

SERIES 04: THE MODERN TREATY PARTIES: CANADA

KEY TAKE-AWAYS

- The Government of Canada negotiates and implements modern treaties for all Canadians; we are all treaty people
- Negotiation is managed by one federal department
- Implementation is managed by over 30 federal departments
- Honour of the Crown must be upheld
- Since the first modern treaty, the terms have changed to include self-government and ensure constitutional and other legal protections
- The 2015 Cabinet Directive and the Fiscal Process are promising developments in modern treaty implementation



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UNDERSTANDING OUR TREATIES

FEDERAL ROLE IN MODERN TREATIES



Since European settlers first arrived, Indigenous peoples in what is now called Canada have sought to retain and regain control of their land and governance.

Treaties are one tool that Indigenous peoples are using to achieve that control. Since the 1970s, modern treaties have been negotiated between Canada and Indigenous peoples. Today, there are 25 modern treaties being implemented, and many more are in the negotiation stage.

There are usually three parties to a modern treaty: the Indigenous organization, the Government of Canada and a provincial or territorial government. This series focuses on the role of the Government of Canada.



We bring a primary responsibility for the Crown on behalf of all Canadians to make sure that we engage honorably, to make sure that all of our duties are fulfilled, and to make sure that we have the types of conversation that will set the future for reconciliation, that will set the future for respect for relationship, and to make sure that we will all succeed together.

DANIEL QUAN-WATSON

Deputy Minister, Crown-Indigenous Relations and Northern Affairs Canada

THE FEDERAL GOVERNMENT PLAYS A SIGNIFICANT ROLE IN MODERN TREATIES AND IN ENSURING THE IMPLEMENTATION OF MODERN TREATIES.

The federal government plays a significant role in modern treaties and in ensuring the implementation of modern treaties. As many know, modern treaties are largely trilateral in nature, and each signatory has an important role to play. The federal government is one of the signatories, but because of how the government works, our role is a little bit different in that we represent the Crown as one but there are many departments that have to work together to uphold the honor of the Crown.

JULIE MUGFORD

Former Senior Director, Modern Treaty Implementation Office,
Crown-Indigenous Relations and Northern Affairs Canada

WHY DOES CANADA NEGOTIATE AND IMPLEMENT MODERN TREATIES?

The Government of Canada negotiates and implements modern treaties on behalf of the Federal Crown.

In other episodes we talk about why Indigenous peoples enter into modern treaties, but what motivates Canada to spend decades negotiating and implementing them?

Canada negotiates modern treaties as a way to reconcile Indigenous rights with the sovereignty of the Crown. Indigenous Canadians have constitutionally protected rights to their land and the legally established right to self government. When an Indigenous organization makes a land claim, the Government of Canada cannot simply ignore it.



Navigating through the work that the federal government does around treaties is complex. There are many, many governments and many government departments that actually are involved in making sure that our treaties are implemented and that Canada upholds its duties. So, one of the things that I do is try to bring all that, those federal departments and agencies, together to make sure that they understand the commitments that Canada has made, and that we're actually fulfilling them.

ROSS PATTEE

Assistant Deputy Minister, Implementation Sector,
Crown-Indigenous Relations and Northern Affairs Canada

The approach of the Government of Canada to Indigenous land claims has changed dramatically since the first treaty was negotiated in the 1970s, and will no doubt continue to change, and Indigenous organizations continue to assert their rights to their land and to govern themselves.

UNDERSTANDING OUR TREATIES

FEDERAL ROLE IN NEGOTIATION

There are two main stages in the development of every modern treaty: negotiation and implementation. This episode focuses on the Government of Canada's role in negotiation.

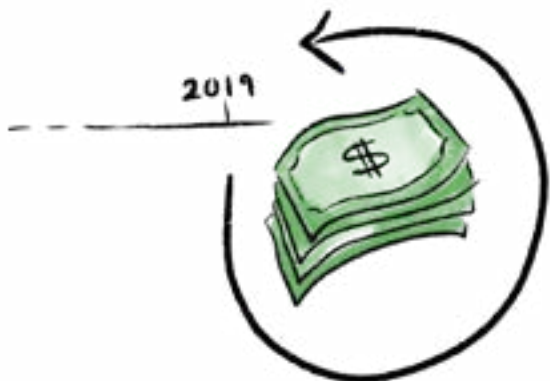
Negotiation of modern treaties is managed by one federal department, currently called Crown-Indigenous Relations and Northern Affairs Canada, or CIRNAC.

This department has teams of negotiators and support staff involved in multiple negotiations across Canada. Throughout the negotiations process, CIRNAC consults with many other departments to inform the negotiations, but only CIRNAC representatives negotiate.

Our work involves representing Canada at over 150 negotiation tables that are from coast to coast to coast. Those tables represent over 500 Indigenous communities with about a million Indigenous people represented. At those tables, the work that we're doing is primarily related to the dialogue on how we can co-develop approaches to not just recognize, but to truly implement the inherent rights and title of Indigenous peoples, as well as to support the self-determination of Indigenous peoples.

JOE WILCO

Senior Assistant Deputy Minister, Crown-Indigenous Relations and Northern Affairs Canada



Negotiations often take decades, involving teams of staff and lawyers.

Until recently, Indigenous organizations borrowed millions from the Government of Canada to finance their participation. This huge financial burden was removed in 2019, when Canada committed to reimburse all paid negotiation loans, forgive unpaid balances and finance current and future negotiations.

THE FEDERAL PERSPECTIVE ON NEGOTIATIONS

How do modern treaty negotiations look from the perspective of the Government of Canada?

Federal negotiators represent the interests of Canada at the negotiating table, but also must find ways that is acceptable to the Indigenous negotiators. Compromise is required. Also, to keep negotiations moving, federal negotiators must often educate their colleagues in the huge federal bureaucracy about the realities of life in Indigenous communities and the reasons for certain sections in a treaty.



The most challenging part of my job is recognizing that I work in a very large organization that has many, many parts to it: the federal government. And while certainly the treaties have a definite purpose and a definite objective, it's hard sometimes to get that objective across to an evolving federal government with hundreds of thousands of people in it. So, making sure that we continue to educate the rest of the federal government as to what treaties mean, and making sure that we're all kind of rowing in the same direction, and recognizing what the purpose of the treaties are. That, for me, is still the big challenge.

ALLAN MACDONALD

Former Director General, Implementation Branch, Crown-Indigenous Relations and Northern Affairs Canada

RELATIONSHIPS BETWEEN NEGOTIATING TEAMS

As you might expect, relationships between federal and Indigenous negotiators can be tense and confrontational at times, but they are usually respectful and polite.

We need to be able to work together each and every day to fulfill the agreement and the obligations in those agreements. But of course, it's also important to understand that we may not always agree on everything. And you know, there's nothing wrong about that. For me, what's really important is that we disagree in a way that's respectful and that allows us to be able to start the next day to deal with the next set of issues that are going to come along.

ROSS PATTEE

Assistant Deputy Minister, Implementation Sector,
Crown-Indigenous Relations and Northern Affairs Canada

You do walk in there with the weight of feeling the Crown on your shoulders, and you want to make sure that Crown interests are captured. But you also have to have an open mind enough, I think, to understand that the Crown doesn't have all the interest here. The Crown has to move in some areas, and in some cases, maybe the Crown is misinformed or wrong with its approach.

So, how negotiations sometimes unfold, it's important that you have a particular dialogue at a table. One of the things that I've found that's really important about negotiations are the discussions you have away from the table. When you need to pull somebody aside from the table and say, "Look it. This is not working for that reason. Maybe we should try this approach." And be able to have that kind of trust you might have with an individual or a couple of folks across the table from you, away from the table so there's less of a show.

So, if you can build up that trust and build up that understanding, it's really, really helpful for negotiations to have frank and honest dialogues sometimes away from the table.

ALLAN MACDONALD

Former Director General, Implementation Branch, Crown-Indigenous Relations and Northern Affairs Canada



CO-DEVELOPING MANDATES WITH PARTNERS

As federal negotiators and Indigenous partners come together at the table, they explore new ways of reaching agreements that recognize and implement the rights of Indigenous peoples.

The discussion begins with both parties outlining potential topics and their interests for the negotiation. The parties then co-develop key components and parameters that inform a negotiation mandate. This new way of approaching negotiations, that is more respectful of the interests of all parties, has resulted in significant uptake amongst Indigenous partners, and has yielded numerous agreements.



I think our approach to negotiations are changing a bit in the federal government. In the past, we would get a mandate from Cabinet, and then defend that mandate at the table. And that became kind of an adversarial relationship. I think now we're moving more to an interest-based negotiation, more of a co-developed type style of negotiations.

ALLAN MACDONALD

Former Director General, Implementation Branch,
Crown-Indigenous Relations and Northern Affairs Canada

THE TERMS OF MODERN TREATIES HAVE CHANGED OVER TIME...

When Indigenous organizations asserted their rights in the 1960s, the federal government denied those rights.

Since then, multiple legal precedents and the ratification of Canada's Constitution (i.e. Section 35) have established the rights of Indigenous peoples not only to their land, but also to self-government. Along the way, negotiators have adapted, which is why, for example, all modern treaties signed after 2000 include self-government provisions.





At the heart of the treaty relationship is the legal phrase “honour of the Crown,” which means the Crown is responsible for making sure its obligations are met in an honourable and ethical manner.

The Crown must take into account not just the strictly legal interpretations of modern treaties, but also their “spirit and intent.” When federal negotiators sit down at modern treaty negotiation or implementation review tables, their actions must uphold the honour of the Crown.

Negotiations can be very frustrating. Everybody goes into that room passionate about doing the best thing. Everybody goes into that room wanting a better candidate, but you also go into that room with very different histories, very different hopes for the future sometimes, and a very different understanding of how to get there.

And making sure, especially if you’re working for the federal or provincial government, that you really know what the Indigenous partners want, what their dreams are, what their fears are and how to work to make those things happen while at the same time making good on the mandates that you have representing the provincial or federal government. That’s, to me, the magic in this. It’s been the most complicated set of things that I’ve ever done in my career. Sometimes the most frustrating, but for sure, the most rewarding and the thing that will last the longest after my career is over.

DANIEL QUAN-WATSON

Deputy Minister, Crown-Indigenous Relations and Northern Affairs Canada

The job of a federal negotiator is complex, requiring the ability to work in true partnership with Indigenous communities and provincial or territorial counterparts, while remaining aligned with federal interests and upholding the honour of the Crown.

A federal negotiator works hard to understand and accommodate all perspectives at the table, and works collaboratively with partners to co-develop negotiation parameters to inform final agreements that recognize and implement the rights of Indigenous peoples. At some negotiation tables, these flexible agreements can evolve into a signed treaty or self-government agreement that is ready for the implementation stage.

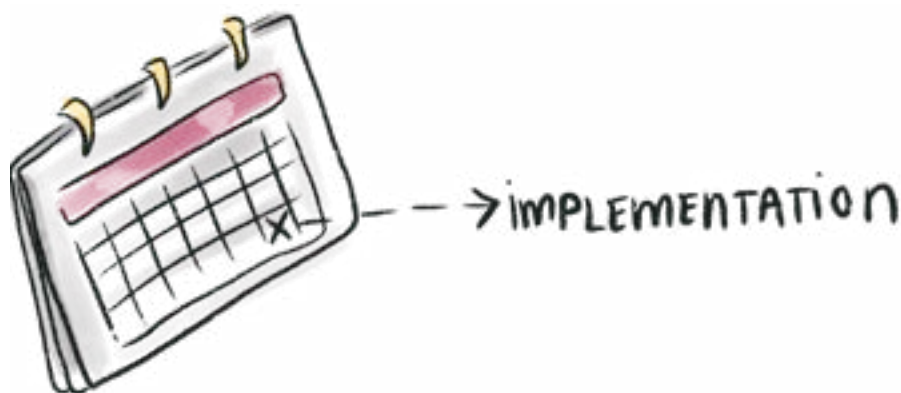
FEDERAL ROLE IN IMPLEMENTATION (PART 1)

After much effort to reach an agreement, the negotiations are over, and the treaty is finally signed. Now the real work begins! Let's talk about modern treaty implementation from the federal perspective.

While negotiation is handled by one Government of Canada department, implementation of modern treaties involves more than 30 federal departments.

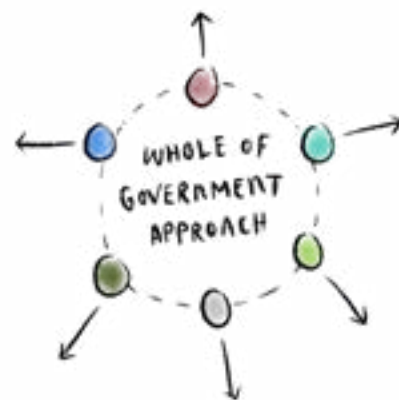
THE EFFECTIVE DATE: IMPLEMENTATION BEGINS

After the effective date (the day a modern treaty comes into effect), every department of the Government of Canada has treaty implementation obligations.



A modern treaty is a constitutionally protected nation-to-nation agreement, not with a single department such as CIRNA, but with Ministries such as Fisheries and Oceans, Justice, Environment and Climate Change. Each ministry must understand its treaty obligations and establish working relationships with modern treaty organizations. In recent years, this process has come to be known as the "whole of government" approach.

SINCE THE FIRST MODERN TREATY CAME INTO EFFECT IN THE EARLY 1970S, THE FEDERAL BUREAUCRACY HAS BEEN VERY SLOW TO MEET ITS MODERN TREATY OBLIGATIONS.



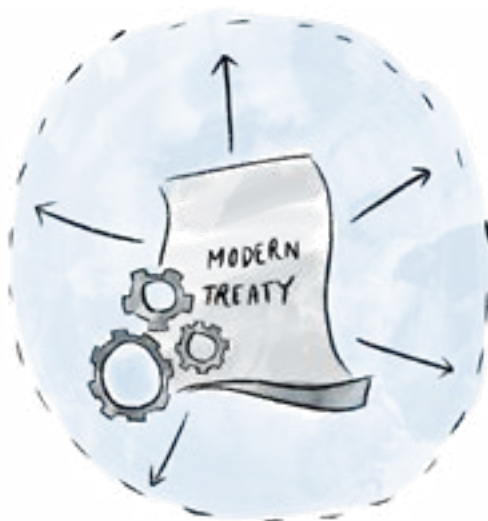
THE 2015 CABINET DIRECTIVE


In 2015, there was a Cabinet Directive requiring a “Whole of Government” approach to modern treaty implementation. This directive was a response to decades of pressure from modern treaty organizations, and it led to some changes:

- More than 30 federal departments began to receive information and train their staff about their modern treaty obligations.
- The Modern Treaties Implementation Office (MTIO) was created to support the implementation of the “Whole of Government” approach across all federal departments.
- A requirement to conduct an Assessment of Modern Treaty Implications (AMTI) on proposals to Cabinet was created to provide a process for federal departments to assess the implications of their actions on the implementation of modern treaties.
- The Deputy Ministers Oversight Committee (DMOC) was created to provide executive oversight of the implementation of the Cabinet Directive. It is also a place where high-level bureaucrats can learn about modern treaty issues and share information.
- Other internal programs and tools were created to collect and analyze information about modern treaty implementation.

THESE RECENT DEVELOPMENTS AT THE FEDERAL LEVEL HAVE BEEN PROMISING, BUT WORK IS STILL NEEDED.

Modern treaty organizations continue to insist the Government of Canada meet its obligations and fully implement modern treaties. Some of the tools are now in place, but they are not being used to their full potential.





The Modern Treaty Implementation Office is often involved in implementation. The treaty directorates are responsible and the first point of contact for implementation issues. But oftentimes, when there are issues at play, we try to step in and provide some advice or guidance. We work with other federal departments to come up with a process to help expedite or to resolve issues before they become issues that are too big to resolve easily. And we also, for example, will work with treaty partners to bring issues to the Deputy Ministers Oversight Committee on implementation and have discussions there. We also participate at some of the implementation committee meetings that are set up by our colleagues in the implementation directorates. And through those forums, we hear some of the issues that are on the ground that are being discussed. And again, it facilitates that development of relationships and the creation of relationships with treaty signatories.

The office is fairly new in terms of government timelines. It's a fairly new creation and it really champions a whole of government approach to treaty implementation. And up until 2015, unfortunately, a lot of participants in the field looked at implementation and federal obligations as a responsibility of the department—then DIAND, INAC, now CIRNA—and looked at it as one department being responsible for them, and making sure that they were implemented. Whereas, in fact, for implementation to be successful, it requires all participants and a whole of government approach.

One of the biggest elements of our work really, is also something that is personally important to me as well, and that is really just spreading the word and making sure that all federal civil servants are aware of modern treaties, understand the implications of them and really appreciate what it means too, when they're developing a policy or program or if they're changing legislation or regulations, that they take into consideration modern treaties, the rights of modern treaty holders, and they develop whatever it is that they're developing in a way that is respectful and advances the importance of Canadian development as outlined in a number of pieces, including modern treaties.

JULIE MUGFORD

Former Senior Director, Modern Treaty Implementation Office, Crown-Indigenous Relations and Northern Affairs Canada

THE “WHOLE OF GOVERNMENT” APPROACH HAS CREATED SIGNIFICANT OPPORTUNITIES FOR THE GOVERNMENT OF CANADA TO MEET THEIR MODERN TREATY OBLIGATIONS, BUT IT DOES NOT BEGIN TO SOLVE ALL IMPLEMENTATION CHALLENGES.

Indigenous organizations continue to assert their rights and insist that the federal government develop more effective ways to implement modern treaties.

FEDERAL ROLE IN

IMPLEMENTATION (PART 2)

Implementing a modern treaty is an ongoing process that requires regular meetings, careful management of relationships, good process and a commitment to true collaboration. When disputes can't be resolved any other way, the courts decide.

IMPLEMENTATION REVIEWS

Every five years or so, modern treaty signatories meet to revisit the treaty and resolve any unforeseen issues.

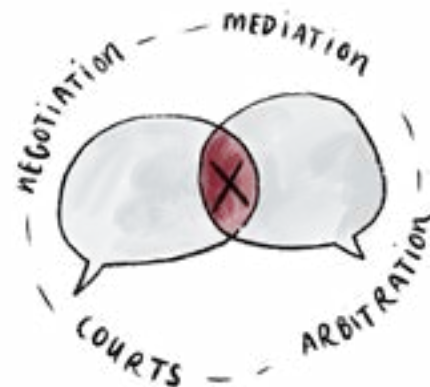
These implementation reviews are an opportunity for Canada to act as a good faith partner and address implementation issues like insufficient funding for self-government.

RESOLVING DISPUTES

During the implementation process there are times when the Crown and modern treaty organizations disagree.

If the disagreement is significant enough, it may be referred to a dispute resolution mechanism. These mechanisms, such as good faith negotiation, mediation and arbitration, vary significantly between treaties.

If dispute mechanisms do not resolve the matter, Indigenous organizations may use the courts. The James Bay and Northern Quebec Agreement and the Nunavut Agreement are just two examples where unresolved disputes ended up in court, and both cases led to improved dispute resolution processes. In 2015, the Government of Canada paid \$255 million in an out-of-court settlement to end a nine-year legal dispute over unmet obligations in the Nunavut Agreement.



Relationship challenges exist everywhere in every relationship, and modern treaties are no different. There are challenges in terms of implementing them, and I think a lot of it is interpretation. And as treaties are negotiated and entered into effect, people change. Whether it's federal government officials, provincial/territorial officials or modern treaty officials, not everybody stays in the same position over many, many years that can be required to negotiate and implement a modern treaty. And part of that changing landscape is that views change, interpretations change.

And modern treaties are often written in a way that is open to interpretation, and it allows for the evolution of society and how people evolve. But it also raises questions around what was meant, how things need to be implemented, and that is one of the challenges. And also, another challenge related to that is just in terms of awareness. And I think that's one of the biggest successes of the Modern Treaty Implementation Office, is that we have raised awareness across the federal system in terms of modern treaties, what they are, what the obligations and what the responsibilities are of public servants federally. And I think that has made a lot of change in the system. It's slow, but it's taking place.

JULIE MUGFORD

Former Senior Director, Modern Treaty Implementation Office, Crown-Indigenous Relations and Northern Affairs Canada

WORKING WITH PROVINCES AND TERRITORIES

The nation-to-nation relationship between Canada and modern treaty organizations sometimes requires funding to flow directly between them.

In some situations, funding that used to go to a province or territory is redirected to modern treaty organizations. This change is sometimes met with resistance from provinces and territories.

We have intergovernmental relations with the provinces, and there are always dialogues and there's sometimes conflicts, but it's always important to keep the communications frank and honest and transparent. And for me, that's the key, whether it's treaty negotiation, or a tripartite negotiation, or an intergovernmental discussion.

ALLAN MACDONALD

Former Director General, Implementation Branch, Crown-Indigenous Relations and Northern Affairs Canada

THE FISCAL PROCESS

Until recently, federal policies that affected Indigenous people were written by federal bureaucrats with little to no consultation with Indigenous organizations.

In 2016, the Government of Canada and self-governing modern treaty organizations began to develop the Collaborative Fiscal Policy Development Process, or the Fiscal Process. This process aims to streamline federal policy development for self-governing modern treaty nations and other self-governing Indigenous groups without compromising the nation-to-nation relationship each treaty requires.

To date, there have been significant positive results, including repayment of treaty negotiation loans and improved funding of modern treaty governments.

Prior to 2015, work had been undertaken in kind of a traditional consultation method where policy people in the Government of Canada had sat down with various representatives of those who have modern treaties to have a discussion about making changes to the government's fiscal policy.

We decided to launch a process where we invited representatives from each of the self-governing Indigenous governments to sit down with us and to actually write the policy together. Now, as it turned out, there were a lot of skeptics to that. There were skeptics on the Indigenous side just as there were skeptics within the Government of Canada. I think at some point it was kind of remarked that I may have been the only person that actually believed we could do this. It took two years to build that policy in this way.

We were kind of having a recipient-to-funder conversation, and we needed to change that. It was really important that we actually think about having a conversation that was more reflective of the type of relationship that we wanted, but importantly, that that needed to start showing up in the policy document we were trying to draft. I reiterated many times to people that this was a shared pen. We would not be the sole writers of this policy.

Prior to that policy, a typical renegotiation to renew a fiscal agreement under a modern treaty would take anywhere from two to three years, to upwards of six to eight years. I think the average is somewhere around five to six years. After we put this policy in place, 25 self-governing Indigenous governments had renewed their financial chapters, financial agreements with Canada, in six months. Why is that? Because we built a policy together that actually met the needs of Indigenous governments, because it was a policy that was built on the premise of understanding those needs. That is a far different approach than we had been able to take prior.

JOE WILD

Senior Assistant Deputy Minister, Crown-Indigenous Relations and Northern Affairs Canada

THE COLLABORATIVE FISCAL POLICY PROCESS IS NOT PERFECT, BUT IT IS A STEP IN THE RIGHT DIRECTION FOR POLICY DEVELOPMENT BETWEEN THE GOVERNMENT OF CANADA AND SELF-GOVERNING MODERN TREATY ORGANIZATIONS.



WE ARE ALL TREATY PEOPLE

From the decades of negotiation to the ongoing implementation of modern treaties, there is no end date to the relationship between the Government of Canada and modern treaty organizations.

For Canadians, it's important to remember that the Government of Canada negotiates and implements these treaties for all of us. We are all treaty people.

We are only going to be able to strengthen our country if we can overcome this legacy. That the future of Canada, the future of our society, the values that we hold dear to our hearts will only be lived in real experience, and for everyone who is in Canada, if we can get this relationship fixed and if we can address the legacy associated with colonialism.

JOE WILD

Senior Assistant Deputy Minister, Crown-Indigenous Relations and Northern Affairs Canada

What is the most frequent misconception about treaties that I run into? I think it would have to be that these are documents for Indigenous peoples. They're not. They're about how we'll live together.

Here's an interesting test. Go and take a look at your provincial or territorial land title certificate forms online, or maybe you have one of your own. You'll notice that it starts with a Crown grant almost everywhere across this country. Ask yourself: where does it say how that land got into the Crown's hand in the first place, so that it could pass down through everybody whose hands it had been through until it got to yours? If that's not something that you've ever thought about before, understand that for many Indigenous peoples in this country, that is a core conversation that has gone on for over 400 years. That is why I think it's important that we understand that treaties are for all people in this country.

DANIEL QUAN-WATSON

Deputy Minister, Crown-Indigenous Relations and Northern Affairs Canada