

Don Couturier

Negotiating the Dehcho: Protecting Dene
Ahthít'e' Through Modern Treaty-Making



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Don Couturier was born and raised in Yellowknife, Northwest Territories, and recently completed law school and a Master of Public Administration at Queen’s University. During his studies, Don spent summers working for a boutique Aboriginal law firm in the Northwest Territories and for West Coast Environmental Law in Vancouver, BC, where he co-authored a report on Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada. In June of 2020, Don will clerk at the Court of Appeal of Alberta for his articling year, and following this, for Justice Kasirer at the Supreme Court of Canada (2021-2022). Don previously worked as a policy advisor with the Government of Northwest Territories, most recently in the Office of the Secretary to Cabinet, where he helped coordinate the transition between governments during the 2015 territorial general election. Don is interested in the ways in which the revitalization of Indigenous legal orders can give content and meaning to Indigenous rights alongside Canada’s common and civil law traditions. Part of this project involves thinking about how Canadian constitutional and criminal law can make space for Indigenous jurisdiction. In a forthcoming article in the Queen's Law Journal (Spring 2020), he discusses and evaluates recent criminal law judgments in Nunavut that incorporate principles of Inuit law in their reasoning. Don is honoured to have been a 2018-20 Jane Glassco Fellow, and thanks the Gordon Foundation and his cohort of Fellows for a truly educational and empowering experience.

INTRODUCTION

Cought between two legal and political systems with conflicting interpretations of history, the Dehcho self-government negotiations falter. The task: the Dehcho Dene, Government of the Northwest Territories (GNWT) and Canada must harmonize their competing visions through nation-to-nation partnership and treaty federalism. What principles ought to guide constitutional struggles of this kind? During the first gathering of the fourth cohort of the Jane Glassco Northern Fellowship in the Yukon, Ta'an Kwäch'än elder Shirley Adamson impressed upon me that we “must always remember the treaties.”² Tethering modern negotiations to historical relationships both honours the past and appropriately frames the terms of dialogue. The Two Row Wampum, a 1613 treaty between the Haudenosaunee and Europeans often cited as an ideal framework for modern treaty-making,³ symbolizes a ship sailing side-by-side with a canoe in the spirit of coexistence and non-interference. However, the Dehcho Process looks more like a ship and canoe passing in the night. Yet these voyagers have met before, promising to live in peace and friendship for as long as the sun shines, the grass grows and the river flows. The canoe communicates this to the ship—but the ship glides on, with only a flicker of recognition, and the treaty partners slip into darkness once again.

Attempting to distil a politically and historically complex negotiation, this research modestly

describes the positions of each party, identifies areas of mutual understanding, and analyzes potential compromises and opportunities going forward. Three primary sources inform my analysis. First, the normative intent behind Treaty 8 and Treaty 11, which was to create obligations of peace and friendship between the Dehcho Dene and the Crown.⁴ Second, lessons from the success of Edézhzhíe, the first Indigenous protected area in the Dehcho region. Edézhzhíe exemplifies how co-governance mechanisms can advance both Dehcho First Nations (DFN) and Crown interests, even where these interests greatly diverge. Finally, I apply the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*⁵ to the rolling Agreement in Principle (AiP), providing as they do objective criteria for establishing nation-to-nation partnership. Out of respect for the extensive negotiations and offers made to date, no numerical suggestions for land quantum or cash settlements are given. Instead I focus on areas where DFN and Crown worldviews can co-exist in symbiotic tension. I find that:

- ▶ DFN has considerable opportunities to achieve their sovereignty goals within the GNWT's and Canada's legislative and administrative scheme;
- ▶ the GNWT and Canada can achieve legal certainty in exchange for a flexible and innovative approach to resource management in the Dehcho region; and

1 Dene althit'e “means the ongoing relationship between Dene and the land as expressed through the Dene way of life, including language, customs, traditions, historical experiences, spiritual practices, and laws,” as cited in the Agreement Regarding the Establishment of Edézhzhíe, signed October 11, 2018, <https://dehcho.org/docs/Edehzhie-Establishment-Agreement.pdf>.

2 Over the course of two years, the Fellowship conducted regional gatherings across three territories and Ottawa. During our first gathering in the Yukon, Fellows were asked to pitch their policy ideas to various officials and community leaders from all sectors. Feedback and guidance were given in return. I benefitted greatly from the wisdom of many elders, and in particular Shirley Adamson.

3 See generally John Borrows and Michael Coyle, co-editors, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).

4 “Any fully elaborated legal framework for the implementation and enforcement of historical treaties must reflect the central fact that those treaties were intended to create a new normative order between Indigenous peoples, the Crown, and settler governments.” Michael Coyle, “As Long as the Sun Shines: Recognizing that Treaties Were Intended to Last,” in *The Right Relationship*, 54.

5 Canada, Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (Ottawa, 2018), <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf>.

► the rolling AiP reflects some of the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* but lacks others. Cultivating the absent principles could greatly improve the terms of self-government.

As these recommendations suggest, progress requires compromise. Land quantum remains the most contentious barrier—essentially, how much comprises the settlement area. Addressing other concerns peripheral to, but touching on land quantum will diminish the numerical importance of “X kilometres squared.” Strict quantum will always be critical, but agreement becomes more likely where adjacent concerns are satisfied. DFN influence in resource management decisions can find expression through the co-governance mechanisms explored here, which include adapting resource management to mirror the spirit of Indigenous-led governance taking shape in Edézhzhíe, and giving equal weight and consideration to Dehcho law in decisions to grant or deny licences, permits and project certificates.

I begin with a brief history of Treaty 8 and Treaty 11 as the guiding framework for the relationship between the Dehcho Dene and the Crown. An account of the negotiating context and summary of the parties' positions is then provided. Analysis of Edézhzhíe's lessons for the Dehcho Process follows. I highlight areas of compromise and recommend several options that would enable parties to advance their respective interests. I recognize that in 2015, the GNWT appointed a Ministerial Special Representative to make recommendations on the Dehcho Process. I am grateful for the information her report provides. I build on aspects of these recommendations, but also augment them in what I believe are new and helpful ways.



Photo by Pat Kane

BACKGROUND

From Treaty 8 (1900) and II (1921-22) to Modern Negotiations

Where does the Dehcho Process come from?

Treaty 8 and 11 founded the Dehcho Dene/Crown relationship. To DFN, these Treaties represent living obligations of peace, friendship and non-interference.⁶ To the Crown (represented by Canada), they authorized European settlers to take up treaty lands in exchange for, *inter alia*, the guarantee that the Dehcho Dene's way of life would remain undisturbed.⁷ These conflicting interpretations still influence the parties' modern negotiating positions. DFN views the Dehcho Process as building on and clarifying (but never superseding) oral promises made under those Treaties, whereas the GNWT insists that the outcome of the Dehcho Process (a final agreement) will clarify and confirm the Aboriginal treaty rights of the Dehcho First Nations and set out the relationship between the parties entirely.⁸

Reaching agreement will unquestionably clarify DFN's legal rights and the government's corresponding obligations. And yet, evidently, securing agreement requires balancing these conflicting interpretations. As Michael Coyle writes, "[t]o be embraced by Indigenous and non-Indigenous treaty partners alike, any effective approach to the implementation of the historical treaties must be cognizable by and convincing to both treaty partners in light of their distinctive world views and legal traditions."⁹ As a starting point, this could involve, on one hand, recognition that the Agreement represents the contemporary legal basis for the DFN–Crown relationship, with the understanding, on the other, that as circumstances change over time, good faith negotiations may be required to renew treaty obligations.¹⁰ Such a compromise balances the GNWT's and Canada's desire for legal certainty with DFN's position that the treaties represent evergreen relational promises of peace and friendship.

The Dehcho Process, Edézhzhíe, and Indigenous-led Resource Management

Land remains the fundamental impasse: how much to include and how to manage it. Differences in legal worldview fuel this

6 Indigenous interpretations of Treaty 8 and Treaty 11 share some commonalities with other historic numbered treaties signed in the 19th and 20th centuries. For an excellent narrative on Treaty 6's meaning to the Montreal Lake Cree Nation see: Harold Johnson, *Two Families: Treaties and Government* (Saskatchewan, Purich: 2007).

7 See generally: René Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Calgary: University of Calgary Press, 2004, originally published in 1973); Dehcho Process: Background and MLA Briefing Note, 2015, https://dehcho.org/docs/DFN_Negotiations_Process_2015_11.pdf.

8 Interview with Fred Talen, Director of Negotiations, Department of Executive and Indigenous Affairs, Government of the Northwest Territories, May 9, 2019. Mr. Talen indicated that the GNWT and Canada take an aligned position on this matter.

9 Coyle, "As Long as the Sun Shines," 43.

10 *Ibid.*, 58, 61-62. This adopts Coyle's framework for negotiating modern treaties and applies his principle that historical treaty partners should be prepared to negotiate, over time, a new consensus on treaty understandings to address contemporary needs and interests.

tension. Public governments must satisfy a range of interests including economic development, effective program and service delivery, and environmental protection. Statute and common law, informed by its property, environmental and administrative law concepts, provide the Crown's legal instruments. In service of these interests, the Crown seeks legal certainty and a textual reading of the Treaties, which vests all NWT lands in the Crown save where Aboriginal title has been proven or an agreement has been finalized. Jurisdictional authority and limitations derive from section 35 of the Constitution, which establishes the Crown's obligations to Indigenous peoples.

The Dehcho Dene, conversely, assert total territorial and jurisdictional sovereignty in the Dehcho region. DFN seeks cultural preservation, strong national identity, and meaningful participation in contemporary economic and social life.¹¹ Dehcho law continues to apply, as it always has since time immemorial.¹² Inherent governance authority pre-dates European settlement. DFN favours an oral or relational understanding of the Treaties, wherein Dehcho lands were never surrendered.¹³ The GNWT and Canada recognize DFN's inherent right to self-determination and associated section 35 rights, and therefore seek to facilitate legal certainty through self-government. A brief summary of the negotiating history and

positions will illuminate how these differences inform the land quantum impasse.

The Dehcho Process: History, context, and negotiating positions

Negotiations began in 1999.¹⁴ The *21 Common Ground Principles* and subsequent *Dehcho First Nations Framework Agreement* establish the overarching goal of recognizing a Dehcho "government based on Dene laws and customs, and other laws agreed to by the parties."¹⁵ The *Dehcho First Nations Framework Agreement* sets out the guiding principles, objectives, roles, and other negotiating specifics. Obstacles quickly arose. Litigation resulted from Canada taking the position that the *Mackenzie Valley Resource Management Act* (MVRMA) dictated the terms of environmental review for resource development in the region.¹⁶ Settlement was reached in 2005, with Canada promising to negotiate a stand-alone Dehcho Resource Management Authority (DCRMA) in exchange for DFN abstaining from challenging the validity of the MVRMA.¹⁷ The next ten years saw slow progress towards an AiP. By 2017, many terms were tentatively reached on governance, justice, culture and language, marriage, adoption

11 Dehcho First Nations, accessed July 15, 2019, <https://dehcho.org/>. These goals are apparent from DFN's mission statement and governance goals. My research also included conversations with Michael McLeod, who reiterated these sentiments. See also Dehcho Land Use Planning Committee, *Respect for the Land: The Dehcho Land Use Plan Background Report*, last modified November 2005, accessed July 15, 2019, [http://www.dehcholands.org/docs/revise_draft_plan_nov_2005/Revised%20Draft%20-%20Dehcho%20Land%20Use%20Plan%20-%20The%20Plan%20-%20November%202005%20-%20Text%20%2B%20Maps%20\(PDFs\).pdf](http://www.dehcholands.org/docs/revise_draft_plan_nov_2005/Revised%20Draft%20-%20Dehcho%20Land%20Use%20Plan%20-%20The%20Plan%20-%20November%202005%20-%20Text%20%2B%20Maps%20(PDFs).pdf).

12 Dehcho First Nations, accessed July 15, 2019, <https://dehcho.org/>. See DFN's Mission Statement on their website.

13 Dehcho First Nations, *Dehcho Process Chronology*, accessed July 15, 2019, <https://www.liidliikue.ca/sites/default/files/Chronology%20and%20FAQS.pdf>, 1. This document appears to be the most detailed account of the Dehcho Process available online.

14 Dehcho First Nations, *Dehcho Process Annual Report*, last modified June 2008, accessed July 15, 2019, https://dehcho.org/docs/DFN_Negotiations_Process_Report_2007-2008.pdf. See also: Dhara Philpot, *Crown Consultation in the NWT: A Case Study to Establish a Consultation Working Group in the Dehcho Region* (Master's Dissertation, March 31, 2010), 47-48.

15 "The Deh Cho First Nations Framework Agreement," conclusion date: May 23, 2001, https://www.eia.gov.nt.ca/sites/eia/files/dfn_framework_agreement.pdf. The Agreement is based on the 21 Principles of Common Ground, which was the result of Peter Russell's Special Ministerial Envoy in 1997.

16 Dehcho First Nations, *Dehcho Process Chronology*, 3.

17 *Ibid.*

and child welfare, social housing and income assistance.¹⁸ Land quantum and resource management terms remain outstanding. DFN recently stated its desire to put lands and resources negotiations on hold while other aspects of the agreement are implemented.¹⁹

DFN's Lands and Resources Position

DFN's latest position consists of three terms:²⁰

1. Canada must deliver on its DCRMA promise;
2. Dehcho Ndehe (the settlement lands) must include at least 50,000 square kilometres of surface and subsurface lands subject to 100% DFN control; and
3. outside Dehcho Ndehe, joint land use planning between DFN and government must be done through the negotiated Dehcho Land Use Plan (DLUP).

DFN has indicated several variations on the above that might be acceptable to them. First is an option with only surface rights in the settlement area but a generalized interest in other regional lands. This would reduce the extent of DFN's interest in the settlement lands but would extend their interest in regional lands outside the settlement area. Second, DFN has proposed a "Dehcho Model" in which DFN owns just surface rights of some lands but surface *and* subsurface rights of others

(a patchwork of land ownership, guided by available land uses set out in the DLUP).²¹ At this point, these are theoretical suggestions which have not been taken up by the GNWT or Canada in their formal positions as of yet.

DFN also takes a position on its preferred negotiating party. Given that Canada, not the GNWT, negotiated and signed the historic Treaties, DFN prefers to negotiate directly with Canada as the Crown's representative.²² This position has been complicated by the GNWT's growing role in the negotiations since devolution, in which the GNWT acquired jurisdiction over lands and resources from the federal government. Whatever the final outcome of the Dehcho Process, for DFN, a self-government agreement would clarify but not replace the promises made under the historic treaties.

In June 2018, Canada and the GNWT jointly offered DFN two options.²³

Option 1: \$113 million cash settlement with 48,000 square kilometres of surface and subsurface resource royalty rights, but no resource revenues from Crown land in the Mackenzie Valley.

Option 2: The same cash settlement, but with a smaller land offer of 42,000 square kilometres of surface and subsurface rights, and a small share in mineral royalties from development on Crown land in the Mackenzie Valley. The offer was rejected.

18 "Dehcho First Nations Agreement in Principle" (Rolling Draft, Version #41, January 3, 2017), accessed July 15 2019, <https://dehcho.org/docs/50-ROLLING-DRAFT-AIP-VERSION-DATED-JANUARY-3-2017-2-1.pdf>. The 2017 rolling draft is the most recent version available online. As I am not privy to negotiators' discussions surrounding the specific provisions within this draft, I cannot claim that it represents the most accurate and recent representation of the agreement between the parties.

19 Alex Brockman, "Dehcho First Nations put land issues aside – for now – in land-claim talks with Ottawa, NWT," CBC, <https://www.cbc.ca/news/canada/north/dehcho-first-nations-land-negotiations-1.5193005> (June 27, 2019).

20 Dehcho Process Negotiating Team Report, last modified June 2017, accessed July 15, 2019, <https://www.liidliikue.ca/sites/default/files/Dehcho%20Process%20Update%20-%202017%20Assembly%20package.pdf>, 2-3.

21 *Ibid.*

22 Dehcho First Nations, Dehcho Process Chronology, *supra* note 13, 10.

23 Kirsten Murphy, "Dehcho First Nations not impressed with federal government land claim offer" CBC News, July 27, 2018, accessed July 15, 2019, <https://www.cbc.ca/news/canada/north/dehcho-first-nation-land-claim-offer-1.4763245>.



Photo by Pat Kane

The GNWT's Negotiating Position

The above offers reflect the GNWT's position:²⁴

1. the settlement area should be between 42,000 to 48,000 square kilometres;
2. the settlement lands may include either surface and subsurface rights or surface rights only with a generalized interest in the subsurface of the settlement area; and
3. resource royalties from Crown lands in the Mackenzie Valley are possible but depend on the direction taken to 1.

Negotiations are trilateral, except where matters arising from the provisions of treaty 8 or 11 are discussed, at which time the GNWT becomes an observer and negotiations occur

between DFN and Canada.²⁵ In terms of resource management, the GNWT affirms that all parties want regional land use plans, which would include implementing the DLUP.²⁶ The GNWT and Canada endorse the DCRMA as part of the integrated system of resource management in the Mackenzie Valley. The GNWT has considerable flexibility to negotiate the type and structure of government DFN wants to establish.

Notably, the parties agree on the DCRMA and the implementation of the DLUP, satisfying two of DFN's three terms. Where the offered lands vest surface and subsurface rights in DFN, such lands would be under DFN control. Why the impasse? Is the difference between 48,000 and 50,000 square kilometres really the only impediment? No—we need to look more closely. Concerns over how the DCRMA and DLUP would operate in practice continue

²⁴ Interview with Fred Talen, May 9, 2019.

²⁵ "The Deh Cho First Nations Framework Agreement," preamble.

²⁶ Interview with Fred Talen, May 9, 2019.

to divide parties. Increasing the DCRMA's and DLUP's on-the-ground ability to effectively respond to DFN's legal and political worldview and generate associated resource royalties (including the Dehcho region outside the official settlement) would reduce land quantum opposition. The 2018 designation of Edézhzié as the first Dehcho Protected Area offers clues as to how negotiations could evolve to address these peripheral concerns.

Edézhzié and its Bearing on Negotiations

As the first Dehcho Protected Area, Edézhzié permanently protects the Horn Plateau, the Dehcho Dene's spiritual home since time immemorial, from development of its boreal forests, waters and wetlands.²⁷ Protection flows from both Dehcho law and the area's status as a National Wildlife Area under the *Canadian Wildlife Act*.²⁸ The Dehcho K'éhodi Guardians and the Canadian Wildlife Service will oversee the Edézhzié Management Board (EMB) and draw on a blend of Dene culture and western science in monitoring and conservation efforts.²⁹ Dehcho elder Edward Sabourin emphasized the importance of Edézhzié by stating: "this is for our survival in the future."³⁰

Most strikingly, the EMB will make decisions by consensus with a view to protecting

Edézhzié's sacredness and position as a critical harvesting location. Dene laws and values, language, and youth-elder mentorship arrangements will guide the manner in which Edézhzié is managed and protected.³¹ Management of Edézhzié must "uphold Dene laws, incorporate and strengthen Dehcho Dene *Zatié* as the foundation for Dene *Náodhee*, and promote the transmission of Dene knowledge and Dene *Náodhee* from present to future generations."³² The *Dehcho Protected Area Law* reconciles the Dehcho Dene's way of life with modern land management.

While development is strictly off the table within Edézhzié (whereas it animates resource management debate in the Dehcho region more broadly), its features usefully illustrate how the governance aspirations of the Dehcho Dene can be fulfilled in a contemporary context.³³

Renewing Treaty Obligations

The shared management role between the Dehcho K'éhodi Guardians and the Canadian Wildlife Service in Edézhzié honours DFN's interpretation of the historic treaties. Both DFN and government officials work side-by-side in mutual recognition and respect for the expertise that each brings to the table. Neither interferes with the other, and Dehcho law informs conservation and management efforts in the area.

27 Dehcho First Nations, Dehcho Protected Area Law, Resolution 1, enacted on July 25, 2018, at the Dehcho Annual Assembly in Wrigley, NT, <https://dehcho.org/docs/REGARDINGEdehzhieDehchoAnnualAssembly2018.pdf>.

28 Courtney Mason, "Indigenous protected areas are the next generation of conservation," *The Conversation*, November 29, 2018, accessed July 15, 2019, <http://theconversation.com/indigenous-protected-areas-are-the-next-generation-of-conservation-105787>.

29 Ibid. See also Dehcho First Nations, Dehcho Protected Area Law.

30 Office of the Grand Chief of the Dehcho First Nations, "Edézhzié designated as a Dehcho Protected Area – Establishment Agreement with Canada Approved," news release dated 2 August 2018.

31 Dehcho First Nations (website).

32 Dehcho First Nations, Dehcho Protected Area Law.

33 For the report informing policy movement towards Indigenous protected areas, see Indigenous Circle of Experts, "We Rise Together: Achieving Pathway to Canada Target 1 through the Creation of Indigenous Protected and Conserved Areas in the Spirit and Practice of Reconciliation," last modified March 2018, accessed July 15, 2019, https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf.



Photo by Aaron Tambour

Territorial Sovereignty

The *Dehcho Protected Area Law* recognizes that the Dehcho Dene have lived on and governed their lands and waters since time immemorial.³⁴ Canada's signing of the *Edézhzhíe Establishment Agreement* reflects its acknowledgement of this law's authority.³⁵ While conservation, rather than resource development, likely plays a role in Canada's willingness to acknowledge territorial sovereignty in this region, Edézhzhíe's success stems from this affirmation of DFN's legal worldview.

Management of Lands and Resources

The *Dehcho Protected Area Law* includes the principle that "The Dehcho Declaration (1993) affirms the inherent rights and powers of the Dehcho Dene to govern as a nation."³⁶ The *Edézhzhíe Establishment Agreement* signals Canada's implicit recognition of the Dehcho Dene's self-determination with regard to protection and management of Edézhzhíe. The *Dehcho First Nations Framework Agreement* and AiP include similar preambles;³⁷ negotiators must vigilantly tie these principles to land and resource management mechanisms.

34 Dehcho First Nations, *Dehcho Protected Area Law*, preamble.

35 Environment and Climate Change Canada, *Edézhzhíe Protected Area*, last modified April 16, 2019, accessed July 15, 2019, <https://www.canada.ca/en/environment-climate-change/services/national-wildlife-areas/locations/edehzhie.html>.

36 Dehcho First Nations, *Dehcho Protected Area Law*, preamble.

37 "Dehcho First Nations Agreement in Principle" (Rolling Draft, Version #41, January 3, 2017).

POLICY OPTIONS AND RECOMMENDATIONS FOR NEGOTIATORS

The distance between DFN's and the Crown's legal and political perspectives manifests as disagreement over land quantum. DFN seeks influence on resource development in the Dehcho region broadly speaking, whereas the GNWT seeks to protect development opportunities in the Mackenzie Valley outside the settlement area. Some compromises seem immediately obvious. For example, the DCRMA could provide input into but not control over resource decisions outside settlement lands; the GNWT could explicitly recognize Dehcho law's application to the DCRMA and its recommendations; and a share of resource royalties should be on the table outside the settlement area regardless of final land quantum. Beyond these preliminary thoughts, the following recommendations balance the interests of DFN and the Crown by addressing various concerns while protecting core interests.

1. The DFN compromise and opportunity: Accepting land selection and pursuing sovereignty goals within the GNWT's legislative and administrative scheme

The DFN Compromise

If DFN accepts a land offer within the GNWT's offer range, it can still assert sovereignty beyond the settlement lands in other ways.³⁸ Accepting the GNWT's integrated system of resource management (with the DCRMA operating under the MVRMA) need not preclude the DCRMA from serving DFN's political goals. Dehcho law can influence the MVRMA process by informing the DCRMA's recommendations, meaning DFN will still shape resource management in its traditional territory while allowing the GNWT to preserve its legal rights.³⁹ True, DFN may not hold surface or subsurface rights to these lands, but the DLUP would apply and inform environmental assessment decisions.⁴⁰ If the agreement includes the second option offered including a share of resource royalties in these Crown lands, DFN can participate meaningfully in resource management and reap the economic benefits of doing so. In turn, this would allow the GNWT to retain some control over "open" lands outside the settlement area and preserve its current legislative and administrative scheme.

The DFN Opportunity

DFN could press for joint authority over the DCRMA's operating procedures so that, over time, they mirror the co-governance model seen in Edézhíé. Mechanisms for community input could follow. As Jocelyn

38 For a leading example of how this may be possible, see John Borrows' discussion of Nisga'a law application in the context of the modern Nisga'a Final Agreement. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 96. Borrows argues that the Nisga'a Final Agreement includes important provisions recognizing and asserting Nisga'a law. See also "Dehcho First Nations Agreement in Principle" (Rolling Draft, Version #41, January 3, 2017), 99.

39 The Mackenzie Valley Land and Water Board (MVLWB) comprises several regional panels that regulate the use of land and water and the deposit of waste by issuing land use permits and water licenses. These panels each have their own jurisdiction. They include the Gwich'in Land and Water Board, the Sahtu Land and Water Board, and the Wek'eezhii Land and Water Board. See: Mackenzie Valley Land and Water Board, "Co-Management: Our role in Integrated Resource Management Under the Mackenzie Valley Resource Management Act (MVRMA)," accessed July 15, 2019, <https://mvlwb.com/content/co-management>. The DCRMA would become integrated under this system as another regional panel. Where the DCRMA's decisions and/or recommendations are grounded in Dehcho Law, Dehcho law influences this overall process.

40 Separately from the MVLWB, the Mackenzie Valley Environmental Impact Review Board conducts environmental assessments of proposed projects in the Mackenzie Valley. During screening, project proposals are assessed by the relevant land use planning board for compliance. The DLUP would operate here to insert the Dehcho perspective into the review process. See Mackenzie Valley Review Board, "Process Diagrams," accessed July 15, 2019, http://reviewboard.ca/process_information/process_diagrams.

Jo-Strack and Douglas Clark argue, co-management in the North, while far from perfect, has made significant progress in the past 20 years under the tireless efforts of Indigenous and non-Indigenous peoples who believe in the system.⁴¹ With conscientious refinement, the DCRMA could grow into the EMB's likeness through consensus decision-making and reliance on Dene laws and values. In legislative and administrative terms, the DCRM integrates into the territory's co-management regime, but its operational policies, procedures and guidelines need not be frozen in time. This reflects a compromise between the difficulty with overhauling entrenched legislative and governance systems related to self-government and the need to give expression to Indigenous laws in governance matters impacting Indigenous rights.

2. The GNWT and Canada's compromise and opportunity: Accepting flexibility in resource management in exchange for legal certainty

The Crown Compromise

The GNWT and Canada could jointly-ratify a Governance Protocol (GP) for shared governance in resource management. MVRMA legislation would govern the DCRMA, but a GP would inject a good-faith political commitment to nation-to-nation partnership. GP terms could enshrine commitments to



Photo by Aaron Tambour

⁴¹ Douglas Clark and Jocelyn Joe-Strack, "Keeping the 'co' in the co-management of northern resources," Northern Public Affairs, vol 5, issue 1 (April 2017), accessed July 15, 2019, <http://www.northernpublicaffairs.ca/index/?s=douglas+clark>.

giving equal weight and consideration to Dehcho law in resource management in the Dehcho region outside the settlement area.⁴² The protocol could simply take the EMB as precedent and commit to, over time, working with DFN to adapt the DCRMA's policies and procedures to mirror the EMB. Guided by the DLUP, the DCRMA's recommendations would infuse Dehcho law into environmental assessments. While DFN would render binding decisions within the settlement area, the DCRMA would make recommendations on resource management in the Dehcho region broadly according to the GP's terms, which in turn would inform the decision of the territorial Minister receiving input from the Mackenzie Valley Environmental Impact Review Board (MVEIRB).

The Crown Opportunity

The NWT's integrated system of resource management accommodates such an approach, rendering it politically feasible. Legal certainty would be achieved in two ways. First, the GNWT would consolidate the MVRMA scheme. Adopting a GP would not require the GNWT to deviate from its negotiating mandate; instead, it would simply require it to review the internal process by which decisions are made under the current administrative framework. Put differently, re-designing procedure on the basis of treaty partnership introduces a regional, contextual approach to resource management within the MVRMA. Procedural flexibility alters how parties do business but leaves their legal rights untouched. The GNWT would retain legal title to Crown lands in the Mackenzie Valley, and all

DCRMA recommendations would flow through the MVLWB or DLUP-informed environmental assessments and would require ministerial approval. Second, legal certainty would be achieved by securing the agreement itself. This would significantly advance the GNWT's mandate commitment to conclude outstanding land, resource and self-government agreements.⁴³

3. Constitutional Dialogue: Capturing the Spirit of the Treaties through the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples

The Dehcho Process represents a forum for constitutional dialogue between nations, the result of which will produce a contemporary example of treaty federalism.⁴⁴ The Dehcho Process must foster respectful treaty relations in the spirit of nation-to-nation partnership to manage the interpretive differences highlighted in this paper. Where the parties negotiate as equal partners, fair constitutional dialogue bridges these otherwise conflicting legal perspectives. As a political commitment to more fully recognize Indigenous rights, the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* offers objective criteria for evaluating the AiP as a modern treaty. To the extent that

42 See: Naomi Metallic and Janna Promislow, "Realizing Aboriginal Administrative Law" in *Administrative Law in Context*, eds Colleen M Flood and Lorne Sossin (Emond: Toronto, 3rd ed, 2018), 130. Metallic and Promislow observe that while it is easy enough to assert that Indigenous law should play a role in decision-making and judicial review, what this looks like in practice, how it is incorporated, and ultimately how it is adjudicated where disputes arise is more difficult to discern.

43 Government of the Northwest Territories, *Mandate of the Government of the Northwest Territories 2016-2019 Revised*, accessed July 15, 2019. <https://www.eia.gov.nt.ca/sites/eia/files/mandate-of-the-gnwt-2016-2019-en.pdf>, commitment 5.1.4.

44 Graham White, "Treaty Federalism in Northern Canada: Aboriginal Government Land Claims Board" *Publius* 32, no. 3 (2002) accessed July 15, 2019, <http://www.jstor.org/stable/3330968>, 89. In his analysis, White finds that such agreements exist at the intersection of government-national, federal/territorial and Aboriginal orders of government, giving rise to substantial independence from government. Although White concludes that these agreements have significantly enhanced Indigenous peoples' ability to influence land, wildlife and resource decisions, the extent to which Indigenous culture and worldviews are brought to bear on these decisions remains unclear.

its terms embody these principles, the parties can be confident that the mutual intention of the historical treaties is upheld within the modern agreement. The more the AiP achieves this balance, the less interpretive differences surrounding the legal status of the historic treaties will hinder modern understandings of the parties' rights and obligations.

Several aspects of the AiP clearly reflect the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. These include:

- ▶ Principle 1, the inherent right to self-government;
- ▶ Principle 2, reconciliation as a fundamental purpose of section 35 of the Constitution Act, 1982;
- ▶ Principle 3, Indigenous self-government as an evolving system of cooperative federalism; and
- ▶ Principle 4, treaties as acts of reconciliation based on mutual recognition and respect.⁴⁵

For example, the *Dehcho First Nations Framework Agreement* sets out how DFN, Canada and the GWNT agree to negotiate on a government-to-government basis within the framework of the Constitution of Canada.⁴⁶ The rolling AiP's preamble states that the Treaty of 1921 (Treaty 11) recognizes the inherent rights and political powers of the Dehcho Dene, and further sets out that

the parties are committed to implementing the principles of the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*.⁴⁷ Concurrent law-making authority between DFN, the GNWT and Canada is recognized, with Dehcho law prevailing where conflict arises.⁴⁸ Within the settlement lands, DFN will have extensive jurisdiction, including, among others, over non-renewable resources,⁴⁹ language and culture,⁵⁰ and the administration of justice.⁵¹

Other principles are conspicuously absent, signalling the need for greater compromise from the Crown. Specifically, Principle 6, *meaningful engagement with Indigenous peoples that aims to secure their free, prior and informed consent* and Principle 8, *a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development* could be more explicitly referenced and supported. DFN's outstanding concerns with respect to participation in resource management and associated resource royalties reflect these shortcomings. The above recommendations go some way towards fulfilling these goals. With federal and provincial commitments to implementing *UNDRIP* on the horizon, decision-making processes grounded in consent-based resource development are crucial to moving negotiations forward.

The suggested Governance Protocol on the DCRMA's operation within the MVRMA, that is, moving it in the direction of Edézhíe's EMB, nudges negotiations in this direction.

⁴⁵ Canada, Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. See principles 1, 2, 4, and 5.

⁴⁶ "Dehcho First Nations Agreement in Principle" (Rolling Draft, Version #41, January 3, 2017), preamble.

⁴⁷ Ibid.

⁴⁸ Ibid., 6.6.2.

⁴⁹ Ibid., Chapter 9.

⁵⁰ Ibid., Chapter 22.

⁵¹ Ibid., Chapter 25.

Sharing resource royalties in the Dehcho region regardless of final land quantum also fits nicely with the goal of economic partnership in resource development. Such provisions do not require an overhaul of the NWT's legislative or administrative regime, but they do require a willingness to commit to a new style of intergovernmental relations in the Dehcho region. Put simply, this third recommendation calls for getting the terms of constitutional dialogue right. Applying the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* to the AiP reveals that equal participation in and benefit from resource development is the crucial area where the Dehcho Process falters. The first two recommendations aim to satisfy these outstanding principles.

CONCLUSION

On the outstanding issue of land and resource management, strict land quantum and cash settlement offers such as the one offered most recently by the GNWT will not move negotiations forward and overcome this impasse. More is needed: changing the *kind* of deal on offer through the recommendations presented here will. Although compromise and flexibility will be required, workable solutions need not force either party to abandon their deeply held and sometimes conflicting worldviews. Collaborative co-governance arrangements can blend these perspectives without subordinating either one. The federal government's political commitments to more fully recognize Indigenous rights, as well as emerging ways of thinking about environmental assessment, canvassed here, provide specific and objective direction beyond the positional mandates embedded in the Dehcho Process. These suggestions,

which include moving towards a model of consent in resource management and sincere engagement with Indigenous law in the decisions of co-management boards, simply reflect the momentum and dominant tide of resource management narratives in Canada. Implementing these recommendations is possible without overhauling all progress to-date on the AiP or the territory's legislative and policy resource management scheme.

In several ways the Northwest Territories' governance landscape holds promise for innovative models of treaty federalism to take root. Canada's three territories already lead in terms of the scope and scale of their self-government agreements. Emerging Indigenous-led protected areas can complement this multi-level governance map by introducing greater application of Indigenous law and jurisdictional sovereignty over lands and natural resources. Co-management in the NWT currently embraces Indigenous knowledge in environmental assessments but could be refined by aligning its procedures with Edézhíe's approach so that the laws of Indigenous governments wield greater power in decisions to greenlight projects. My recommendations have attempted to outline several concrete ways in which this move could be brought to fruition through the Dehcho Process. These developments would bridge the diverging legal assumptions pushing DFN and the Crown apart and provide assurances that a final agreement advances and protects the interests of all parties.

Negotiating the Dehcho: Protecting Dene Anthít'e Through Mordern Treaty-Making

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Cover photo by Aaron Tambour

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