



Evolution of Yukon's Aboriginal Law and the Goal of Reconciliation, A 360° PERSPECTIVE

By Dwight Newman

Professor of Law & Canada Research Chair in Indigenous
Rights in Constitutional and International Law,
University of Saskatchewan

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INTRODUCTION

This paper was commissioned by Action Canada, who asked the author to describe in broad terms the lay of the land on Aboriginal relations in Yukon.

The author, Dwight Newman, is Professor of Law & Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan.

Action Canada asked specifically for a short overview of Canadian-Aboriginal relations at the federal level, the courts' structuring of government-Aboriginal relations, the long-term visions of the Supreme Court of Canada as well as Aboriginal and non-Aboriginal governments concerning Aboriginal relations, and how specifically these issues are playing out in Yukon.

A draft version was supplied to Action Canada, and this final version responds to some comments received from Action Canada.¹

CANADIAN ABORIGINAL RELATIONS AT THE FEDERAL LEVEL

The concept of "Aboriginal relations" is not a specifically legal concept and is thus not guided by one particular set of legal rules. Rather, a set of various documents, treaties, statutes, constitutional instruments, and court decisions together provide guidance on Aboriginal relations in Canada. This section of the paper will seek to overview a number of key documents, while trying to refrain from an extensive discussion of the key court cases, which occupy the next section of the paper.

The concept of "Aboriginal peoples" is constitutionally defined, leading to the ongoing use of the term "Aboriginal" as a major Canadian term even in an era when the international term "Indigenous" is gaining great currency elsewhere. Section 35 of the *Constitution Act, 1982*, which is a section of the 1982 constitutional amendments that recognizes and affirms "existing Aboriginal and treaty rights" contains a definition of Aboriginal peoples as "includ[ing] the Indian, Inuit and Métis peoples of Canada".² The complex set of governmental relationships with these diverse communities are affected by many different instruments.

Traditionally, there has been a distinctively federal relationship with Aboriginal peoples (albeit with long-standing uncertainty in relation to Métis communities). Section 91(24) of the *Constitution Act, 1867* (formerly called the *British North America Act*, and being the constitutional instrument implementing Canadian Confederation) provided, in the language of the time, for federal rather than provincial jurisdiction in relation to "Indians, and Lands Reserved for the Indians".³ A 1947 case (*Re Eskimos*) made clear that the language of section 91(24) was meant to include Inuit peoples as well, clarifying the availability of federal jurisdiction in relation to Inuit peoples.⁴ Only in recent years, in the *Daniels* case, have the courts ruled finally on the matter of whether section 91(24) implies federal jurisdiction in relation to Métis peoples, with the Federal Court and Federal Court of Appeal thus far having ruled that it does.⁵

Just what the provincial relationship is to Aboriginal communities has long been debated. Provinces have various grounds of jurisdiction under section 92 of the *Constitution Act, 1867*, with a significant addition to that *Act*, section 92A concerning natural resources, being implemented in 1982 and that section, along with others, confirming broad provincial jurisdiction over lands and natural resources, as well as their jurisdiction over private law generally.⁶ Recent cases have ruled that provinces, acting within their jurisdiction, can properly apply their jurisdiction even on Aboriginal lands (though with some limits on applying it on reserve lands),⁷ and some have

¹ The author is also very grateful to Yule Schmidt for some prior discussions and many useful suggestions as to helpful sources.

² *Constitution Act, 1982*, s. 35.

³ *Constitution Act, 1967*, s. 91(24).

⁴ *Re Eskimos* (Reference whether "Indians" Includes "Eskimo"), [1939] S.C.R. 104.

⁵ *Daniels v. Canada*, [2013] F.C.R. 6, varied by *Daniels v. Canada*, 2014 FCA 101.

⁶ On provincial jurisdiction over natural resources – and some limited exceptions – see generally Dwight Newman, *Natural Resource Jurisdiction in Canada* (Toronto: LexisNexis, 2013).

⁷ Such holdings are present in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 48 and *Grassy Narrows First Nation v.*

even now interpreted the implication that provinces would be able to enter into treaties concerning land claims with First Nations without involving the federal government at all, counter to the tradition of the federal government entering into treaties or, more recently, the federal government and provinces entering tripartite agreements with a First Nation. Those ideas are still untested but do seem to flow from some recent case law.⁸

Nonetheless, the long-standing federal relationship has largely shaped Aboriginal relations at a national level and has been principally, given the uncertainties on 91(24), with “Indians” or those usually now more respectfully called “First Nations”. The federal government has long regulated its relationship with these communities by statute, with the section 91(24) jurisdiction grounding the passage of the *Indian Act* in its first form in 1876, with that *Act* bringing together and consolidating various pieces of legislation that had existed before.⁹

The broad category of “Indians” or “First Nations”, of course, is an imposed term applied across many different identities, with First Nations individuals having been grouped in both smaller communities (with the *Indian Act* then legislatively imposing the concept of a “band”) and in larger nations with which the smaller communities had different kinds of relationships (these larger nations being groups like the Cree, Anishinaabe, Dene, and so on). From even earlier on, Canada had entered into various kinds of relationships with Aboriginal communities cast at various levels and sometimes recast in ways convenient to Canada more than necessarily to Aboriginal communities themselves.

The British Imperial Crown entered into treaty relationships in what would become Canada even from early on.¹⁰ It entered, for instance, into Peace and Friendship Compacts with Aboriginal communities in the Maritime provinces in the 1700s. In 1763, following military conflict with France and in light of various issues that had arisen with respect to settler relations with Aboriginal communities in British North America and the Thirteen Colonies, the Imperial Crown issued the *Royal Proclamation, 1763*, which assured Aboriginal communities that lands would be purchased from them only by the Crown through treaty-making rather than by private settlers. Some accounts suggest that a large group of Aboriginal communities gathered the next year to ratify a treaty to accompany the *Royal Proclamation*, the 1764 Treaty of Niagara, which Aboriginal perspectives see as having assured them of ongoing self-government through the image of a two-row wampum,¹¹ but the exact legal consequences have not been interpreted in this way by Canadian courts.

Following this instrument (and in a period continuing after the American Revolution, which made the *Royal Proclamation* relevant only to Canada), the Imperial Crown engaged in extensive treaty-making with groups of Canadian Aboriginal communities drawn together for treaty purposes, through various treaties in southern Ontario, the Robinson treaties in northwestern Ontario in 1850, and the eleven numbered treaties (or Victorian treaties) negotiated between 1871 and 1921 across much of the West. Treaty 11, negotiated in 1921, covered a small part of Yukon Territory. But Yukon, like British Columbia, Quebec, Labrador, and other parts of the North, remained largely uncovered by treaty relationships.

Modern treaties have been increasingly negotiated in recent decades, with the James Bay and Northern Quebec Agreement (JBNQA) being the first of these,¹² the Nisga’a Agreement in British

Ontario (*Natural Resources*), 2014 SCC 48.

⁸ Such an idea was under discussion at a recent panel at the Canadian Bar Association Annual Meeting and is the Subject of some discussion in Ken Coates & Dwight Newman, “The End is Not Nigh: Reason Over Alarmism in Analyzing the *Tsilhqot’in* Decision” (Macdonald-Laurier Institute, September 2014).

⁹ *Indian Act*, S.C. 1876, c. 18 (39 Vict.), continued on into *Indian Act*, R.S.C. 1985, c. I-5.

¹⁰ For a general history of treaties in Canada, see J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).

¹¹ For a broad reading of the Treaty of Niagara and its implications, see John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government”, in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997).

¹² James Bay and Northern Quebec Agreement (JBNQA) (1975), available online at: <http://www.gcc.ca/pdf/LEG00000006.pdf>

Columbia being another precedent of sorts,¹³ and the negotiation of dozens of such modern treaties covering various areas but still leaving many unceded areas, especially in British Columbia.¹⁴

The federal government has applied its jurisdiction whether or not treaties are present and has regulated First Nations under various iterations of the *Indian Act*. Various versions largely pursued a vision of assimilation, including through such policies as residential schools. In the late 1960s, in the face of the unequal economic and social circumstances of Aboriginal people, the government of Pierre Trudeau prepared a White Paper in which it announced its plans to move toward full assimilation so as to increase equality for Aboriginal individuals.¹⁵ Significant Aboriginal activism protested and has continued since, seeking a recognition of the distinctiveness and self-determination of Aboriginal communities.¹⁶ The White Paper was withdrawn, and Trudeau's constitutional repatriation, under pressure, eventually contained a protection for the collective rights of Aboriginal peoples in the form of section 35, referenced earlier.

The *Indian Act*, with gradual amendments over time, has remained in place and imposes a significant paternalistic framework on First Nations while also providing the legal structures through which they operate and have some limited governmental powers recognized through a band governance system. On-reserve matters are subject to this band governance system (within which a structure of band elections is established, with its details not necessarily in conformity with the traditions or modern aspirations of particular communities), but with much federal monitoring of various decisions, with federal funding conditioning many matters, and just generally a lot of ongoing federal government involvement. In recent years, several pieces of legislation have been passed under which First Nations can opt in to different legislative frameworks and thus remove themselves from parts of the *Indian Act*, with the *First Nations Land Management Act* (FNLMA)¹⁷ being an example under which they can assume greater land management responsibilities and engage in a form of sectoral self-governance. The modern treaties largely recognize self-government of the First Nations with which they have been entered, with prescribed areas of jurisdiction precisely defined. And many Aboriginal communities assert an inherent right of self-government and sometimes attempt to exercise that, with governments sometimes ceding to it but courts often not recognizing such attempts if governments choose to challenge them.

THE COURTS' STRUCTURING OF GOVERNMENTAL-ABORIGINAL RELATIONS

The rise of First Nations activism around the time of the Trudeau Government's White Paper was a widespread political activism, but it also made use of litigation. This era gave rise to the first landmark decision on Aboriginal title, the 1973 Supreme Court of Canada decision in *Calder v. British Columbia*,¹⁸ in which six of the seven justices hearing the case recognized in principle the concept of Aboriginal title and its potential applicability to unceded lands. The claim was unsuccessful in the particular case due to a mix of some judges considering the title to have been extinguished and one rejecting the case on solely procedural grounds. However, the decision triggered a new government responsiveness to Aboriginal title claims and initiated an openness to negotiate on some of these claims. The community that had pursued that case, the Nisga'a, eventually reached a negotiated modern treaty in the late 1990s.¹⁹

¹³ Nisga'a Final Agreement (1999), available online at: <http://nisgaalisims.ca/the-nisga-a-final-agreement>; for a discussion of the process leading up to the agreement, see Tom Molloy, *The World is Our Witness: The Historic Journey of the Nisga'a into Canada* (Saskatoon: Fifth House, 2006).

¹⁴ For an overview of the modern treaties, see Thomas Issac, *Aboriginal Law* (Saskatoon: Purich Publishing, 2013) at 161-87.

¹⁵ Statement of the Government of Canada on Indian Policy (The White Paper), 1969, available online: <http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191>

¹⁶ One significant written work that featured in this activism was Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969).

¹⁷ *First Nations Land Management Act*, S.C. 1999, c. 24.

¹⁸ *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313.

¹⁹ This was the Nisga'a Agreement, discussed above, concluded in 1999.

The *Guerin* case in 1984,²⁰ but with the roots of the case prior to 1982 so with it being a case not yet based on section 35 of the *Constitution Act, 1982*, suggested that the Crown has a fiduciary responsibility to First Nations in at least some contexts. Sorting out the meaning of that responsibility has been a complex matter, and the courts actually later moved away from that language toward a concept of the “honour of the Crown”, to which this section will return momentarily.

The 1982 constitutional recognition of Aboriginal and treaty rights initially opened the door for a significant number of title and rights questions to be brought to the courts. By chance, the first to reach the Supreme Court of Canada, *Sparrow* (1990), actually hinged in the Supreme Court of Canada on when limits on Aboriginal rights were justifiable and thus permitted. The Court developed a test for justified infringements that has stood to today, so there is a specific legal test permitting such infringements where necessary to other aims of compelling public significance, though there may be strong political reasons against governments infringing on rights.²¹

The *Van der Peet* (1996) decision of the Supreme Court of Canada articulated a test for the Aboriginal rights protected under section 35, focusing on practices integral to the distinctive culture of an Aboriginal community prior to contact with European settlers, although with logical evolution of those historic practices into modern practices that would now be constitutionally protected. Thus, there is a protection oriented toward various culturally significant practices.²²

That test focuses on specific practices. As framed, it does not readily protect a broad right of self-government. As a result, in the essentially simultaneous decision in *Pamajewon*, the Court, applying the *Van der Peet* test, held against a claimed right of self-government by the community involved.²³ Any such claim would need very extensive evidence of governance across all the claimed areas of jurisdiction if to have the possibility of succeeding. Nonetheless, governments have negotiated on the basis that there is an inherent right of self-government, something that has been given effect in the various modern treaties.²⁴

The *Delgamuukw* (1997) decision purported to apply this test to the specific context of Aboriginal title and a test for it, although with modifications for the context.²⁵ Aboriginal title arises from historic occupation of land prior to the assertion of European sovereignty. That occupation needs to have been exclusive and thus best translated into a right of title rather than some other right to use the land. The *Delgamuukw* decision also emphasized the significance of merging common law and Aboriginal perspectives and thus of making use of Aboriginal oral history evidence as part of the evidentiary record to prove these cases. Qualifications have emerged in later cases around the use of oral history evidence, but the main point stands that oral history evidence and the traditions of Aboriginal communities themselves are significant to the establishment of rights.²⁶

The application of the *Delgamuukw* test to the circumstances of an Aboriginal community that was not constantly in one place raised ongoing challenges. This year, the Supreme Court of Canada issued a landmark decision on Aboriginal title once again in *Tsilhqot'in Nation v. British Columbia*

²⁰ *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

²¹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

²² *R. v. Van der Peet*, [1996] 2 S.C.R. 507. Many scholars have criticized this decision for its potential to freeze rights in particular ways, limiting them to historic cultural practices, although the Court itself purports to leave room for evolution of practices.

²³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

²⁴ Although the Charlottetown Accord in 1993, which would have recognized a right of Aboriginal self-government was rejected, the subsequently elected federal government adopted the *Inherent Right of Self-Government Policy 1995*, which indicates that the federal government recognizes an inherent Aboriginal right of self-government that the government considers protected by s. 35 of the *Constitution Act, 1982*.

²⁵ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

²⁶ In the context of the use of Aboriginal oral history in a later case, see Dwight G. Newman, “*Tsilhqot'in Nation v. British Columbia* and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History” (2005-06) 43 *Alberta Law Review* 433.

in mid-2014.²⁷ This decision, at minimum, clarified the *Delgamuukw* test and the viability of its application to the circumstances of a semi-nomadic community. The valid title claim would be not just to limited specific sites of land but to a larger portion of a community's traditional territory of which it could show sufficient and exclusive historic use, with exclusivity demanding only that the community had been the ones recognized by others as making decisions about the use of that land. Some see the decision as having farther-reaching implications (and it did decide several other specific issues that are important), but all of its implications are not yet known.

Two other interesting elements in the *Tsilhqot'in* decision are worth noting. First, the use an Aboriginal community may make of Aboriginal title lands, other than via cession to the Crown, is limited to those uses that are consistent with its ongoing value to future generations. The meaning of that restriction is not fully known. Second, the case elaborates upon an override test, under which the Crown may override Aboriginal title in certain limited circumstances based on something akin to the *Sparrow* justified infringement test. Again, political factors may operate against any widespread use of that override power.²⁸

This decision is a recent decision on an Aboriginal right (specifically, title). In recent years, there have been few such court decisions, as many matters have been under negotiation – which has resulted in the dozens of modern treaty relationships that have been developed. There have been other reasons Aboriginal communities have been tending not to put cases directly on rights or title. One of these reasons has been the role of a doctrine called the “duty to consult”, which has provided an interim means of dealing with rights and title claims whose status is not totally certain.

The duty to consult was established in the *Haida Nation v. British Columbia* decision (2004)²⁹ as a proactive obligation of governments to consult with potentially affected Aboriginal rights-holders when contemplating a government administrative decision or action that could negatively affect their claimed or asserted rights, even prior to final proof or settlement of their claims.³⁰ The depth of the duty and how much the government needs to do in response to it depends on how strong the rights claim is and on how severe the negative impact on the community could be. The accompanying decision in *Taku River Tlingit First Nation v. Yukon* (2004)³¹ made clear that the duty to consult could be fulfilled through a general environmental assessment process, with the Court holding that it had been met in the *Taku* circumstances. However, what is required on the duty to consult is highly contextual. At the high end of the spectrum (where there is a strong claim and a severe impact), the duty will clearly include an expectation not only of consultation but also of accommodation. In all cases, the idea is that the expectation is one of meaningful consultation, which could include an accommodation of the Aboriginal rights or treaty rights impacted by some adjustment in the government decision at issue. Government practices have developed significantly on accommodation, but there remains a great deal of uncertainty on what is expected in terms of accommodation, partly because the implications of the duty to consult are so contextual.

There are many complexities on the duty to consult, and there have been numerous subsequent court decisions. All have made clear that the duty to consult flows from the honour of the

²⁷ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

²⁸ For discussion of this and other parts of the case, see Ken Coates & Dwight Newman, “The End is Not Nigh: Reason Over Alarmism in Analyzing the *Tsilhqot'in* Decision” (Macdonald-Laurier Institute, September 2014).

²⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.

³⁰ For a complete overview of the duty to consult and further case citations that would support the statements in this paragraph, see: Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) (an older work cited in a number of different judicial decisions) and Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) (the author's latest take on the duty to consult). See also Dwight Newman, “The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector” (Macdonald-Laurier Institute, May 2014).

³¹ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.

Crown (which is a reformulation, in a sense, of the idea of Crown fiduciary duty to Aboriginal communities) and from the aspiration the Court considers to be present in section 35 of the *Constitution Act, 1982* for “reconciliation” between Aboriginal and non-Aboriginal communities.³²

The *Mikisew Cree First Nation* (2005)³³ decision makes clear that the duty to consult applies not only to Aboriginal rights but also to treaty rights. In a 2009 Yukon case, *Beckman v. Little Salmon / Carmacks First Nation*,³⁴ the Supreme Court of Canada had to consider whether there was a duty to consult in relation to a modern treaty, whose carefully negotiated terms would often carefully circumscribe consultation processes arising in certain circumstances. The Court ended up holding that although the treaty terms would often shape the duty to consult, nonetheless, the constitutional duty to consult remained as a background duty that could still come into play. The meaning of this case was not entirely clear and has generated some uncertainty.

A more recent Yukon decision is also noteworthy. In *Ross River Dena Council v. Yukon*,³⁵ the Yukon Court of Appeal ended up holding that the Yukon government would need to change its mining legislation so as to enable more consultation at an earlier stage in the process of the allocation of mining-related rights. The Supreme Court of Canada in late 2013 decided not to hear an appeal of this decision. So, the Court of Appeal ruling stands. It seems to extend the application of the duty to consult so as to apply not only to decisions made by government based on existing law but also to a requirement that the law itself require enough consultation. That is a significant extension, and it is not clear how far it goes. But it has at least led to a requirement that Yukon amend its mining regime so as to avoid automatic allocations of rights to those who stake claims without consultation with Aboriginal communities who might be affected by later working of the claim.

More than in almost any area of government policy, Aboriginal relations is significantly affected by court decisions. The duty to consult applies to wide ranges of government decision-making, and the government ultimately needs to conduct its Aboriginal relations in a manner complying with all pertinent Aboriginal and treaty rights.

LONG-TERM VISIONS

This case law of the Supreme Court of Canada has been particularly oriented to the concept of reconciliation between Aboriginal and non-Aboriginal Canadians, and the concept of reconciliation has been used as a description of the purpose of section 35 of the *Constitution Act, 1982*. In one sense, this concept is not highly prescriptive – it leaves room for governments and Aboriginal communities to work out what will work so all can live together. Indeed, the Supreme Court of Canada has often suggested the importance of negotiation in attaining reconciliation-related outcomes that the courts cannot themselves simply impose. A second key expectation of the Supreme Court of Canada is that governments are to act honourably – or in accord with the “honour of the Crown”. The long-term vision of the Supreme Court of Canada, then, is that Canadian governments and Aboriginal communities will find ways of living together that reconcile their differing aspirations and visions and that will maintain an honourable relationship. Its vision is that the visions of others need to come together.

³² Many of the duty to consult cases reference this purpose of s. 35. As put by Justice Binnie in the opening paragraph of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 at para. 1, “The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests, and ambitions.” The term “reconciliation” has been present in the s. 35 jurisprudence for many years but has had its meaning gradually shift toward this sort of meaning: see Dwight Newman, “Reconciliation: Legal Conception(s) and Faces of Justice”, in John Whyte, ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich, 2008) 80-87.

³³ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69

³⁴ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103. On the delicate interplay of contractual and covenantal interpretation of treaties that this case raised, see Dwight Newman, “Contractual and Covenantal Conceptions of Modern Treaty Interpretation” (2011) 54 *Supreme Court Law Review* (2d) 475.

³⁵ *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, leave to appeal to Supreme Court of Canada denied 19 September 2013.

The long-term vision of the government and of Aboriginal communities is less definite. The Royal Commission on Aboriginal Peoples (RCAP), whose massive final report was released in 1996, offered a set of recommendations consistent with the idea of pursuing self-determination or self-government for Aboriginal communities, but based on a reorganization of Aboriginal communities into differently sized units that would provide for efficient government.³⁶ That specific vision has not necessarily been embraced by governments.

However, the federal government has embraced an approach of negotiating self-government that fits with the differing needs of different First Nations and an approach of developing various pieces of opt-in legislation. Through both of these moves, it seeks a devolution of powers to First Nations so as to allow decision-making closer to the community while simultaneously expecting certain measures of accountability and transparency. There was an initial adoption in 1995 of a policy framework committed to the inherent right of self-government and to negotiations based on that principle.³⁷ More recent policy frameworks have built upon this, including the extended document, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government”.³⁸ In recent years, the government has sought to pursue a “results-based approach” to speed negotiations. At the same time, new legislative options are available for First Nations to make choices to opt in to different frameworks. The government has also been committed to such matters as attempts to reform First Nations education systems and to Aboriginal economic development more broadly through a variety of mechanisms.³⁹

Long-term visions of government-Aboriginal relations by Aboriginal communities are not simple to characterize. There are widespread statements of a vision of nation-to-nation dealings with Canada, with each First Nation then effectively seeking recognition as a separate nation. That vision is inconsistent with the recommendations of the Royal Commission on Aboriginal Peoples, whose recommendations are sometimes cited as something that has been embraced.

The Assembly of First Nations is a particular delegated body with representation of each First Nation and a National Chief elected by the chiefs of the First Nations from across Canada. Its Charter commits it to the pursuit of self-determination for First Nations, thus seeming to offer a consistent picture of an end goal.⁴⁰ The AFN has also served as an interlocutor with the federal government on various policy issues. However, those discussions have also shown the AFN to be fragmented and not necessarily to represent a cohesive national vision on the end goal for First Nations.

One particular division is between treaty and non-treaty First Nations (with the latter quite numerous partly because of the sheer number of First Nations from British Columbia). In discussions about First Nations education reform, which broke down earlier this year, treaty First Nations sought a relationship governed more by their treaties whereas non-treaty First Nations were relatively open to a range of options around the shape of new education legislation. In the end, the National Chief resigned, and the AFN is currently going through a process of reflection on what it represents and seeks.

Those First Nations with modern treaties are, in many cases, particularly interested in treaty implementation, with a significant sense that this has been incomplete, underfunded,

³⁶ This particular recommendation appears in section 7.7 of volume 2, but there are five volumes of significant work in the Report: Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples* (Canada Communications Group, Ottawa, 1996).

³⁷ *Inherent Right of Self-Government Policy 1995* (Canada).

³⁸ *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (2010), available online: <https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>

³⁹ Many different pieces of opt-in legislation have been established under the last three prime ministers, with these pieces of legislation allowing First Nations who choose to do so and who fulfill the statutory prerequisites to opt out of parts of the *Indian Act* and into new frameworks around specific issues.

⁴⁰ *Charter of the Assembly of First Nations* (1995, with amendments to April 2003), available online: <http://www.afn.ca/index.php/en/about-afn/charter-of-the-assembly-of-first-nations>

and lacking sufficient government prioritization. Bodies other than the AFN play a significant role on such issues. At a national level, the Land Claims Agreements Coalition is one significant voice for implementation of modern treaties.⁴¹ At a territorial level, there will be others. Yukon has pursued a modern treaty relationship with its First Nations, and the Council of Yukon First Nations is now a significant voice related to implementation of those treaties.

YUKON'S NEGOTIATED AGREEMENTS AND THE FUTURE

The negotiation process in Yukon actually moved relatively early on land claims issues compared to other negotiation contexts around modern treaties. Building on a 1973 document from Yukon First Nations called *Together Today for Our Children Tomorrow*,⁴² negotiations through the 1970s and 1980s culminated in an Umbrella Final Agreement in 1990.⁴³ That Umbrella Final Agreement has served as the basis for negotiations with each of Yukon's fourteen individual First Nations, and there are now Final Agreements with eleven of those First Nations. These eleven First Nations that have reached finalized Self-Government Agreements are no longer under the *Indian Act* but operate pursuant to the provisions in their Final Agreement and their Self-Government Agreement.⁴⁴ Three Yukon First Nations – White River, Ross River Dena Council, and Liard River – are not in such agreements at this point and thus remain legally bands under the *Indian Act*; these communities have also been in ongoing litigation with Yukon over various rights issues.⁴⁵

Yukon's object with these agreements (and the federal government's) was to achieve a final resolution of claims and, perhaps more importantly, to achieve legal certainty with respect to the scope of ongoing rights and title. Yukon's Umbrella Final Agreement was, for a period, regarded as a model to elsewhere and was seen as having resolved many uncertainties in a manner that facilitated resource companies entering into Yukon with greater clarity on what they could and could not do as compared to in jurisdictions without this kind of legal certainty. However, perceptions now appear to have shifted significantly on this point.⁴⁶

In the negotiations related to the Umbrella Final Agreement, Yukon First Nations sought to achieve the range of goals outlined in *Together Today for Our Children Tomorrow* (1973). These included such matters as a greater control over education, real opportunities at community development, means of preserving Indigenous cultural identities, various means of economic development, the development of Indigenous media outlets, and ownerships of land.

The Umbrella Final Agreement – and thus the individual Self-Government Agreements – enable the possibility of the eleven self-governing First Nations assuming jurisdiction in four specific areas of health, education, social services, and justice. Their moves to do so add a new layer of legal complexity within a sparsely populated territory, though they simultaneously allow these First Nations to take up jurisdiction in areas important to their aspirations. However, the First Nations involved appear, in some cases, to have approached their jurisdiction broadly,

⁴¹ The Land Claims Agreements Coalition was formed in 2003 and represents modern treaty organizations from across Canada.

⁴² *Together Today for our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People* (January 1973), available online: http://www.eco.govyk.ca/pdf/together_today_for_our_children_tomorrow.pdf

⁴³ Yukon had ranked very highly within the Fraser Institute's annual ranking of worldwide mining jurisdictions. However, it has fallen dramatically, with a significant dimension of that being an increased perception of risks due to unsettled land claims: see Jesse Winter, "Yukon knocked from top 10 for mining", *Yukon News* (5 March 2014). Even relatively recently, there had been efforts to advertise Yukon as offering legal certainty due to its settled land claims, with the Umbrella Final Agreement being seen as having offered this certainty very early on.

⁴⁴ The various agreements affecting Yukon First Nations can be accessed through <http://cyfn.ca/agreements/>

⁴⁵ See e.g. *White River First Nation v. Yukon Government*, 2013 YKSC 66; *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, leave to appeal to Supreme Court of Canada denied 19 September 2013. Ross River Dena Council has recently commenced further litigation on hunting rights: Chuck Tobin, "Fish, game association 'very disappointed' by suit", *Whitehorse Daily Star* (6 August 2014).

⁴⁶ See note 43, above.

and there are interesting cases being litigated on how far they can apply their jurisdiction to members of the First Nation who are elsewhere entirely (even outside Yukon).

Despite the aims – especially but not exclusively on the government side – to attain legal certainty, the final agreements would now appear to have left more matters unresolved than was first realized. There are ongoing legal disputes about the meaning of particular treaty terms (as is the case in some other parts of the country with modern treaties as well).⁴⁷ For example, the treaties had included agreement around land use planning processes. However, the meaning of the treaty terms was not as clear as it possibly could have been, and there have been major disputes in the Peel River Watershed that have led to litigation on the meaning of the treaty terms.⁴⁸ Yukon's First Nations, in general, may be looking for a larger degree of power and larger stake in “co-management” than the Yukon government may have foreseen.

On ongoing uncertainties, the *Beckman v. Little Salmon/Carmacks First Nation* case referenced in the last section is an example of the agreements not providing certainty in so far as the Court recognized consultation duties outside the consultation duties established within the pertinent agreement, which the government had previously considered to provide final shape to those duties.⁴⁹ Add on the circumstances of the communities not yet in modern treaties,⁵⁰ and cases like the consultation decision in *Ross River Dena Council v. Yukon* illustrate that there are ongoing, significant legal constraints on Aboriginal relations from court cases that have continued to expand the scope of government obligations. Some First Nations see a route forward through further litigation, and the Ross River Dena Council, for instance, has recently launched another legal case about hunting rights.⁵¹

As at the national level, the division of Yukon First Nations into those with and without treaties – in this case, with and without modern treaties – creates some interesting dynamics as between different First Nations. Those that have settled agreements want to ensure that these agreements give them all that they hope and that they have not lost out by settling. Those without settled agreements may hope to gain more rights without ceding title, while also hoping for more power in future arising from ongoing development of the law on title. Developments like the *Tsilhqot'in* case from British Columbia have some direct implications in Yukon for these communities that have outstanding land claims.⁵² In an interesting way, there is a level of competition as between different First Nations within Yukon, adding a different layer of complexity to trying to describe the aspirations of Yukon First Nations as to end goals.

Overall, speaking of the specific “end goals” of different parties concerning Canadian-Aboriginal relations – whether nationally or at a Yukon level – assumes a greater coherence and clarification of these goals than is generally present in parties' own thinking. The challenges at hand are not merely the finding of solutions that bring together all parties' goals but also the greater definition of these goals themselves.

⁴⁷ Some of this was evidenced in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, which involved a dispute about consultation requirements that might exist outside of the modern treaties.

⁴⁸ Thus, the Nacho Nyak Dun and the Tr'ondek Hwech'in, despite having modern treaties, are involved in a lawsuit in relation to government decisions in the Peel River Watershed, with a dispute thus existing between First Nations and the Yukon government on the implications of the treaty terms.

⁴⁹ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.

⁵⁰ For major assertions by those First Nations not in modern treaties concerning the implications of the recent *Tsilhqot'in* decision, see Jacqueline Ronson, “First Nations Assert Land Rights in Wake of Historic Case”, *Yukon News* (4 July 2014).

⁵¹ Chuck Tobin, “Fish, game association ‘very disappointed’ by suit”, *Whitehorse Daily Star* (6 August 2014).

⁵² The decision strengthens the legal position of various First Nations with unceded lands. See generally Ken Coates & Dwight Newman, “The End is Not Nigh: Reason Over Alarmism in Analyzing the *Tsilhqot'in* Decision” (Macdonald-Laurier Institute, September 2014).