tribal Council**

Karen: Unlike the speakers this morning, I fall under a really recently negotiated treaty. We were negotiating a treaty with other 14 nations, and during the vote, it became obvious that not all of us were

ready to proceed. 5 disbanded to form the Maa-nulth treaty society. At that stage, the five nations voted to continue to negotiate a treaty. April 1, 2011, was the effective date of the Maa-nulth treaty. And what did we get out of that? 2,500 citizens, 32% are Huu-ay-aht. We have our lands, which we govern, and we are able to situate ourselves and decide what we want to do.

We have shares of resource revenues for development in the overall treaty area, and we are learning new ways of doing better. In 2005, before we got into negotiating, our leadership wanted to know what we really want. At that stage, we asked Heather Castleden to come in and focus on our young people. We had to know what they wanted, where they wanted to go, and what they wanted to see come out of this treaty process.

Now we are moving into the implementation stage, so the question becomes: how are we doing? We have had our first elected government, and now we have our second elected government. We have had 4 years of working with government, industry, and other partners. We are actively implementing our government, so now Heather is going back to those young people and asking: how are we doing? We are in the midst of using academic research to understand how implementation going. Our nation is growing, we have added 200 people in 4 years, and we keep growing.

I am going to welcome Heather to introduce the research stage that we are at.

Heather: Before we begin, I would like to thank the Algonquin, whose territory we are in. I would also like to acknowledge that I have been a guest in the Huu-ay-aht territory for many years. The question I would like to address is: for peoples involved in land claims, how can you engage with academics to your best advantage? I am a big supporter of community-based participatory research. Often times, for academics, the academy is a place to come up with your own ideas. But with community-based participatory research, I work with communities and nations about questions they have, with the focus on how we can work together to answer them. This doesn't mean we aren't also driving theory, it's simply a different way to get there.

My previous work with Huu-ay-aht certainly set the tone for our ongoing work. When you do community-based participatory research, as an academic, it's a philosophical and theoretical approach to research. In this case, you are not driving the bus. As an academic engaging in this work, the research has to be relevant, responsible, and reciprocal.

This raises some important challenges. How do we make sure that the work meaningful to everyone? How do we structure the research design? How do we best come together to interpret our data? All of these questions are about bringing answers out and trying to understand our results in a more holistic way. This includes sharing and making decisions about when and where we share our results. With respect to research outcomes, participatory research means co-ownership of data, and results. From an academic point of view, we are interested in taking the project from design to dissemination.

It's also about building my capacity to be a more responsible researcher. We hire and train to do research, and in doing so we build technical capacity. Our research has an impact on land use planning, on health priority planning, on legal proceedings, and on late-stage treaty negotiations. Our work needs

to be linked to treaty celebrations, to film festivals, to employment outcomes (i.e. we engaged a number of youth in second project, as research assistants; and I have heard that many youth were then employed elsewhere because of having research experience). There are many more impacts that can spin off from this kind of work than simply research results..

This is the third project together, and it focuses on the treaty negotiation journey – the 18-year process it has taken to get here. The first project was focused on photography and storytelling, the second on digital experiences. Now we are looking at the process of moving from a negotiated treaty to an implemented treaty. Our work is just getting started. It takes a long time to un-work some of the Indian Act processes and experiences. Additionally, something else to note, we came together at the point of treaty implementation, which raises important questions with regard to what value can I bring. The research becomes about implementation and moving forward.

In academia, we get this thing called tenure. For community-based research, tenure is when you are invited back to do more research. However, there are some important constraints. Funding has become increasingly tight in academic work throughout all of the tri-council (through SSHRC, CIHR, and NSERC), and there have been a lot of cuts (success rates for research proposals sits at around 18-20%). In 2011, we wanted to work together, we took a year to develop the project, we submitted it, and then we didn't get funding. This is particularly where that long-term research relationship is important, because it meant we could try again. We had the trust and the relationship to know that the project could continue forward. This is important to us all – and a year later we got the results, and we were funded for 4 years for the project.

Our major research goal is around process, but it is also a comprehensive case study. We want to document and understand the journey for Huu-ay-aht that comes with implementing their treaty. With the project, we have 4 key objectives: (1) we want to situate the Huu-ay-aht experience within a broader context (socio-political, historical, geographical, economic, and cultural); (2) we want to understand how treaty negotiators express and negotiate the political process of negotiation – the First Nation is growing; (3) we want to understand the issues, challenges, and opportunities that comes with implementing the treaty; and (4) we want to monitor and evaluate our research process and understand how to do this work well and collaborate together.

To situate our work in regards to the Maa-nulth Treaty: we have been working together for 10 years, and have built a trust relationship. We have access to confidential archive material, which is critical to understanding the lead-up process. Now what I need is provincial and federal access. We don't have access yet, but are trying to do it through a reconciling relationships approach. The second goal is to document perspectives of treaty members regarding the treaty and the process of implementation. So far, we have done 40 interviews with hereditary chiefs, negotiators, government, legal representatives, BCTC staff and legal council, and the provincial government. We have yet to secure federal government participation, but hopeful with new governmental change. Finally, we have been invited to observe

treaty implementation and community engagement sessions, and the team is going to meetings at communities.

A few take away points. We have developed a strong research relationship, in part because we have a research agreement that can be sustained over changes in leadership. At the outset (and at the request of the council), we created an arms-length advisory committee. This allows us to be more flexible and responsive.

This research is important. It was requested by the leadership, and is the first modern treaty on Vancouver Island. Moreover, it's the first multi-nation modern treaty. Our process shows that we can build capacity and enter into successful and long-term research relationships. We are planning to share our results through venues like this, and more broadly, to engage with all Canadians, as we are all treaty peoples. Finally, our work shows that you can overcome the institutional barriers to working together and being responsive in research. You need to have humility as an academic; we are just there on a learning journey.