Comparing Federal Government and Indigenous Perspectives on Self-Government Agreements

Introduction: Agreements for Self-Government

Indigenous peoples have lived in what is now Canada for thousands of years, governing themselves and developing unique legal orders. The Canadian state, with its colonial roots, has been slow to recognize this reality. However, there has been a recognition that the Indigenous nations governed themselves before colonial occupation and can do so again. This has lead to an increased volume of negotiations to create Indigenous self-government agreements. Currently, there are 22 standing self-government agreements between the federal government and various Indigenous groups, with approximately 50 self-government negotiating tables ongoing throughout the country.[1]

According to the *Constitution Act, 1867*, the federal government has jurisdiction over "Indians, and land reserved for the Indians."[2] Section 35 of the *Constitution Act, 1982*, however, recognizes that "existing aboriginal and treaty rights… are hereby recognized and affirmed."[3] With this back-drop British Columbia courts have determined that it is constitutionally valid for the Crown to negotiate self-government agreements with Indigenous nations to grant these nations jurisdiction over local matters.[4]

Negotiated agreements can "set out law-making authority" in many different areas, including: "governance, social and economic development, education, health, lands, and more."[5] Self-government agreements in Canada are a patchwork, some are comprehensive in nature[6] but others are "sectoral agreements in education, health, resource management, etc."[7] Self-Government Agreements may involve land claims, but they do not always.[8] Jurisdiction for Indigenous laws can take many forms and can be based around territory (binding on the land controlled by the Indigenous group), personality (binding on members of a First Nation), or based around emergency measures.[9]

This article seeks to highlight, that while opinions on self-government agreements are diverse and should not attempt to be summarized in one broad stroke, it is important to learn about the positions of the federal government and some Indigenous peoples. Thus, this article is an introductory reflection of self-government agreements from both the state and Indigenous perspective; in an era of attempted reconciliation, this is useful context to this evolving constitutional and colonial relationship. This can assist Canadians in reflecting on one of the most important constitutional relationships in Canada.

Indigenous Self-Government from the Federal Government's Perspective

In February 2018, Prime Minister Justin Trudeau promised "a fundamental rethink" of how

the government recognizes Indigenous rights by "vowing to work with Indigenous partners to… foster self-governance."[10] The Prime Minister states that the federal government's desire is to "get to a place where Indigenous peoples in Canada are in control of their own destiny, [and are] making their own decisions about their future."[11] This statement is representative of the lofty rhetoric adopted by the federal government about Indigenous self-government.

The federal government views Indigenous self-government agreements as a tool for reconciliation to "address a long history of colonialism and the scars it has left."[12] Self-government agreements are thought to be preferential to lawsuits from Indigenous groups seeking to attain self-government through constitutional litigation.[13]

If areas of provincial jurisdiction are effected then "provincial governments are necessary parties to negotiations and agreements."[14] The goal of self-government is for Indigenous laws to "operate in harmony with federal and provincial laws."[15] In case of a conflict, the federal government has stated that Indigenous laws "protecting culture and language generally take priority," but laws of "overriding national or provincial importance" must prevail over local Indigenous laws.[16] The *Charter of Rights and Freedoms, Canadian Human Rights Act,* and *Criminal Code* will continue to apply.[17] This ambiguous policy is likely an effort to keep flexibility in the negotiation process.

Sensing the need for flexibility, the federal government acknowledges that agreements will look different from one Indigenous community to another since they have different needs, histories, cultures, and economies. For this reason, agreements can vary considerably in content. From Canada's perspective, matters that are "internal" and "integral to [the individual group's] culture" would naturally fall into Indigenous jurisdiction.[18]

Thus, the federal government has publicly adopted a vague yet optimistic tone in how they approach Indigenous self-government agreements. This contrasts with some Indigenous voices.

Indigenous Perspectives on Self-Government Agreements

Unsurprisingly, given their long and difficult relationship with the federal government, Indigenous people have greater skepticism about the federal government's motivation behind self-government negotiations. It must be remembered that Indigenous people are not all from the same culture and as individuals they have diverse values, opinions, and aspirations. These are just some perspectives of Indigenous people about self-government agreements.

A primary concern about engaging in negotiations is that it will require Indigenous nations to give up something important in return. According to Cree (*nêhiyaw*) lawyer Sylvia McAdam, self-government agreements require foregoing future claims to Aboriginal rights through litigation "in exchange for the rights included in the new settlement or agreement."[19] This can be a difficult psychological burden if you believe that self-government should already be recognized and not negotiated like a contract. Some critics

believe that self-government negotiations are an attempt to "re-assert [Canada's] failed and internationally condemned extinguishment model under different names."[20] If less damning than extinguishment, there is concern that self-government agreements "relegate Indigenous nations into municipal status," and would make Indigenous governments a delegated body where governing authority can be taken away or not respected.[21]

Some Indigenous people further believe that the negotiations for self-government can carry too many emotional and tangible burdens for local populations to accept. This is made worse by delays and lengthy negotiations periods. The late Arthur Manuel and Grand Chief Ronald Derrickson believe that this leads Indigenous negotiators to discover that "they could not get support for a deal from their own people," leading the negotiations to go "on and on and never bear fruit."[22]

Further, there are incredible costs in negotiation and legal fees both for the federal government and for the Indigenous communities affected. Arthur Manuel and Grand Chief Ronald Derrickson claim that "over a billion dollars" has been spent in negotiations for self-government, where "more than $500 million dollars has been borrowed from impoverished Indigenous communities."[23] This borrowed money could be used for other reasons, such as poverty reduction measures. At least some Indigenous people do not view the cost and effort of negotiating self-government agreements to be worth what they get in return.

However, there are positive aspects of negotiating self-government for Indigenous peoples. McAdam points to the Muskeg Lake Cree Nation as a success story. The Nation utilized a self-government agreement "to develop the urban reserve" in Saskatoon where they "developed buildings and property" to build many successful business enterprises.[24] This is just one example of how Indigenous nations can use self-government to create economic prosperity that was not possible under federal control.

Conclusion

Indigenous self-government negotiations and agreements are complex for the federal government and for Indigenous nations and people. As such, it is impossible to develop a standard narrative for how the Canadian state, or the diverse Indigenous peoples of Canada, view such arrangements. However, self-government agreements are a modern manifestation of a long, storied, and complex colonial relationship between the Crown and the Indigenous peoples that occupy this land.

The relationship between the Canadian state and Indigenous peoples is at the heart of Canada's history, governance, and constitutional framework. As the relationship evolves in an era of "reconciliation," it is important to attempt to understand this complex relationship – and how it manifests in ways such as Indigenous self-government agreement negotiations.

[1] Crown-Indigenous Relations and Northern Affairs Canada, "Self-government" (12 July

2018), online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>.

[2] *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5.

[3] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[4] *Campbell v British Columbia (Attorney General),* 2000 BCSC 1123; *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General),* 2013 BCCA 49.

[5] S*upra* note 1.

[6] John J Borrows & Leonid I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary,* 5th ed (Toronto: LexisNexis, 2018) at 63. Comprehensive self-government agreements include the *Cree-Naskap (of Quebec) Act*, SC 1984, c 18, the *Sechelt Indian Band Self-Government Act,* SC 1986, c 27 in British Columbia, the *Champagne and Aishihik Self-Government Agreement* in Yukon, and others. Other self-government agreements are included in modern treaties, such as the 1999 Nisga'a Final Agreement.

[7] *Ibid.*

[8] Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich Publishing Ltd) at 72 [McAdam]. Comprehensive claims always involve land, but specific claims do not necessarily include land claims.

[9] Peter W Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can Bar Rev 187 at 198-200.

[10] John Paul Tasker, "Trudeau promises new legal framework for Indigenous people" (14 February 2018), online: *Canadian Broadcasting Corporation* <https://www.cbc.ca/news/politics/trudeau-speech-indigenous-rights-1.4534679>.

[11] *Ibid.*

[12] S*upra* note 1.

[13] Crown-Indigenous Relations and Northern Affairs Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (15 September 2010), online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>. The Government says that litigation should be the "last resort."

[14] *Ibid.*

[15] S*upra* note 1.

[16] *Supra* note 13.

[17] *Supra* note 1.

[18] *Ibid.*

[19] McAdam *supra* note 8 at 74.

[20] Arthur Manuel & Grand Chief Ronald Derrickson, *The Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy* (Toronto: James Lorimer and Company Ltd, 2017) at 115 [Manuel & Derrickson]. The term "extinguishment" refers to the extinguishment of Indigenous culture. The *Truth and Reconciliation Commission of Canada* referred to this as "cultural genocide."

[21] McAdam *supra* note 8 at 75.

[22] Manuel & Derrickson *supra* note 20 at 114. The late Arthur Manuel is from the Neskonlith Indian Band in British Columbia and Grand Chief Ronald Derrickson is from the Westbank First Nation in British Columbia.

[23] *Ibid*.

[24] McAdam *supra* note 8 at 73-74. Some of the Muskeg Lake Cree Nation's enterprises include: Muskeg Property Management Inc., Cree Way Gas Ltd., Cree Investments, Jackpine Holdings Ltd., Dakota Dunes Golf Links LP and STC Inc.