

Treaty Implementation Challenges

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1. Enforcement – Overview

Lawmaking authority is only as good as the extent to which the laws can be enforced. Treaty First Nations are recognized as having authority to make laws but often lack the capacity to enforce those laws. Canada and British Columbia have the enforcement capacity but lack the authority without designation by the Treaty First Nation.

Enforcement has three components: 1) observation; 2) investigation; and 3) prosecution. As well, a Treaty First Nation may establish other enforcement mechanisms, such as compliance notices and tickets.

Observation

This entails “boots on the ground” patrols by enforcement officers. A Treaty typically requires a Treaty First Nation’s enforcement officers to be adequately trained which takes time and resources.

Investigation

If an offence is observed or occurs, an investigation and proper compilation of evidence is required to ensure successful prosecution. Enforcement officers must be properly trained in order to collect evidence in a manner that ensures that evidence is admissible in Court.

Prosecution

A Treaty typically requires prosecution of offences under the Treaty First Nation’s laws to take place in Provincial Court. This requires a Notice to the Profession from the Chief Justice of the Provincial Court to determine which Registry those prosecutions will be heard in. The Treaty First Nation must also appoint its own prosecutor who must become familiar with the Provincial Court’s requirements for prosecution.

Other Enforcement Processes

A Treaty First Nation has the lawmaking authority to establish other enforcement processes, such as processes for collecting amounts owing on unpaid tickets or for other amounts owing under the Treaty First Nation’s laws. A Treaty typically requires this type of enforcement to take place in the



British Columbia Supreme Court (regardless of amount owing). Arrangements need to be made with the applicable Registry to ensure these processes can be implemented.

2. Enforcement – Agreements

If a Treaty First Nation lacks the capacity to employ its own enforcement officers, arrangements will need to be made with Canada, British Columbia or a local municipality so their enforcement officers can be designated under the Treaty First Nation's laws to enforce those laws. It is preferable to have these arrangements set out in an agreement (and not a protocol) so these arrangements are binding on both parties.

Potential Agreements

- British Columbia Ministry of Environment – lands and resource harvesting offences (wildlife, freshwater fisheries, harvesting in provincial protected areas and environmental protection).
- British Columbia Ministry of Lands, Forests and Natural Resource Operations – lands and resource harvesting (forestry and subsurface resources).
- Canada Department of Fisheries and Oceans – resource harvesting (fisheries – to date has refused to enter into an agreement with the Maa-nulth First Nations).
- Environment Canada – lands and resource harvesting (migratory birds).
- Parks Canada – lands and resource harvesting (harvesting in federal protected areas).
- Royal Canadian Mounted Police – quasi-criminal type offences (opposite of Community Tripartite Agreements).
- Local municipality bylaw enforcement officers – municipal bylaw type offences.

Maa-nulth: 1) Natural Resource Sector Enforcement Framework Agreement with Letters of Expectation with MOE, FLNRO, Parks and EC; and 2) RCMP Agreement.

3. Moving Beyond the Indian Act

Challenge of changing long-held mindsets:

- Understanding representative democracy principles:
 - Difference between legislative function and executive function of government (who and what) and its implications for Constitutional development (no longer just a Band Council); and
 - Understanding the legislative development process: 1) issues identification; 2) drafting; and 3) enactment (with three readings).
- Transparency and accountability principles:
 - No government action without written authority; and

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- Following due process (including engagement with citizens).
- Honouring the Treaty First Nation's culture and traditions in the above:
 - Merging of two streams into a mighty river.
- Understanding the transition from aboriginal rights and title to Treaty rights and title and its implications.

4. Other Challenges

- Keeping governments' attention after effective date: 1) Canada and the "divorce" mentality (e.g. ineligible for certain funding despite Treaty wording and negotiator statements); 2) British Columbia's fixation on LNG; and 3) will be dealing with different people from those at the negotiation table (get it in writing, words are meaningless!) – after effective date you negotiate from a significantly weaker position;
- British Columbia Legislation Consultation – little ability to effect change because immediately prior to enactment stage and not at issues identification stage;
- Ownership of subsurface resources on additions to Treaty lands;
- Foreshore Jurisdiction – 1) broadening to cover all municipal type jurisdictions and 2) dispute between Canada and British Columbia over coastal waters jurisdiction;
- Reasonable Opportunity – avoiding the one-template-for-all syndrome;
- Culture and Heritage Resource Protection – Provincial law is basically ineffective so the commitment has little value;
- Surveys – British Columbia's limited resources means surveys may not be completed for 20 years;
- Process for fishing outside domestic fishing area when allocation unachievable; and
- Punted issues – ensure there is written agreement to fund additional work required (Maa-nulth: negotiations for Reasonable Opportunity Agreement, Foreshore Agreement; Culture and Heritage Resource Protection Protocol, various Enforcement Agreements and access to Pooled Borrowing programs all unfunded, resulting in hundreds of thousands of dollars of additional costs).

