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## Canada's Collaborative Modern Treaty Implementation Policy: A New Roadmap in a Long Journey

By: David V. Wright

**Matter Commented On:** [Canada's Collaborative Modern Treaty Implementation Policy](#)

After years of requests and proposals from Indigenous Modern Treaty parties, the federal government has released [Canada's Collaborative Modern Treaty Implementation Policy](#). This is the latest development in a series of law and policy reforms introduced by the federal government in this area in recent years. The main purpose of the new policy is to “support the full, effective, and timely implementation of all current and future Modern Treaties in Canada, with the specific goal of advancing a systemic shift in institutional culture” (Crown-Indigenous Relations and Northern Affairs Canada, News Release, [“Modern Treaty Partners and Canada Launch Co-Developed Policy to Transform Intergovernmental Relationships”](#) (28 February 2023)). This short post explains the context into which the new Policy enters and provides a succinct overview of its contents.

### Background

The journey to this new development has been a long one. Beginning in 2006 with the [Land Claims Agreement Coalition's](#) (LCAC) [“Four-Ten Declaration”](#), and 2008 [Model Policy](#), Indigenous Modern Treaty parties have been requesting and proposing a comprehensive federal policy focused on the implementation of Modern Treaties. This flows from a long-standing frustration with the federal government's tendency to approach Modern Treaty implementation with “narrow and technical understandings and interpretations of its Modern Treaty obligations” that in turn “hindered effective implementation of agreements” (Model Policy at 7). Problems with interpreting Modern Treaties in “an ungenerous manner or as if it were an everyday commercial contract” has been acknowledged by the Supreme Court of Canada in both *Beckman v Little Salmon/Carmacks First Nation* ([2010 SCC 53 \(CanLII\)](#) at para 10) and *First Nation of Na-Cho Nyäk Dun v Yukon* ([2017 SCC 58 \(CanLII\)](#) at para 37, citing *Beckman*), and again recently by the YKSC in the recent case of *First Nation of Na-Cho Nyäk Dun v Yukon (Government of)* ([2023 YKSC 5 \(CanLII\)](#) at para 225 (*Metallic Minerals*)).

This narrow, technical approach has also been recognized and documented by the Standing Senate Committee on Indigenous Peoples, [Honouring the Spirit of Modern Treaties: Closing the Loopholes](#) (May 2008), and by the Federal Office of the Auditor General (OAG) (see [Chapter 8 – Indian and Northern Affairs Canada – Transferring Federal Responsibilities to the North](#) (Ottawa: Office of the Auditor General of Canada, 2003) at 8.37 – 8.45) who stated that the federal government “seems focussed on fulfilling the letter of the land claims’ implementation plans but not the spirit” (OAG at 8.2). The new policy aims to address such frustrations by committing the

federal government to “living up to the spirit and intent of Modern Treaties” ([Message from the Minister of Crown-Indigenous Relations](#)).

The new policy is not an isolated development. After decades of relatively slow change in federal land claims policy and practices, there have been several significant developments in recent years. In 2015, for example, the federal government released the [Statement of Principles on the Federal Approach to Modern Treaty Implementation](#). The Statement includes 12 principles that are “intended to provide guidance to the Crown in right of Canada on the approach to Modern Treaty implementation to which it should aspire” (see additional background [here](#)). Also in 2015, the federal government put in place the [Cabinet Directive on the Federal Approach to Modern Treaty Implementation](#). The Cabinet Directive sets out the federal government's “operational framework for the management of the Crown's Modern Treaty obligations” and “guides federal departments and agencies to fulfill their responsibilities”. It also created a Deputy Ministers' Oversight Committee and a new branch within Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) called the Modern Treaty Implementation Office (MTIO) with the mandate to “provide ongoing coordination and oversight of Canada's Modern Treaty obligations, and to support the mandate of the Deputy Ministers' Oversight Committee” (at part 3). More recently, Canada and Indigenous Modern Treaty parties have been engaged in a collaborative fiscal policy development process that is fundamentally changing the federal government's fiscal relationship with Indigenous Modern Treaty parties. In 2018, Canada released its new [Collaborative self-government fiscal policy](#) to “provide a principled approach to fiscal relations with all Indigenous Governments in a manner that is consistent with the commitments made in self-government agreements and Modern Treaties” (at para 9).

At a broader level, these developments are taking place in the context of Canada's 2016 clarification that it is a “[full supporter, without qualification](#)”, of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). That commitment laid the foundation for the 2021 federal *United Nations Declaration on the Rights of Indigenous Peoples Act* ([SC 2021, c 14](#)) pursuant to which the government has recently released its first [draft action plan](#). Meanwhile, since 2015 the federal government has been engaging in “[Recognition of Rights and Self-Determination discussion tables](#)” to “explore new ideas and ways to reach agreements that will recognize the rights of Indigenous groups and advance their vision of self-determination for the benefit of their communities and all Canadians”. And the LCAC continues its work toward creation of a “[Modern Treaties Implementation Review Commission](#)” that would “monitor and report to Parliament on the progress of Modern Treaty implementation matters in all parts of Canada”. Specifics remain to be determined, including a potential model resembling the federal Commissioner of the Environment and Sustainable Development within the Office of the Auditor General. To date the federal government has not fully endorsed this new institution; though, as discussed below, Annex B of the new policy sets out a basis for this work to continue in the near future.

## **Overview of the New Policy**

### ***Purpose and Context***

The front end of the new policy explains how it ties together the many existing federal initiatives and policies that are relevant to Modern Treaties, most of which are described above. For example, it explains what the Cabinet Directive does, but then clarifies that the Directive “does not contain

the fulsome direction needed to support a true shift in the Crown-Indigenous Modern Treaty Partner relationship” (at 1.8). The policy also explains that it “builds on and is supported by the Cabinet Directive, the Statement of Principles and the experience gained through implementation of agreements to date by all parties, in order to provide additional direction to federal departments and agencies” (at 1.12). As such, the new policy can be viewed as a helpful step toward coherence and clarity across federal initiatives and policies directed at Modern Treaty implementation. It stands to help all Modern Treaty parties and the public better understand the entire Modern Treaty implementation landscape.

Additionally, the purpose and context sections of the policy contain powerful statements that will no doubt be welcomed by Indigenous Modern Treaty parties. For example, there is the affirmation that “[n]o relationship is more important to Canada than the one with Indigenous peoples” (at 1.1) and that “institutional legacies of colonialism in Canada have perpetuated systemic racism against Indigenous peoples” (at 1.9). There is also the very clear statement that Modern Treaties are “part of the constitutional framework of Canada and represent a distinct expression of reconciliation” (at 1.5) and that “Modern Treaty Partners have not realized the promises in these agreements intended to support stable, thriving cultures and equitable levels of material well-being. These failures create ongoing legal, financial and reputational risks and damages to Canada” (at 1.8). It was one thing for the Senate committee and OAG to reach these findings several years ago, but it is another – and very significant – thing for the federal government to be acknowledging these realities of their own accord today.

### ***Principles and Advancing Objectives***

The new policy sets out 11 principles to guide “the timely, effective, and full implementation of Modern Treaties” (at part 3). These principles are consistent with, but different from, the 2015 statement of principles mentioned above. Several statements in the new policy stand out in particular. For example, 3.4 states that Modern Treaties are “living documents capable of evolving over time” and that “the terms of a Modern Treaty should be amended to reflect advancements in the legal and policy contexts of reconciliation and new approaches that are adopted in Modern Treaties”. That principle is a basis for a step change that moves beyond the federal government’s narrow approach to implementation to date, including an openness to treaty amendments that integrate changes in law and policy that were not on the table when the treaties were negotiated (many of which were more than 30 years ago).

Other highlights include explicit reference to revitalization of Indigenous laws and governance (at 3.5), to UNDRIP as an “authoritative interpretive source for Canadian law [which] informs the implementation of Modern Treaties” (at 3.7), to the honour of the Crown (at 3.8), to Modern Treaty relationships being “with the Crown as a whole” (at 3.11), and to Indigenous Modern Treaty parties requiring “sufficient fiscal capacity” which is to be achieved through the “renewed fiscal relationship”, including the new fiscal policy mentioned above (at 3.12). Overall, these new principles can be viewed as building upon the 2015 principles, while also speaking more directly to the needs and interests of Indigenous Modern Treaty parties.

Part 4 of the policy builds on the stated principles by focusing directly on the objectives set out in Modern Treaties. As noted above, there has been a long-standing gap in Modern Treaty implementation whereby Canada has focused on a narrow, technical reading of treaty

commitments while Indigenous treaty parties have focused on the spirit and intent. This part of the policy builds a bridge across that gap. Paragraph 4.2 makes this explicit:

[t]he parties recognize that the objectives articulated in Modern Treaties will not be achieved unless the obligations in Modern Treaties are fully implemented consistent with their spirit and intent. Canada is committed to taking a broad and purposive approach to Modern Treaty implementation and working collaboratively with Indigenous Modern Treaty Partners to advance treaty objectives.

Part 4 then goes on to set out a number of high-level shared objectives, including strengthened Indigenous governance, improved management of lands and resources, support for culture, language and heritage, fostering of economic development opportunities, improved social development, and respect for the environment (at 4.3). The policy then commits federal deputy heads to collaborate with Indigenous Modern Treaty parties to advance the objectives and measure results (at 4.4).

### ***Pushing the Bureaucracy***

Part 5 provides explicit direction to public servants. This is a key portion of the policy given one of the core stated purposes to “advancing a systemic shift in the federal public service's institutional culture, reflected in behaviour, decision-making and actions at every level of the federal government”. The thrust of this part of the policy is to push the bureaucracy to shift to a broad and purposive interpretation of treaty obligations and to ensure that federal policies and procedures are consistent with Modern Treaty obligations and objectives. Notably, the policy indicates that inconsistencies must be removed, “including through amending laws, policies and operational practices across government” (at 5.1.(e)).

Part 6 then goes a step further by instructing deputy heads that they “must be aware of and fulfill their role in implementing Modern Treaties through the development and delivery of programs, services, policies, and legislation in a manner consistent with Modern Treaty relationships, obligations, and objectives, as well as the evolving legal framework” (at 6.1). This should augment the overall push for a “whole-of-government” approach across the federal bureaucracy. One can imagine, for example, that while a deputy head of CIRNAC may already be (or very much should be) thinking along these lines, this part of the policy speaks very pointedly to deputy heads who may be less inclined or less aware of the need to do so in federal departments such as health, national defence, public safety, or infrastructure.

Paragraph 6.2 then instructs deputy heads to take a “considered approach” to the design and renewal of Modern Treaty-relevant federal legislation, policies, and programs, and then sets out what a considered approach means.

As is typical with a federal policy or program, Part 7 requires a joint evaluation of the policy every 5 years. It also commits Canada and Indigenous treaty parties to “continually monitor and assess the effectiveness and implementation of this policy and ensure that problems and issues are addressed in a timely manner” (at 7.1). This mechanism should be helpful in terms of transparency, accountability, and ongoing collaboration.

One aspect that is not included in the policy (yet – see below) is an explicit role for any independent oversight body to monitor effectiveness of the policy and overall implementation of the policy itself. Rather, part 7 is the sole mechanism of this kind and it is entirely internal to the policy itself. However, this policy provides precisely the type of criteria that the OAG would use in a future examination of the extent to which the federal government is actually making the shifts and changes to which it has committed (see [here](#) for an example of the OAG using these types of criteria in the context of the Labrador Inuit Land Claims Agreement). As such, it is reasonable to expect this policy to have some “teeth” through future application by the OAG. What’s more, if the federal government does eventually accept the LCAC proposal to create an oversight institution for Modern Treaty implementation, be it within the OAG or not, this policy will provide a clear basis for robust examinations of federal successes and failures.

### ***Commitments to Further Work***

While the contents of the policy are significant, there is much more to come. Part 8 contains a series of placeholders for “additional annexes to set out key processes, tools and mechanisms” which will be “essential components of this policy and will form an integral part of it as if they were set out in its body” (at 8.1). Contemplated annexes include:

- a) establishing new implementation mechanisms and improving the effectiveness of existing ones;
- b) developing a strategy for the comprehensive, meaningful, and reliable measurement of progress in the context of implementing the broad objectives individually outlined in each Modern Treaty;
- c) ensuring that Indigenous Modern Treaty Partners are able to fully exercise their jurisdictional powers and manage and administer programs and services to their citizens, members or beneficiaries as set out in their agreements;
- d) ensuring that Indigenous Modern Treaty Partners without self-government are able to conclude self-government arrangements;
- e) supporting the evolution of Modern Treaties, including through robust periodic review and renewal processes designed to facilitate negotiated amendments;
- f) improving dispute resolution processes;
- g) addressing challenges that prevent co-management boards from recruiting and retaining qualified nominees to serve;
- h) establishing effective mechanisms to ensure that all federal departments and agencies are alive to implementation issues and that these issues receive the right level of attention, including potential revision or replacement of the Cabinet Directive;
- i) providing meaningful training to federal government officials to ensure Modern Treaties are respected and their promises upheld;
- j) improving information-sharing;
- k) working collaboratively to determine how the policy and ancillary mechanisms may apply to, or must be adapted for, self-government agreements and other constructive arrangements while maintaining recognition of the distinct nature of relationships created by Modern Treaties.



This list is a commitment to an immense amount of work that will take many years. All of it is important. However, there will no doubt be challenges on the part of the federal government and Indigenous Modern Treaty parties in carrying out all that needs to be done. Having said that, this explicit roadmap is a good start, and represents a clear and constructive plan that has never existed before. Whether all of that future work can be realized is an open question, particularly given the relatively weak monitoring, evaluation, and review mechanism in part 7. That imbalance between the strong commitment to future work and the weak oversight mechanism underscores the need for an independent oversight body. Presumably it is this imbalance that compelled the government to include a commitment to new oversight mechanisms in Annex B, as discussed below.

## ***Annexes***

Many annexes are to come, but two are already present in the policy. Annex A contains an explicit commitment to a “permanent forum between the Prime Minister as the head of the Government of Canada, the appropriate Ministers, and leaders of Indigenous Modern Treaty Partners and Self-Governing Indigenous Governments” at least once per year (at A.1). Canada has already made good on this commitment, hosting the forum in early May 2023 (see a summary [here](#) from the Tlicho Government). The purpose of the forum is “to provide an opportunity for direct conversations between leadership on significant matters of concern that may arise in that relationship” (at A.2), and the Annex includes a commitment to collaborative development of terms of reference (at A.3). The second part of Annex A then sets the basis for an “Intergovernmental Policy Circle”, comprised of senior level officials and representatives to provide “a venue to work collaboratively on cross-cutting implementation issues and to discuss federal legislative, policy and program initiatives” (at A.4 - A.9). In practical terms, much of that work will likely be carried out by the sub-working groups contemplated in A.8.

Annex B sets out a commitment to “develop independent oversight mechanisms”, recognizing that “more work is required to ensure the federal government is held accountable to Parliament for its actions” (at B.1). Notably, this commitment is time-bound. Within “the next 6 months” the federal government and Indigenous Modern Treaty parties are to co-develop “recommendations to put in place credible, effective, sustainable and independent oversight mechanisms to hold the federal government accountable to Parliament” (at B.2). The Annex then explicitly acknowledges that several models are to be explored, including potential housing in the OAG, as previously proposed by the LCAC. The purpose of such a body is acknowledged to be “monitoring and reviewing the federal implementation of Modern Treaties” (at B.3).

## **Concluding Observations**

This new policy is a significant development in the Modern Treaties law and policy landscape. It represents a basis for a non-incremental step change in treaty implementation that moves the federal government away from problematic narrow and technical interpretations of treaty commitments and treaty relationships. In that regard, the policy can be viewed as a consistent and helpful next step in the series of recent federal initiatives in this area. However, more work lies ahead than behind. Not only must the federal government and Modern Treaty parties continue working together in a context of resource and capacity scarcity to develop the important annexes contemplated in the policy, but the actual work toward full implementation of treaty commitments must also be carried out en route to what really matters: the realization of treaty *objectives* in

service of building trust and pursuing reconciliation in Crown-Indigenous Modern Treaty relationships.

It is common in Modern Treaty implementation contexts to hear that federal, provincial, and territorial governments view the treaties as a divorce while Indigenous treaty parties view the agreements as a marriage. Though blunt, that metaphor captures the reality of Modern Treaty implementation to date as an instance of an expectations gap. Each treaty party has been viewing the treaties differently and conducting themselves in accordance with those different views and expectations. This policy holds the potential to build a bridge across this gap by setting a common reference point for the treaty relationship into the future. It will be interesting to see whether the federal government (let alone provincial and territorial governments who do not fall under this policy) is willing to fully bridge the gap and follow the roadmap provided by the new policy. Modern Treaty implementation has been a bumpy journey to date. Time will tell whether this new policy creates a smoother path or not.

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