

IMPLEMENTING COMPREHENSIVE LAND CLAIMS AGREEMENTS

Terry Fenge

After five months of public hearings, last May the Senate Committee on Aboriginal Peoples tabled its fifth interim report on land claims agreements, which recommended policy, attitudinal and institutional changes. Here Terry Fenge, who is a consultant specializing in Aboriginal, environmental and northern issues and assists Nunavut Tunngavik Inc. in its participation in the Land Claims Agreements Coalition, provides an insider's view on the report and related issues. "Modern treaties are long, detailed and complex as well as comprehensive," he observes, and "all involved would agree that implementing them is challenging, even with the best will in the world." That is why he argues, as did the Senate Committee, that we need an implementation policy and an independent body to oversee the implementation process, including financial matters.

Après cinq mois d'audiences publiques, le Comité sénatorial des Peuples autochtones a déposé en mai son cinquième rapport intermédiaire relatif aux ententes sur les revendications territoriales globales des Autochtones. Conseiller auprès de Nunavut Tunngavik Inc. en ce qui concerne sa participation à la Coalition pour les ententes sur les revendications territoriales, Terry Fenge analyse le rapport et certains enjeux connexes. « Les traités actuels sont longs, détaillés, complexes et généraux », observe-t-il, et « tous les intéressés conviendraient de la difficulté d'en assurer l'application, même avec la meilleure volonté du monde ». Aussi propose-t-il, à l'instar du Comité sénatorial, d'adopter une politique de mise en œuvre des ententes sur les revendications territoriales et de confier la surveillance du processus à un organisme indépendant.

Following five months of public hearings, in May 2008 the Senate Committee on Aboriginal Peoples released its report, "Honouring the Spirit of Modern Treaties: Closing the Loopholes." Inaptly named — the report identified gaping holes rather than loopholes in the Government of Canada's attempts to implement modern treaties — the committee recommended sweeping policy, attitudinal and institutional changes. Convinced that the "honour of the Crown" was at stake, the committee's recommendations closely reflected oral and written testimony it received from modern treaty organizations.

It remains to be seen, of course, whether the Government of Canada will act upon the committee's recommendations. If it does, conservation and management of natural resources and economic development in the northern tier of Canada — the area covered by modern treaties — will reflect more fully their intent and procedures.

If it does not, relations between many modern treaty organizations and the Government of Canada will in all

probability deteriorate and more implementation disputes will likely end up in the courts, potentially delaying northern resource development. The outcome of this debate is also likely to influence the attitude of Aboriginal peoples in British Columbia and the southern portion of the Mackenzie Valley in the Northwest Territories, who are currently involved in modern treaty negotiations or considering entering into such negotiations.

Prompted by the Supreme Court of Canada, the Government of Canada resumed treaty-making with Aboriginal peoples whose Aboriginal title to land and natural resources had not been extinguished by earlier treaties or superseded by law in 1973. Twenty-one such treaties are being implemented, covering more than one-third of the country: in Yukon, Northwest Territories, Nunavut, Labrador, northern Quebec and northwest British Columbia.

Deemed "comprehensive," to distinguish them from "specific" agreements to resolve disputes arising from imple-

mentation of historic treaties, modern treaties are long, detailed and complex, as well as comprehensive. Since the adoption by the Government of Canada in 1995 of the Inherent Right Policy, modern treaties have been able to provide for Aboriginal self-government. And the rights conferred through them are protected under Canada's Constitution.

Simple, clearly defined, one-off tasks such as transferring cash compensation or parcels of land to Aboriginal peoples have been carried out, usually in accord with agreed-upon timetables. On the other hand, Aboriginal witnesses reported serious problems when fulfilling obligations or achieving objectives that required co-operation and co-ordination among federal agencies.

Each modern treaty reflects local and regional circumstances, but most provide fee-simple ownership of 10-30 percent of the settlement area, including a smaller percentage of the subsurface; cash compensation; economic development opportunities; a share of royalties from development of Crown land and natural resources; participation in management of land, water, wildlife and assessment of the impacts of development; enhancement of culture; and the means, mechanisms and funding to exercise self-government.

All involved would agree that implementing modern treaties is challenging, even with the best will in the world. Periodic reviews by independent consultants reporting to panels and committees established through the agreements, and reviews of the Gwich'in, Nunavut and Inuvialuit Agreements conducted by the Auditor General of Canada, have pinpointed numerous implementation problems. Lack of capacity, inadequate funding, institutional timidity, disagreements as to the meaning and intent of certain provisions, and inherent difficulties in breathing life into conceptually broad agreements have all been cited to explain implementation shortcomings. Some dis-

putes remain unresolved for years, and inadequate monitoring often leaves the parties unsure if they are achieving their objectives.

The record of modern treaty implementation is mixed. Many Aboriginal witnesses informed the Senate Committee that key obligations had been fulfilled by the Government of Canada and that

much was being accomplished. Simple, clearly defined, one-off tasks such as transferring cash compensation or parcels of land to Aboriginal peoples have been carried out, usually in accord with agreed-upon timetables. On the other hand, Aboriginal witnesses reported serious problems when fulfilling obligations or achieving objectives that required co-operation and co-ordination among federal agencies. The Deputy Minister of Indian Affairs and Northern Development (DIAND) admitted as much when he said it was difficult to get other agencies to carry out their responsibilities pursuant to modern treaties, notwithstanding the constitutional nature of the agreements.

This comment reinforced the impression that DIAND did not have sufficient influence in Ottawa to co-ordinate the Government of Canada's involvement in modern treaty implementation. In its brief to the Senate Committee, Nunavut Tunngavik Incorporated (NTI) recommended that a new conductor — a central agency — be given responsibility to coordinate the federal orchestra. That the Privy Council Office refused to appear before the Senate Committee and that the Treasury Board Secretariat, which did appear, vigorously supported DIAND's continued co-ordinating

role, suggests there is little likelihood of machinery-of-government reforms to promote full and complete implementation of modern treaties.

That many in Ottawa view implementing modern treaties as an issue for DIAND to sort out rather than a task facing the Government of Canada as a whole reveals a fundamental misunderstanding of what modern

treaties are all about. A witness for the Nisga'a Nation captured well this misunderstanding.

Modern treaties, he suggested, are marriages between Aboriginal peoples and the Government of Canada and, like all marriages, they have to be implemented together,

in partnership. The Government of Canada, in contrast, views modern treaties as divorce settlements — a view that reflects the minimalist interpretation on the part of the Department of Justice of the Government of Canada's obligations.

In 1985 Aboriginal peoples then negotiating comprehensive land claims formed a coalition to press the Government of Canada to broaden the rights and benefits that could be included in modern treaties. This initiative largely succeeded with the adoption in 1986 of the still extant Comprehensive Land Claims Policy. Only one sentence of this policy, however, deals with implementation, requiring an implementation plan to be in place upon ratification of each modern treaty. In November 2003, Aboriginal peoples, recalling the successful outcome of working together in the 1980s, and facing mounting difficulties in implementing modern treaties, formed the Land Claims Agreements Coalition (LCAC) to jointly press the Government of Canada to adopt a formal policy to fully implement these agreements.

Chaired by NTI and Nisga'a Nation, LCAC has organized and sponsored two conferences in Ottawa,

each attended by approximately 500 people, including foreign guests, to explore perspectives on modern treaty implementation. From November 2003 to December 2005 legal and technical representatives of LCAC members met regularly with representatives from DIAND, the Department of Justice and others, facilitated by the Privy Council Office, to jointly sketch the parameters of a modern treaty implementation policy. These discussions were discontinued by the Government of Canada following the January 2006 federal election. Be that as it may, the coalition continues to press its case. For example, *The Globe and Mail* has published LCAC's op eds, and leaders of member organizations often refer to the LCAC in speeches and presentations on various political and policy issues. LCAC members co-ordinated their appearances before the Senate Committee on Aboriginal Peoples, and the third international conference on implementing modern treaties is planned in Ottawa in spring 2009.

Coalition politics of any kind is often fraught with tension and difficulties. That 11 Aboriginal peoples' organizations facing very different political and economic circumstances have for more than four years maintained a collective demand for a federal policy on modern treaty implementation is nothing short of remarkable. The resilience of LCAC is a result of the shared experience of its members and the insistence by all that demonstrated problems be addressed by the Government of Canada. As well, this resilience is reflected in the quality of the coalition's analysis as to the nature and reasons for implementation difficulties, the clarity of its position and the consistency with which it has been advocated, and the collegial manner in which it has pursued its objective in discussions with representatives of the Government of Canada.

In 2003 LCAC released a discussion paper inviting the Government of Canada to commit to an implementation policy founded on the four following principals:

- It must be recognized that the Crown in Right of Canada, not the Department of Indian Affairs and Northern Development, is party to our land claims agreements and self-government agreements.
- There must be a federal commitment to achieve the broad objectives of the land claims agreements and self-government agreements within the context of

Coalition politics of any kind is often fraught with tension and difficulties. That 11 Aboriginal peoples' organizations facing very different political and economic circumstances have for more than four years maintained a collective demand for a federal policy on modern treaty implementation is nothing short of remarkable.

the new relationships, as opposed to mere technical compliance with narrowly defined obligations. This must include, but not be limited to, ensuring adequate funding to achieve these objectives and obligations.

- Implementation must be handled by appropriate level federal officials representing the entire Canadian government.
- There must be an independent implementation audit and review body, separate from the Department of Indian Affairs and Northern Development. This could be the Office of the Auditor General, or another office reporting directly to Parliament. Annual reports would be prepared by this office, in consultation with groups with land claims agreements.

These are hardly radical suggestions. Rather they reflect a considered analysis of the Ottawa-based nature of the problem. LCAC does not seek to reopen the terms of individual modern treaties through a policy development process. Each member is committed, however, to the principle

of full and complete implementation of all modern treaties according to their provisions.

The coalition has pointed out on many occasions that upon ratification of modern treaties, the Crown immediately obtains certainty and clarity of title to land and natural resources, enabling it to issue development rights to third parties unencumbered by Aboriginal title. Aboriginal peoples, in contrast, while exercising many rights and enjoying benefits through even incomplete implementation, are still waiting for the full measure of promised benefits. The

blanket refusal of the Government of Canada to engage in arbitration to resolve disputes, as provided for in almost all agreements, has become a symbol as well as a fact of implementation frustration.

Not surprisingly, different interpretations of the meaning of clauses in modern treaties give rise to conciliation, mediation and, in the absence of arbitration, litigation. But the very breadth and number of implementation grievances and allegations in, for example, the lawsuit against the Government of Canada initiated in December 2006 by Nunavut Tunngavik Inc. (see www.tunngavik.com) illustrates the need for an implementation policy that binds all departments and agencies of the Government of Canada to the task of implementing modern treaties.

Speaking not about NTI's lawsuit but generally, the Senate Committee on Aboriginal Peoples noted:

Treaties are "living" agreements: constitutional arrangements for the peoples and the land they occupy. The proper implementa-



Courtesy Terry Fenge

Leaders of the Land Claims Agreements Coalition at a meeting in Gatineau, on June 30, 2006. From left to right: Adamie Akalu (Makivik Corporation), Paul Kaludjak (Nunavut Tunngavik Inc.), Matthew Coon Come (Grand Council of the Crees of Quebec), George Mackenzie (Tlicho government), Nelson Leeson (Nisga'a nation), Mary Ann Ross (Gwich'in Tribal Council), Andy Carvill (Council for Yukon First Nations), William Andersen the Third (Nunatsiavut government), Larry Tourangeau (Sahtu Secretariat), Pita Aatami (Makivik Corporation), and Frank Andrew (Sahtu Secretariat).

tion of treaties is essential to ensuring co-operative relations... The committee is troubled by the narrow approach to treaty implementation adopted by the federal Government. Federal practices and policy in this regard have resulted in the diminishment of the benefits and rights promised to Aboriginal peoples under these agreements...We believe much of this failure rests with the institutional role and mandate of the

Department of Indian Affairs and Northern Development (DIAND) ...Failure to properly implement the provisions of modern treaties puts Canada at risk for generating new legions of broken promises. However, we are convinced that these challenges can be overcome. The honour of the Crown rests upon it.

From this unyielding interpretation of the nature of the problem, the committee made the following sweep-

ing recommendations to the Government of Canada:

- That it abandon its practice of systematically refusing to consent to arbitration;
- That, in collaboration with the Land Claims Agreements Coalition, it take immediate steps to develop a new national land claims implementation policy, based on the principles endorsed by members of the Land Claims Agreements Coalition;

- That, in collaboration with the Land Claims Agreements Coalition, it take immediate steps to establish an independent body, through legislation, such as a Modern Treaty Commission to oversee the implementation of comprehensive land claims agreement, including financial matters;
- That the Clerk of the Privy Council take immediate steps to establish a senior level working group...to revisit the authorities, roles, responsibilities and capacities respecting the coordination of federal obligations under comprehensive land claims agreements, with a view to establishing clear guidelines, and that the Clerk of the Privy Council Office table these guidelines with the Senate Committee by March 31, 2009; and
- That the periodic negotiation of implementation funding for Canada's obligations under modern land claims agreements be led by a Chief Federal Negotiator, appointed jointly by the Minister

of Indian Affairs and Northern Development and the Land Claims Agreements Coalition, reporting directly to the Minister of Indian Affairs and Northern Development.

The Government of Canada will respond to the Senate Committee in due course, and this response will be scrutinized by modern treaty organizations. Representatives of the Department of Indian Affairs and Northern Development are reportedly "signal checking" with other departments to ascertain the appetite to reform the implementation of modern treaties along the lines spelled out by the Senate Committee. In the meantime DIAND is reorganizing its claims implementation branch and is developing a "comprehensive framework" and "action plan" on modern treaty implementation, which it promises to share with the coalition in fall 2008. Representatives of DIAND and the Treasury Board Secretariat informed the Senate Committee that they had

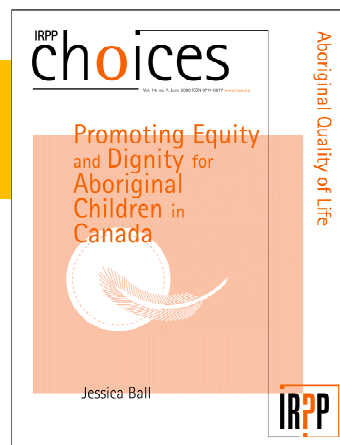
agreed to streamline access to claims implementation funding, but what this actually means is unclear.

While these responses have been welcomed by the coalition, it hardly seems likely that administrative reforms, and that is all that has been suggested so far, will be adequate to address the substantive implementation issues identified by the coalition, the Auditor General of Canada, and the numerous reviews of individual agreements. The need remains for a formal land claims agreements implementation policy to ensure that the Government of Canada lives up to its modern treaty responsibilities.

Terry Fenge is an Ottawa-based consultant specializing in Aboriginal, environmental and northern issues. From 1985 to 1992 he was director of research and senior negotiator for the Inuit organization that negotiated the Nunavut Land Claims Agreement. He assists Nunavut Tunngavik Incorporated in participating in the Land Claims Agreements Coalition.



Institute for
Research on
Public Policy
Institut de
recherche
en politiques
publiques



Nouvelle publication de l'IRPP IRPP New Publication

This study found that a large proportion of young Aboriginal children continue to lack adequate housing, food security, clean water and access to services. Professor Ball presents a series of policy recommendations, including that the federal government increase its funding of the Aboriginal Head Start programs launched in the mid-1990s to enable access for a minimum of 25 percent of Aboriginal children.

Cette étude constate que beaucoup d'enfants autochtones ne vivent pas dans des conditions adéquates de logement, d'alimentation et de sécurité, et n'ont pas accès à de l'eau saine et à des services sociaux de base. L'auteure présente une série de recommandations, notamment que

le gouvernement fédéral devrait augmenter son financement du Programme d'aide préscolaire aux Autochtones (établi au milieu des années 1990) afin qu'au moins 25 p. 100 des enfants autochtones puissent bénéficier de ce soutien.

Disponible / available: www.irpp.org