

Report Part Title: Nation to Neighbour

Report Title: Canada's Arctic Agenda:

Report Subtitle: Into the Vortex

Centre for International Governance Innovation (2019)

Stable URL: <http://www.jstor.com/stable/resrep21105.5>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Centre for International Governance Innovation is collaborating with JSTOR to digitize, preserve and extend access to this content.



Nation to Neighbour

Tony Penikett

Good Intentions?

The stated intentions of government policies toward Indigenous peoples always deserve close examination.

On Christopher Columbus's return from his first voyage to the Americas in 1493, Pope Alexander VI "awarded" the New World to Spain's rulers, Ferdinand and Isabella (Alexander VI 1493). As the world knows, for Indigenous Americans, slaughter, slavery and smallpox soon followed. University of London scientists found that this Amerindian genocide caused the reforestation of Latin America's corn fields and, consequently, the eighteenth century's Little Ice Age, which froze the River Thames — obviously an unintended consequence (Bodkin 2019).

In this period, Ottawa warrior chief Pontiac, a military genius, organized a powerful Indigenous resistance against British colonization of the western Great Lakes region. In response, on October 7, 1763, England's King George III issued the Royal Proclamation that reorganized British colonies in North America and affirmed that "the several Nations or Tribes of Indians...who live under our Protection, should not be molested or disturbed in the Possession of...their Hunting Grounds."¹ Meanwhile, the Crown negotiator Sir William Johnson wrote: "The Indians of the Ottawa Confederacy...also the Six Nations...were amused by both parties [the British and French] with stories of their upright intentions, and that they made War for the protection of the

1 See https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/.

Indian rights, but they plainly found, it was carried on to see who would become masters of what was the property of neither the one nor the other" (Tully 1995, 119).

Colonization

Nevertheless, in consequence of the Royal Proclamation, the United States negotiated hundreds of Indian treaties, almost all of which were subsequently violated by American authorities. We might ask: was that their original intention?

At Fort Carlton in August 1876, Canada negotiated Treaty 6 with 2,000 starving Cree Assiniboiné and Ojibwa hunters and their families. Much nation-to-nation ceremony attended the negotiations and Canada's representatives routinely invoked the honour of the Crown (Erasmus 1999, 238). But, that same year, Parliament approved the Indian Act, which infantilized First Nations peoples by making them wards of the federal state. Then, in 1927, Canada forbade Indian Nations from hiring lawyers to press their land claims — early in the twentieth century, Canada still spoke with a forked tongue. However, in February 1973, Canada's Supreme Court rendered a split decision on *Calder*, the Nisga'a Nation's land rights lawsuit against the Government of British Columbia, which had asserted that the Royal Proclamation did not apply to the province.² The decision led Prime Minister Pierre Trudeau to send negotiators to those areas without treaties: British Columbia, northern Quebec, Northwest Territories and Yukon Territory.

Canadians may now see colonial horrors simply as ancient history but still ask reasonable questions about the intentions of today's politicians. In its early days, given a choice between assimilation and accommodation, Canada's government chose *assimilation*, a policy revealed in Prime Minister John A. Macdonald's notorious defence of the residential school system before the House of Commons (Canada 1883, 1107-8). Late in the twentieth century, opinion shifted toward *accommodation*. One hundred and thirty-two years after Macdonald's statement before Parliament, the Truth and Reconciliation Commission of Canada (2015) published its 94 *Calls to Action*. On March 16, 2018, Simon Fraser University hosted a BC Reconciliation Conference, which asked of those 94 calls: "When are we going to get to the hard stuff?" This remains an excellent question.

The Arctic and Modern Northern Treaties

In the Arctic, "two solitudes" existed, not as the English and French divide described in Hugh MacLennan's masterpiece (1945), but as distinct Indigenous and settler communities. Justice Thomas R. Berger's report on the Mackenzie Valley Pipeline Inquiry, *Northern Frontier, Northern Homeland* (1977), explored the collision of competing Indigenous and settler aims for the Far North. For decades, the federal Ministry of Indian and Northern Affairs perpetuated this duality. Under this regime, ignorance and absurdity often reigned, as when, for example, Ottawa ordered the territories to host Canada Day fireworks displays in the Land of the Midnight Sun, the one region where few could enjoy them.

Back in 1968, when oil was discovered in Alaska, the American government and oil

2 *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313.

companies set about building a pipeline, until the Alaska Federation of Natives told them that they did *not* own the land along the pipeline route. Land claim negotiations got underway in the halls of the US Congress. By 1971, Congress had passed the Alaska Native Claims Settlement Act, which returned 178,000 km² of land to Native control, but under forms of *corporate*, not tribal, governance. Inspired by the scale of the settlement for Alaska Natives, their tribal cousins (Gwich'in, Han, Tanana and Tlingit) in Yukon and Northwest Territories (Dene and Inuit) also filed land claims.

After the Supreme Court of Canada ruled on the Nisga'a treaty rights case in 1973, Trudeau's representatives arrived in the North to set up the treaty-negotiating tables. In 2006, I published *Reconciliation: First Nations Treaty Making*, a book about the glacial pace of these negotiations. In the course of this work, a finance official opined that it was far cheaper to negotiate forever than to finalize treaties — clearly, a penny-wise, pound-foolish policy. The BC Treaty Commission report *Looking Back, Looking Forward: A Review of the BC Process* (2001, 4) argued that “before 1991, road blockades, angry rhetoric and litigation filled the daily news. Now, most First Nations in BC have chosen treaty negotiations over direct action and lawsuits” — an admission that, for the Government of BC Treaty Commission, negotiations meant *management* of the Indian issue.

As Douglas McArthur (2002) argues, federal officials intentionally wrote mandates as prescriptive formulas based, in part, on per capita cash calculations. First Nations negotiators protested that, rather than promoting reconciliation, such mandates were designed to manipulate the Indigenous treaty parties (Penikett 2006, 161–73). Cowichan chief Lydia Hwitsum likened “cookie-cutter” mandates to bureaucratic culture. She contrasted that mindset with the give-and-take needed for effective negotiations (*ibid.*, 159).

Federal negotiators readily conceded that treaties based on precedent were supposed to assure that modern treaties would be broadly equitable. Nevertheless, federal negotiator Jim Barkwell declared that “prescriptive mandates and excessive rigidity are enemies of interest-based agreements, while vision and principled flexibility are their friends” (*ibid.*, 163). Nisga'a Nation negotiator Jim Aldridge added that, for Canada, “aboriginal title is a burden” that its negotiators sought to remove “for the cheapest possible cost” (*ibid.*). Should financial considerations ever trump those of justice?

Just at the point when Arctic states started talking to Indigenous northerners, an equally important event occurred: settler populations in Arctic cities began to dialogue with their Indigenous neighbours. These dialogues produced Canada's first Aboriginal self-government agreements; agreements which, decades after their negotiation, still represent *half* of all such agreements in our country. Why was the regional government role so significant? The answer is that in self-government negotiations, there was little federal jurisdiction on the table. Innovative power-sharing accords between Indigenous and Territorial leaders underpinned these breakthrough self-government agreements.

In time, 20 northern land treaties covered the northern 40 percent of Canada's land mass and recognized collective “tribal” title to 500,000 km². These modern twentieth-century treaties dwarf their nineteenth-century counterparts. For example, the Yukon settlement provides 41,000 km² for 7,000 first citizens — more land than is contained in all reserves in Southern

Canada. Yukon First Nations, Canada and, as noted, the Yukon Territorial Government also negotiated Canada's first third-order Indigenous self-government agreements.

In the same time frame, Greenlanders achieved home rule and then self-government, while the Saami people in Norway won the Finnmark Act, a form of co-management borrowed from northern Canadian treaties. In 1987, Mikhail Gorbachev promised to make the Arctic "a zone of peace."³ He invited the Arctic states to dialogue about security issues and environmental questions, and to include their Indigenous populations. With the end of the Cold War, Indigenous land-rights negotiations around the Arctic accelerated.

With the best of intentions, Canada helped create the Arctic Council, but the eight founding states based the organization on the fiction that the Arctic region consists only of nation-states and Indigenous peoples. With the 1996 Ottawa Declaration, eight Arctic states acknowledged the successful Indigenous rights struggles in Alaska, Northwest Territories, Quebec and Yukon, and recognized six Indigenous Permanent Participants (Aleut, Athabaskan, Gwich'in, Inuit, Saami and Russian), each with a voice in Council proceedings.⁴ That Indigenous representatives now sit at the Arctic ministers' table is a great innovation, one that likely would not have happened without northern land-treaty negotiations between federal states, Arctic village leaders *and* settler governments based in Arctic cities.

Regrettably, the Arctic Council left out settler cities and regional governments that represent the vast majority of Arctic residents, leaving them without a single seat at the ministers' table. Nevertheless, China, Germany, India, Italy, Japan, the Republic of Korea, the Netherlands, Poland, Singapore, Spain, the United Kingdom and others were invited to join as Arctic Council observers.

What's wrong with privileging six international Indigenous organizations? Nothing — but when, in 1999, the Northern Forum representing Arctic regional governments, who, with Indigenous authorities, nowadays do most of the governing (hospitals, roads, schools and so on) in the Arctic, asked for a single seat at the ministerial table, the eight Arctic nation-states rejected their application (Penikett 2017, 86).

What was Canada and other states' intention here? Did slick spin doctors persuade Arctic ministers that occupants of air-conditioned workstations in distant capitals adequately represented the views of Northern residents? Ask residents of Tromsø, Yellowknife or Fairbanks if government officials in faraway capitals speak for them, and they'll laugh in your face.

By repute, Alaska is a fairly conservative state, but even during Barack Obama's time in the White House, polls showed that Alaskan Indigenous communities trusted their state government in Juneau more than they did Washington or the White House (EKOS Research Associates 2011). As Ólafur Ragnar Grímsson, the former president of Iceland, observes, in the Arctic it is the federal states — Canada, Denmark, Russia and the United States — that operate at the greatest physical and *psychological* distance from regions they claim to rule (Penikett 2017, 2-3).

3 See www.barentsinfo.fi/docs/Gorbachev_speech.pdf.

4 See <https://oaarchive.arctic-council.org/handle/11374/85>.

Transformation

Modern land claims treaties, devolution and self-government agreements transformed the Far North:

- Alaska Natives have land, money and political power;
- Indigenous villages in Yukon and Northwest Territories enjoy regional government powers;
- The Northwest Territories and Nunavut boast consensus legislatures;
- Greenlanders achieved home rule and self-government and are now debating when to become a nation-state;
- Norway's Finnmark County has co-management of lands and resources; and
- the Inuit of Nunavut are collectively the largest private landowners in the world.

All this happened with the cooperation of regional governments. Young scholars sometimes paint modern treaties as just another form of assimilation, but the peace and prosperity of the Arctic's self-governing Nations, in contrast to the situation on many Southern reserves, would impress Canadians, if they knew the facts.

Sixty years ago, Ottawa talked down to Northern and Indigenous communities. Over time, Northerners began to talk back. Nowadays, village chiefs and legislators in Arctic cities are learning to govern together. Over two generations, Northern Indigenous and settler leaders negotiated an astonishing array of syncretic compromises: collective "tribal" ownership of titled land; treaty-based fish, game and land co-management boards, which replace the old-order fish harvesting priorities with a new hierarchy: conservation first; subsistence second; recreation uses third; and commercial uses fourth. Indigenous and settler leaders today work together on issues such as boom-and-bust economies, fair returns from resource developments, as well as suicide prevention and climate change. For Northerners, *decolonization* is a shared goal. In the interest of reconciliation, perhaps it is time now for the South to start learning from the North?

Northern Models

With the election of a new Liberal administration in 2015, Canada's federal government embraced climate action and the Trans Mountain pipeline, as well as the process of reconciliation. As it happens, the one area where reconciliation is becoming a reality is the Far North. Unfortunately, hardly anybody in Ottawa has noticed. With good reason, Northerners support the broad objectives of Justin Trudeau's reconciliation policy. But what are the prime minister's intentions? Are they accurate expressions of settled Canadian principles and values? Or are we skating on a thin-ice consensus? One doesn't need to search far for contrarian voices. As an example, in a recent opinion piece for the *National Post*, Conrad Black (2019) resurrected the legally problematic *terra nullius* or "empty land" thesis of America's colonization, arguing that opposition parties in Canada should take up, rather than pursue reconciliation, "the position that the Europeans and other immigrants who came to Canada moved into largely vacant land."

Black reminds us that Canadians have yet to seriously debate what might constitute our principles of reconciliation. That said, Ottawa's ambitions may be too vague. Based on media reports, the responsible officials must have hundreds of reconciliation files on their desks, but how many has the Treasury Board funded? Who is managing this workload? By promising so much, is the prime minister building disappointment?

Canada has created a new ministry of Crown-Indigenous Relations and Northern Affairs, and Prime Minister Trudeau commendably deals directly with Inuit Tapirit Kanatami (ITK) President Natan Obed on serious issues such as Inuit education. But what role do the four regional governments with Inuit treaty settlements and jurisdiction over schools play in such exchanges? ITK is *not* a government, yet Obed envisions developing ITK's program delivery and self-government capacities.

Late in the last century, Ottawa seemed ready to fund a transfer of government programs to the management of prairie *political organizations*, including the Assembly of Manitoba Chiefs and the Federation of Saskatchewan Indian Nations. However, these plans faced loud objections from First Nations *governments* in both provinces. Here is a reconciliation issue that has, so far, enjoyed too little public debate.

Sometimes, Trudeau's reconciliation does appear to be a project framed mainly as a negotiation between the nation-state and First Nations. Because Indian Bands (First Nations) are subjects of the Indian Act, a colonial law, "reconciliation" between Canada and its Indian Bands might seem too much like an "in-house" program.

The 1996 Royal Commission on Aboriginal Peoples recommended the reconstitution of Aboriginal Nations, but so far only the courts have acted. In the BC Supreme Court's 2007 *Tsilhqot'in* decision, Justice David Vickers noted that Indigenous rights-holders to land and governance may be the pre-colonial Nations, *not* Indian Act Bands. In 2014, the Supreme Court of Canada in its *Tsilhqot'in* ruling echoed Vickers's opinion.

If the Court is correct, then reconciliation might better be framed as a process involving Indigenous nations and their non-Indigenous neighbours — *nations* and *neighbours* — such as has been substantially advanced over the last 50 years with modern treaties in Northern Canada. Conceptualized this way, rather than being the first party to all reconciliation projects, Ottawa might more properly play the role of *facilitator* in seeking reconciliation across the country between Indigenous nations and their non-Indigenous neighbours.

In this decade, Canada might well re-examine its reconciliation priorities, dialogue with Indigenous and non-Indigenous communities about shared principles, and come to negotiating tables with honest statements of Crown intentions. Although provinces seem to lack the openness of the Northern territories, constitutionalist John Whyte argues that we do need some recognition and space for the norms of Canadian nationality.⁵ That said, true reconciliation should start with truth telling about intentions.

5 Email to author, May 8, 2019.

Tony Penikett is the author of two books, *Hunting the Northern Character* and *Reconciliation: First Nations Treaty Making in British Columbia*, a former BC deputy minister of negotiations and, from 1985 to 1992, premier of Yukon Territory.

Works Cited

- Alexander VI. 1493. *Inter Caetera*. Papal bull, May 4. www.papalencyclicals.net/Alex06/alex06inter.htm.
- BC Treaty Commission. 2001. *Looking Back, Looking Forward: A Review of the BC Treaty Process*. September. www.bctreaty.ca/sites/default/files/review_bc_treaty_process_0.pdf.
- Berger, Thomas R. 1977. *Northern Frontier, Northern Homeland: Report of the Mackenzie Valley Pipeline Inquiry*, vol. I. Ottawa, ON: Supply and Services Canada. <http://publications.gc.ca/site/eng/9.700299/publication.html>.
- Black, Conrad. 2019. "SNC-Lavalin is a sideshow to the real Wilson-Raybould issue." *National Post*, March 15. <https://nationalpost.com/opinion/conrad-black-snc-lavalin-is-a-sideshow-to-the-real-wilson-raybould-issue>.
- Bodkin, Henry. 2019. "'Little Ice Age' which froze the River Thames caused by Americas genocide, study finds." *The Telegraph*, January 31. www.telegraph.co.uk/science/2019/01/31/little-ice-age-cased-thames-freeze-caused-americas-genocide/.
- Canada. 1883. *Official report of the debates of the House of Commons of the Dominion of Canada: First session, fifth Parliament...comprising the period from the twentieth day of April to the twenty-fifth day of May, 1883*. Sir John A. Macdonald, May 9. www.canadiana.ca/view/oocihm.9_07186.
- EKOS Research Associates. 2011. *Rethinking the Top of the World: Arctic Security Public Opinion Survey Final Report*. Toronto, ON: Munk-Gordon Arctic Security Program.
- Erasmus, Peter. 1999. *Buffalo Days and Nights*. Markham, ON: Fifth House Books.
- MacLennan, Hugh. 1945. *Two Solitudes*. Toronto, ON: Collins.
- McArthur, Douglas. 2002. "Treaty Negotiations: What Works, What Doesn't – A Negotiators' Dialogue & Panel Discussion." Morris J. Wosk Centre for Dialogue, Vancouver, November 22.
- Penikett, Tony. 2006. *Reconciliation: First Nations Treaty Making in British Columbia*. Vancouver, BC: Douglas & McIntyre.
- . 2017. *Hunting the Northern Character*. Vancouver, BC: UBC Press.
- Truth and Reconciliation Commission. 2015. *Truth and Reconciliation Commission: Calls to Action*. Winnipeg, MB: Truth and Reconciliation Commission. http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf.
- Tully, James. 1995. *Strange multiplicity: Constitutionalism in an age of diversity*. Cambridge, UK: Cambridge University Press.