Implementation Overviews and Case Studies

Chair: **Dave Joe**, Barrister & Solicitor, Dave Joe Law Corporation

Speakers: **Stephanie Irlbacher-Fox**, Adjunct Professor, Carleton University
Bob Simpson, Director of Intergovernmental Relations, Inuvialuit Regional Corp.
Jim Aldridge, Legal Counsel, Nisga'a Nation
Derek Rasmussen, PhD Candidate, Simon Fraser University

Stephanie Irlbacher-Fox – Overview of Findings in Grey Literature

Stephanie Irlbacher-Fox presented a literature review of the grey literature that is focused on modern treaty implementation. Grey literature includes reports, studies, analyses and websites that are not peer reviewed and have been put together by organizations that are not academic. She explained that people often feel that there needs to be evidence and that there needs to be an academic stamp on every report written, but the insights of people in communities are just as relevant and important.

She began her presentation with a brief introduction to land claim and self-government negotiations in Canada, explaining how the negotiations are heavily weighted to the Federal government. Generally what is included in these agreements benefits the federal government, at the expense of the Aboriginal group. The Land Claims Agreement Coalitions (LCAC) was formed to advocate to the federal government on behalf of the Aboriginal signatories to the agreements, to ensure that Canada follows through on what they promised they would do. The lack of treaty implementation undercuts all the reasons they negotiated these agreements in the first place, and further diminishes their rights and the potential to create a context for reconciliation.

The grey literature review looked at reports and studies from 1998-2014. Common themes found in the literature include lack of implementation or inadequate implementation, including lack of adequate resources. The lack of implementation undermines the spirit and intent, capacity building, and establishing intergovernmental cooperation. The new nation-to-nation relationship that was meant to come out of these agreements is also undercut by having implementation managed through Indigenous Affairs, who formally dealt with Nations under the Indian Act. This diminishes the ability for government to deal with things through a "whole of government" approach, and perpetuates the dominant, subordinate relationship that the Indian Act established.

There is no treaty implementation arm of government. Indigenous Affairs is not in a position to oversee the implementation approach from a policy perspective. Implementation cannot be accommodated by the federal government's current approach. Treaties are meant to establish respectful relationships and coexistence, and there is no finality or end point to treaty rights. The social policy context in which land claims are implemented matters. For example, there is a chronic crisis of sub-standard housing in

Aboriginal communities across the country. If beneficiaries don't have adequate housing to live in, the land claims will have very little impact. This area of research has been understudied in the grey literature.

LCAC reports have been calling for a straightforward, transparent implementation policy, and it remains to be seen whether this will come to fruition. Canada needs to understand that treaties are not Indian Act administered agreements. They are intergovernmental nation-to-nation agreements. There are other socio-economic policies that could be implemented that impact the modern treaties, and this could assist in showing how modern treaty implementation could be fulfilled and the nation-to-nation relationships could be achieved.

Bob Simpson- Inuvialuit Final Agreement – Evaluations, Research and Social, Cultural and Economic Indicators and Monitoring. The Inuvialuit Claim: A Case Study

Bob Simpson presented on evaluations, research and monitoring of the Inuvialuit Claim (IFA). He began with a brief historical overview of past evaluations of IFA, which include a formal review of the IFA; evaluations conducted through INAC; and in-house research conducted by the Inuvialuit Regional Corporation (IRC). More specifically, he discussed certain key evaluations that have been conducted. For example, in 1994, Ekos Research Associates created the Inuvialuit Final Agreement Economic Measures Evaluation Framework. Many recommendations came out of this review but government accepted very few. In 2003, IRC produced a report, Implementing Economic Measures of the Inuvialuit Final Agreement. This report examined what are the key indicators; what was important in defining these; and what indicators measure the objectives of the Inuvialuit as a people. In 2007, the Auditor General got involved and produced a report that was very critical of the department and the evaluations that were done.

Simpson also provided a brief overview of some of the social policy research that is being conducted by the Inuvialuit. The Community Development Division and Office of Intergovernmental Relations is building capacity for the Inuvialuit by gathering information and conducting research; developing programs and services; increasing the community capacity to deliver programs and services; and by working with other governments. Some of the research that has been conducted includes household surveys and literature and policy reviews. One area they hope to get more involved in is program evaluation and development. The areas of research are quite diverse and include an addictions and mental health study (2010); social housing and impact support (2011); education (2014); and an examination of the social, cultural and economic indicators and impacts of resource development (2014). In 2012 and 2015, a comprehensive census of all households in the region was also conducted, in order to examine economic life in Inuvialuit households.

Jim Aldridge – Case Study: Implementation of the Environmental Assessment and Protection Chapter of the Nisga'a Treaty

Jim Aldridge presented on the Nisga'a treaty, and more specifically on environmental assessment and protection. Aldridge explained that the Nisga'a treaty illustrates the broader challenges and themes of modern treaty making in Canada: federal and provincial governments' intention to apply a "cookie-cutter" approach across the country; and the tendency of governments to look at narrowly-defined obligations, rather than objectives.

The main focus of the presentation was on Chapter 10 of the Nisga'a Agreement, Environmental Assessment. Chapter 10 arose following a specific history. There was a mining project underway in the area that had not gone through an environmental assessment or an assessment of the impact on the people living in the area. Despite enormous controversy and push back from the Nisga'a, the mine still opened; however, it only remained open for two years. The Nisga'a argued that profound decisions were being made without considering the specific impacts on the land and the community. This realization would later play an important role when the Nisga'a negotiated Chapter 10 of their agreement. The Nisga'a wanted to be consulted and given enough information to form views on the subject. In addition, if there was going to be assessments, there had to be specific requirements attached to the assessment. In Chapter 10, Nisga'a negotiated a definition of environmental assessment that is not attached to a specific regime. It doesn't matter whether another government does not consider something an environmental issue; if there is an evaluation of impact on the environment, it is an environmental issue that requires assessment. If an assessment was required, it must include specific requirements, such as socio-economic impacts; it must be completed before a final decision is made; and it must take into account any arrangements the Nisga'a has previously made with the project proponent.

Fifteen years after the negotiation of their agreement, the Nisga'a have found that the implementation of Chapter 10 has been an exercise of frustration getting compliance with this framework. First, it all comes back to "duty to consult". The government claims that it is not clear what level of consultation is actually required. However, the Nisga'a agreement outlines the consultation requirements in exact detail. Second, if the Federal Environmental Assessment Act or the Provincial Act does not require an assessment, than these governments feel they do not have to conduct one. However, the Nisga'a agreement outlines that an assessment still needs to be conducted, if they deem that there is going to be an impact on the environment. There is a failure to understand that these treaties have the force of law; they are statutes. The Nisga'a Final Agreement has the force of statutory law and the Federal and Provincial governments need to recognize this.

Aldridge closed by responding to the question, "what will government need to do moving forward?" He argues they need to respect individual commitments that have been set-out in each of the agreements. Implementation cannot be left up to individual departments. There needs to be some sort of cross-departmental authority that would ensure a whole of government approach to implementation. There has to be an enforcement mechanism, and frequent evaluations of whether the objectives of the agreements are being fulfilled.

Derek Rasmussen – Gains and Losses in Canada's Modern Treaties: A Proposal for a Regular Scholarly Update to Indigenous Communities (potentials and pitfalls)

In Derek Rasmussen's presentation, he gave a proposal for a regular scholarly update to Indigenous communities on the potentials and pitfalls of modern treaties. Rasmussen argues that there should be ways of reporting and presenting to Aboriginal groups that have not negotiated a treaty so they have a "shopping list" of how to go about negotiating an agreement and to learn from the best practices and processes. Especially for groups that cannot afford litigation yet, there could be a place for academics to assist these groups in getting the necessary information that they need to get started. Another important piece to track is not only the pieces that Aboriginal groups have been successful at negotiating into their agreements, but also the things that they tried to get and were not successful in attaining. This sharing of experience can help to teach lessons learning throughout negotiation and implementation, and will capture the innovative ideas that have come out of the existing agreements.

Rasmussen finished his presentation with an appeal to the group. He emphasized that what we are hearing in these sessions are differences in these treaties, and there are great strengths and great weaknesses in each of the treaties. We would wish for other groups to not use certain language, for example that might put them at a disadvantage in the future. As yet, we do not have an academic effort where once a year or every two years, we have an assessment of the state of the treaties today. This could be in the form of a special issue journal or a conference. We need to have a tool for sharing this information. We need some way for groups who have not signed treaty to access our experiences and to gain information on what to include or what to avoid in the negotiation of an agreement.