

Breakout Session 4B: Indigenous and Settler Law

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1:15 PM - 2:45 PM

Moderator: David Wright – Associate Professor, Faculty of Law, University of Calgary

Speakers:

- Senwung Luk— Partner, Olthuis, Kleer, Townshend LLP
- Vanessa Udy — PhD Candidate, Faculty of Law, University of Victoria
- Dr. Robert Hamilton— Associate Professor, University of Calgary
- Prof. David Wright – Associate Professor, Faculty of Law, University of Calgary

David Wright:

- Edited Volume: Modern Treaties and the Law. Going to present some of the chapters from this book.
 - Creating the first ever book in Canada to focus exclusively on Modern Treaties and the Law.
 - Mostly desktop-based legal research in this book. Aiming for publication by late 2025 or early 2026.

Robert Hamilton:

- The topic is Indigenous law-making authority under Modern Treaties. Law-making authority is the explicit authority to write contemporary laws, and how they relate to the Canadian Constitution is an important idea to build on.
- The distinction between customary or traditional Indigenous law and written or contemporary sources of law are important but dealt with differently under Modern Treaties.
 - Three chapters touch on this idea, one of them being Indigenous law-making authority under Modern Treaties (which focuses on limitations and boundaries of the authority), the others are on where Indigenous traditional and customary law is or is not present in the context of Modern Treaties, and the Dixon Decision, which is an example of the complex interplay that can occur.
- In the chapter on recognition of law-making authority:
 - The distinction between law-making authority and jurisdictions. Jurisdictions may include shared decision-making authority for land use plans and different forms of co-management.
 - Looked at different agreements to find constraints; sorting through the limitations can help to understand how they can be used in practice.

- Found six groups of limitations: division of powers, provisions on inconsistencies or conflicts, standards, conditions of validity, judicial review and geography and citizenship.
- Authority is shown in relation to a great number of matters within the table of contents or law-making chapters of Modern Treaty agreements.
- Division of power:
 - Usually, it is not framed as such, but different jurisdictions will be explained in considerable detail. The division of power does not refer to delegated or municipal governments. The nature of authority recognized under Modern Treaties may serve for this language to be used.
 - Often law-making authority casts general terms or categories, such as citizenship and language. At times, it can be very specific within the agreement. Limits can also be placed extremely clearly. Spells out important specific limitations within law-making authority.
- Conflict and inconsistency:
 - What happens in the event of a conflict between federal/provincial law and Indigenous law? Federal/provincial law often prevails in relation to certain aspects. An important distinction is the difference between using the language of inconsistency. Can carve out a greater space depending on how the language is interpreted.
 - Indigenous law usually prevails in relation to culture and language, internal governance issues, etc. There is a discernable pattern where Indigenous laws tend to have priority in relation to internal affairs that deal with cultural issues and structures of internal governance.
- Standards and core principles:
 - Many laws recognize the law-making authority of Indigenous Governments, but there is a backstop in reference to standards that are compatible or in substantial conformity with provincial or territorial law.
- Conditions and validity:
 - Tends to be built into the agreements themselves, where they establish criteria that must be met for the laws to be valid. Goes back to the idea of customary/traditional laws and written laws. For example, the Indigenous Nation must maintain a public registry of laws for those laws to be valid.
 - Conditions precedent will be built into the agreement, which limits the full scope of the law-making authority.
- Judicial review:
 - Provincial courts have jurisdiction in relation to many issues surrounding Modern Treaties, including reviewing administrative decisions made under the

agreements. A fascinating area of case law when reviewing decisions, but it is an important limitation. When courts perform reviews, they're dealing with Indigenous decision-makers while incorporating Canadian legal principles. Not necessarily problematic, but it's something to think through.

- Geography and citizenship:
 - Substantial limitation over what lands the laws apply to. Co-management often extends beyond judicial territories. Regarding citizenship, who does the law apply to, to which citizens do they apply, and do they follow when the citizen leaves the lands?

Vanessa Udy:

- Revitalization of Indigenous legal orders and pluralism.
- Co-wrote this chapter with Dr. John B. Zoe. The goal is to present a Tłıchq legal perspective on Modern Treaties and implementation. This chapter can be considered a response to the question of whether the Modern Treaty process can be decolonized.
- Treaties are fundamentally about land and the relationships that people have with it.
- The sun on the Tłıchq flag represents Tłıchq fullness (land, language, culture and way of life). The river represents the flow of time that has impacted people since the arrival of the first settlers. The four teepees represent colonial institutions that sustain and perpetuate the drawdowns on Tłıchq fullness. The North Star represents a new era where treaties are upheld and protected.
- Place names are an important expression of Tłıchq fullness and contribute to Tłıchq understanding of treaty relationships and a recognition of each other through the land, as opposed to through the federal government.
 - The first placename was through Weyèedii. Rabesca Lake is the habitat of Weyèedii.
 - The second placename is connected to the relationship between animals and people. The story is often told of a moose hunter who was turned into a trout. The bones in the head of the trout still look like the tools used for moose hunting.
 - A third time place name recalls the travels of the Tłıchq cultural hero. People and animals have reciprocal agreements; we look after the land, and the land looks after us.
 - Some place names take inventory of the landscape.
- A challenge of Treaty implementation is how to shift from the current extractive approach to one that revitalizes Tłıchq knowledge of the land.
 - Policy, return of resources, and education are part of the approach to solving this challenge. Advocacy surrounding policy has had a real impact on the LCAC so far.
- Revitalization work and full participation in treaty relationships require resources, of

which Tłıchq have been deprived. Putting the control of land back into Tłıchq hands is required.

- The importance of two-eyed seeing is stressed; being able to see it both ways. Western academic skills provide one important perspective, but so do Tłıchq skills. A balance between the two is required.
 - Tłıchq carry out research in collaboration with universities and under stakeholders. Collaborative research remains Indigenous led and grounded in Indigenous ways.
- The reclamation of Tłıchq fullness will provide a roadmap to healthy treaty relationships.
- Treaties don't involve just one person; all parties are required for the relationship to work. It requires settlers to learn more about the lands that they're in treaty with and to take action to those treaties.

Senwung Luk:

- There are situations where the relationship between settlers and Indigenous law is that the settler institutions are not always respectful towards following the treaty.
 - Recognizes that courts are still institutions based on colonial law, but there are still situations where they can be helpful.
- The default position of Canadian law is that one can't sue the Government.
 - Those cases where the Government will be sued are when they say so, but they haven't said that they can be sued when they break Treaties. What does one do in a lawsuit where the Crown doesn't live up to its Treaty promises?
- There have been cases where the Crown has not complied with Treaty and has gone to court to label their breach of treaty as a 'justified infringement' to indicate their intentions.
- Section 35 of the Constitution says that Aboriginal and Treaty rights are hereby recognized. In the 1996 Badger case on hunting charges, it was found that the government does not have to live up to these promises.
 - The case dealt with a hunter being charged on Treaty 8 lands despite having hunting rights. The courts recognized that right but indicated that it was subject to justified infringement by the Crown.
 - Justified infringement can be done for a valid purpose and in a way that minimally infringes on that right.
 - Ultimately, the defence of the Treaty rights was successful in the Badger case, and the hunters weren't charged.
- How does justified infringement apply to Modern Treaties? Whatever justification there is for justified infringement of Historic Treaties, it should not apply to Modern Treaties as they aren't the same thing.

- In the 2014 Makivvik case, a detailed provision in the treaty set out a process for a co-management issue. The Government of Canada decided they wouldn't do it and breached the Treaty.
 - They went to court, and the court found that there was a breach of the Treaty, but they concluded that the infringement was not justified.
 - As of the late 20-teens, the position of Canadian law was that justified infringement exists, and it does apply to Modern Treaties in the same way as one would apply it to Historic Treaties.
 - Modern Treaties are so detailed and procedural that applying the same framework to them doesn't make sense.
- Since then, applying justified infringement to Modern Treaty rights would not be appropriate to what the Supreme Court has said since.
 - The Restoule case was the first time the Supreme Court said that there is a Crown obligation to comply with Treaties and that lawsuits can be produced if not. This comes out of the Honour of the Crown.
 - Another series of cases articulated the differences between Modern Treaties and Historic Treaties. The C-92 Reference is about the First Nations, Métis and Inuit Child and Family and Youth Protection Act, where they said that UNDRIP is now part of the domestic law in Canada.
 - The Pekuakamiulnuatsh case was where Pekuakamiulnuatsh Takuhikan signed a policing agreement with the Government of Canada, where the funding of policing turned out to be insufficient, but the Crown refused to negotiate or re-engage.
 - The resulting lawsuit led to the Supreme Court saying that they were not living up to the Honour of the Crown and that they owed reconciliatory justice damages to the community. If there are reconciliatory justice damages for a breach of non-treaties, how about treaties?
- Have recent cases made applying justified infringements to Modern Treaties untenable? If the Honour of the Crown is so important, they should explain how it can be honourable to decide not to follow a treaty? Finally, how does this relate to UNDRIP?
- The paper proposes that the justified infringement is too open-ended. The emergencies jurisdiction is an important tool that could be used to amend this when it can be shown that there is no way of solving an emergency without the federal government stepping in. There can be limits, but any limitation must be non-discriminatory.

David Wright:

- Chapter 8: Modern Treaties and UNDRIP.
- The first part of the chapter focuses on the status of UNDRIP in Canadian law, which is

still evolving. The second part focuses on addressing the question of to what extent Modern Treaties meet, exceed or fall short of the standards and principles established in UNDRIP.

- The analysis takes as a starting point Section 5 of the federal UNDRIP Act, which commits the Government of Canada to take all measures necessary to ensure it's consistent with the Declaration.
- Taking several high-profile provisions of UNDRIP to use as a lens as specific provision to Modern Treaties. This is an evidence-based targeted analysis.
 - The four UNDRIP articles are Article 18 (participation in decision-making), 28 (lands taken), 32 (project review and approval) and 40 (dispute resolution).
- Article 18 – Participation in decision-making:
 - Says that Indigenous people have the right to participate in decision-making. Through this lens, the analysis views Chapter 16 of the Umbrella Final Agreement that creates the Fish and Wildlife Management Boards. The output of this chapter is recommendations, not decisions.
 - Ultimately, the recommendations from the board, aside from a few exceptions, are for the Minister sitting in the territorial, provincial or federal government. There is a gap between the language in that chapter and Article 18 in UNDRIP.
 - These treaties are a product of compromise. It's not clear that the right to maintain and develop one's own Indigenous decision-making institutions, as contemplated in UNDRIP, is present in the treaty provisions.
- Article 28 – Lands taken:
 - Deal with lands and resources appropriated without consent. This article says that Indigenous people have the right to fair and equitable occupation of traditional territories that have been used or damaged without FPIC.
 - The importance of maintaining land quantum in land claims agreements is underscored. The deeper analysis shows that there is still an explicit treaty basis for the appropriation of lands.
 - The default option is through compensation, but the gap appears with Article 28, which requires FPIC. Expropriation rarely happens in today's Canada, but it could become a live issue in the future.
- Article 32 – Project review and approval:
 - This is another FPIC provision that requires consultation with Indigenous people in a context that is trying to achieve FPIC. The Modern Treaty is the Inuvialuit Final Agreement, for which chapter 11 is devoted to development assessment.
 - There is a direct representation of the Inuvialuit. However, that boils down to recommendations once again, not final decision making. The colonial

government retains that final decision-making power.

- The federal impact assessment regime applies in the Inuvialuit Settlement Region, which gives the minister the final decision-making authority. There is no notion of consent required in Chapter 11.
- Article 40 – Dispute resolution:
 - This article indicates the right of Indigenous people to access just and fair procedures for conflicts and disputes. The Nunavut Agreement's dispute resolution agreements are of focus.
 - The first resolution allowed each party to not engage in dispute resolution; each party had a veto to enter into dispute resolution. Ultimately, that litigation was settled and there is an agreement that agreed to revise the dispute resolution chapter.
 - There was a gap between the UNDRIP standards in the original chapter, but the amended chapter is closer to the mark. It starts out informal, then proceeds toward a structured dialogue, followed by arbitration as a later resort. In that regard, the amended chapter is closer to satisfying some of Article 40 but still does not explicitly require to follow the rules and customs of Nunavut Inuit.
- There is a commitment that the laws of Canada should be consistent with UNDRIP, and Modern Treaties are law in Canada. There is a lot of work to be done to meet the principles established by UNDRIP.
 - Several fronts exist - Strategic litigation, Treaty Modernization Tables, and negotiating and designing a pathway forward are possible approaches to move forward. A novel approach is for an Indigenous Government to pass their own UNDRIP implementation law.

Q&A:

- **Q:** On the case studies, wondering if there are more agreements being negotiated post-endorsement of UNDRIP? Is there a suggestion on how the Crown is adapting its processes to better align with the principles in UNDRIP? To what extent is Canada changing its approach to provisions that are out of line?
 - **A:** A key example is dispute resolution. Don't see those hyper-colonial arbitration chapters anymore, so it is changing, but relatively slowly.
 - **A:** The way treaties are negotiated now has been shifting. There's been a push towards a more incremental approach to treaty negotiation. Parties will pick certain priorities to negotiate, such as self-government, with a final agreement still being pretty far off. An advantage has been to be able to step back and identify what their priorities are and what the limitations of UNDRIP may be.

- **A:** Many Treaties have a provision that indicates that it doesn't take away from the rights that this group has by being Indigenous peoples of Canada. That reference sets the stage for UNDRIP to be, at minimum, a constructive, interpretive tool.
- **A:** Will also see these non-Treaty side agreements come up as well if there is a desire to implement FPIC without amending the treaties but to incorporate consent. The Northwest Territories' UNDRIP Act has a provision that says that they're welcome to enter into an agreement that provides consent.
- **Q:** In the context of the research on when to use the infringement of rights, has that been explored in the context of most wildlife chapters in treaties? Many of these sections have considerations for the parties to take. Do you think those parts should be removed? How do those conservation measures in treaties align or don't align with the suggested solution?
 - **A:** For example, in the Makivvik case, there was a hunting plan outlined, but Quebec rejected that. Was concerned with Quebec being able to say that they didn't care what was in the Treaty through justified infringement. Not trying to say that any rights in Treaties should be ignored, but that should be scoped down to something like an emergency power. Using the pandemic and refusing to meet over Zoom, could be one kind of emergency that could use that justification. It has to be narrowed to true emergencies, not situations where the government likes sport hunters better.
- **Q:** The LCAC is trying to figure out their position on UNDRIP. If I were a federal negotiator, I might say that they have a right to recommend and are complying with UNDRIP by respecting that right.
 - **A:** These are not complete codes; they're open to evolving. The type of arguments may be different depending on the table. Have not seen an analysis of this, but the notion of ongoing consent has been a topic. One could argue that consent is woven into agreements that were previously agreed upon, but that doesn't necessarily mean that the consent is still there today. Any government that wants to take such a rigid approach is opening itself up to litigation risks.