

JANE GLASSCO NORTHERN FELLOWSHIP

Realizing Indigenous Law in Co-Management

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The Jane Glassco Northern Fellowship is a policy and leadership development program that recognizes leadership potential among northern Canadians who want to address the emerging policy challenges facing the North. The 18-month program is built around four regional gatherings and offers skills training, mentorship and networking opportunities. Through self-directed learning, group work and the collective sharing of knowledge, Fellows will foster a deeper understanding of important contemporary northern issues, and develop the skills and confidence to better articulate and share their ideas and policy research publicly. The Fellowship is intended for northerners between 25 and 35 years of age, who want to build a strong North that benefits all northerners. Through the Fellowship, we hope to foster a bond among the Fellows that will endure throughout their professional lives and support a pan-northern network.

AUTHORS



Fort Good Hope | NT

Heather Bourassa

Heather Bourassa is a business owner and active community member of Fort Good Hope. She attended school in Fort Good Hope, Cochrane, and at the Southern Alberta Institute of Technology in Calgary. She has been a co-owner in her family business since 2000. The business is in general contracting, primarily carrying out long-term GNWT contracts.

She is on several boards, including her local Land Corporation Board since 2005, Sahtu Land Use Planning Board since 2012 (chairperson), and the NWT Liquor Licensing Board since 2015. She is a life-long resident of Fort Good Hope and beneficiary of the Sahtu Land Claim Agreement. She is married with two young children. She enjoys time with family and indulging her love of aviation with her private pilot's license and small Cessna aircraft. Living in Fort Good Hope, her family takes advantage of the easy access to the land harvesting wood and traditional foods.

Heather hopes to contribute to the fellowship with her northern experience and passion for northern issues. She also hopes to gain a broader northern perspective networking with other fellows.



Yellowknife | NT

Killulark Arngna'naaq

Killulark Arngna'naaq is an Inuk originally from Qamanit'uaq (Baker Lake) Nunavut, but spent most of her childhood in, and is currently based in Yellowknife, NWT. She completed her BA through Trent University, her Masters of Management and Professional Accounting with the University of Toronto, and attained her CPA, CA designation through the Institute of Chartered Accountancy Ontario.

Killulark is currently working for Tides Canada as their Northern Program Specialist. Killulark hopes that the Jane Glassco Northern Fellowship will help her focus her goals.



Yellowknife | NT

Don Couturier

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.



Whitehorse | YT

Kelly Panchyshyn

Kelly was born and raised in Whitehorse, Yukon, on the Traditional Territory of the Ta'an Kwäch'än Council and the Kwanlin Dün First Nation. She has mixed ancestry, with family ties to both Indigenous and Non-Indigenous peoples. After receiving her Bachelors of Arts, in Cultural Studies and Indigenous Studies from the University of British Columbia in 2017, she returned to the North to work in the Aboriginal Relations Division of the Government of Yukon. Her passion for advancing social and environmental movements across the North soon led her to apply for the Jane Glassco Northern Fellowship. As a Fellow, Kelly's research focused on wild plant harvest, food sovereignty, community identity and co-governance in Yukon. After completing the fellowship, she received funding to complete a Master's of Community Engagement, Social Change and Equity with UBC. Kelly hopes to use this opportunity to build on the research she started with the Fellowship and deepen her commitment to Northern Peoples and places.



Baker Lake | NU

Kaviq Kaluraq

Kaviq Kaluraq lives in Baker Lake, Nunavut. She is an instructor in the Nunavut Arctic College's Nunavut Teacher Education Program. She is also the Acting Chairperson of the Nunavut Impact Review Board, currently serving her third term. Kaviq completed her Bachelor of Science Degree in Environmental Science at Trent University and is currently a graduate student in the Master of Educational Studies Program at Trent University. Kaviq travels to communities across Nunavut to teach, and to meet with community members to learn about how they live and what they strive for in terms of resource development in their communities. Through this fellowship Kaviq hopes to learn more about policies and practices surrounding Inuit environmental literacy and language. She has seen changes around the ways in which Inuit of different generations have relationships with land, and a growing gap of Inuit knowledge about the land among youth. She is interested in policies that allow for knowledge and skills mobilization for traditional Inuit knowledge about the environment using Inuktitut, as well as barriers to mobilization created by policies. Kaviq is interested in learning about the ways people across the North face and address the gaps of traditional knowledge and language about the natural environment; and ways that people are mobilizing traditional knowledge programs through the development of asset oriented and collaborative policies.

INTRODUCTION

Co-management boards (“the Boards”); the governance structures through which Indigenous and non-Indigenous governments jointly manage lands and resources in Nunavut, Northwest Territories, and Yukon, are a bittersweet addition to the northern governance landscape. For some, the Boards enable Indigenous groups to effectively participate in lands and resource management. Over time, the Boards have evolved to serve regional needs well. Yet their ability to transform governance in a manner that reflects Indigenous sources of law and culture is limited. The statutes that give them life and perhaps the culture instilled in them is potentially to blame. Final decision-making authority often rests with the responsible minister, and local decisions can be circumvented. The minister also has the ability to direct the Boards through binding policy direction. This process usually follows the well-worn path of western bureaucracy. Our intention is not to deny the utility of the Boards in their current form, but rather to interrogate how the lessons of Indigenous legal traditions might adjust and improve how they operate. The Boards have been operating for several decades – now is the time to reflect on their use of Indigenous legal traditions, discuss pathways of potential change, and reaffirm the inclusion of Land Claim implementation objectives. Growing awareness of Indigenous law revitalization presents an opportunity to address apparent imbalances in legal perspectives and enhance co-management systems through Indigenous laws and traditions. We offer three recommendations aimed at entrenching Indigenous law in co-management decision-making to more equitably balance the world views between Indigenous peoples and Canadian governments.

BACKGROUND

Co-management Boards were created by federal legislation and Comprehensive Land Claim Agreements to create local decision-making authorities and councils for aspects of natural resource management, land use, and wildlife. They are directly tied to aspects of Indigenous culture and values that are important to Indigenous life and prosperity. These Boards are quasi-judicial bodies guided by common law principals and are subject to judicial review. Boards are equally represented by members of the Indigenous nation and the government with varying mandates and authority depending on legislation and the Board’s role. In many cases, co-management boards are able to unilaterally make decisions on resource management through their own processes however, for major projects, authority for final approval of Land Use Plans and wildlife decisions ultimately resides with the Crown or its delegates. For the purpose of this paper we will focus on the decisions of the Crown.

In the Yukon, the Regional Land Use Planning Process emerges from the Umbrella Final Agreement and the Final Agreements of 11 First Nations. Under this process, the Yukon has been divided up into seven regions.ⁱ Each region may establish a Regional Land Use Planning Commission with one third consisting of nominees from the Yukon First Nation government, one third consisting of nominees from Yukon Government, and the final third formed of members from the public, which must proportionally reflect the demographic ratio of Indigenous peoples in the planning region.ⁱⁱ This commission prepares a recommended regional land use plan for the territory and First Nations to consider. After consultation with each other and



affected communities, both Yukon Government and First Nation government may accept the plan, reject it, or propose modifications. If the plan is rejected or modifications suggested, it returns to the commission who can reconsider the plan and make a final recommended plan. At this stage, Yukon Government may reject or propose modifications to the parts of the plan referring to Non-Settlement Lands and the First Nations may reject or propose modifications on the parts of the plan that refer to their Settlement Land.ⁱⁱⁱ

While First Nation governments can have tremendous influence and participation in the planning process for non-settlement lands inside their Traditional Territories, the final decision-making authority for these lands remain concentrated within colonial governments. The cumulative area of Settlement Land in the Yukon totals 6.5% of the territory's land base. Further, there are First Nations within the territory who do not intend to negotiate a settlement agreement, contributing to the reduction of the total land which Yukon First Nations are able to

reject or modify. While reflecting on why White River First Nation has chosen to not sign a final agreement, Chief David Johnny responds, "You get a say, but you don't get the last say." First Nation governments in the Yukon do not have equal say in the majority of their Traditional Territories.

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say in the majority of their Traditional Territories. As in the Yukon, the NWT process around land use planning, resource development and regulation emerged from the negotiation of land claims. However, Indigenous governments in the NWT continue to be constrained by the hierarchical nature of the legislative and policy regime in place. The Mackenzie Valley Resource Management Act^v is a crucial part of this system. The Act grants rights to Crown governments to the use and flow of all the waters in the Mackenzie Valley, subject to any rights or privileges granted under the Dominion Water Power Act.^{vi} The Act outlines the function of boards as an opportunity for residents of the region to participate in the management of its resource for the benefit of the residents and of other Canadians.^{vii} This serves to establish Mackie Valley residents as participants in the management of resources, rather than managing partners. However, residents selected by the Tł̨cho Government must be appointed by the federal Minister to sit on boards.^{viii} After consulting with a planning board, the Minister also has the power to give binding policy directions to the Board.^{ix} Final say on development also rests with the Crown: “once a land use plan has been adopted, it is submitted to the first nation of the settlement area, who approves it. It then goes to the territorial minister, who must approve it. It then goes to the federal minister, who must approve it”.^x

Land use planning and resource management in Nunavut has a different context owing to its unified Nunavut Agreement. The Nunavut Agreement and subsequent legislation seek to involve Nunavummiut Inuit in all decision-making processes and infuse these decisions with *Inuit Qaujimajatuqangit*. The Nunavut Agreement establishes five Institutions of Public Government

[IPGs], four co-management boards, plus the Nunavut Surface Rights Tribunal. Among these boards are the Nunavut Wildlife Management Board^{xi}, rules for managing conservation areas^{xii}, land and resource management institutions^{xiii}, the Nunavut Impact Review Board (Article 12) and the Nunavut Water Board^{xiv}. Nunavut Tunngavik Incorporated (NTI) is the body responsible for holding the Government of Nunavut (GN) accountable for implementing the Nunavut Agreement. While Inuit participation certainly occurs under this framework, and business is generally intended to be conducted in Inuktitut, its decision-making logic follows the same pattern as co-management in the Yukon and the NWT. For example, the Wildlife Management Board provisions, for example, specifies that “government retains ultimate responsibility for wildlife management.”^{xv} All decisions of the Boards must be forwarded to the responsible Minister who may either accept, reject, or modify a board’s decision. The Minister is required to provide reasons to the Board explaining its decision for disallowing a decision. Like the Yukon and NWT, the co-management regime in Nunavut clearly relies on principles of Canadian law, policy and procedure to a much greater extent than Indigenous legal perspectives.

CHALLENGES IN CO-MANAGEMENT

It is important to distinguish between Indigenous participation in an otherwise colonial system of governance, and co-governance between the Crown and Indigenous peoples. The former considers Indigenous input into decision-making and renders a final decision at the Minister’s discretion, which we suggest is the current state of affairs across the territories. The latter structure seeks to empower Indigenous peoples to decide in partnership with the Crown under a binding process. Some Indigenous groups

may be satisfied with their ability to influence decisions under the current regime. In our view, however, movement toward greater representation of Indigenous law will consolidate and enhance the ability of these groups to be self-determining, creating concrete steps toward reconciliation between Indigenous peoples and Canada. Co-management should be a shared responsibility held by two or more distinct governance bodies to reach consensus on the governance of land and people. This structure requires transparency, mutual accountability, and rational decision-making involving the input and values of both parties. There must be give and take between the Crown and the Indigenous group without fear of unilateral action by one government. Process matters as well; when incorporating Indigenous values in governance systems, decolonization must be at the root of each system. In this context it means that Indigenous legal traditions and values must be inherently integrated within the co-management design and the Crown must integrate these values in co-management agreements to achieve equality.

In the early days of co-management, boards had direct access to the responsible minister and often had direct communication with their office. As government has devolved its decision-making powers, this relationship has become more bureaucratized. For example, once a Land Claim Agreement is finalized, government takes over the implementation of the claims. The resulting revolving door of bureaucrats and the technocratic nature of these agreements obscures the fundamental partnership. The Boards represent an opportunity for Indigenous Governments to utilize existing expertise to aid in the implementation of Land Claims and in the strategic management of resources. However, the Boards are generally poorly resourced, their

mandates are often diminished to specific parts of the Claims, and they rarely participate in the implementation of Land Claims' objectives.

The Sahtu and Gwich'in Claims define the objects of very clearly and are similar. The Tłı̄chō and Nunavut Claims do not define the objectives as clearly, but their claims have similar discussions. The objectives of the Sahtu claim is outlined below. These simple objectives best serve the overall implementation of the claim and cannot be ignored in any interpretation of resource management in the region.

Moreover, the western legal principles binding the Boards informs and shapes the processes they use to conduct their business. Examples include their quasi-judicial nature, reliance on print/text-based records for evidence, transcription, language that is highly technical, and presentation styles that may be intimidatingly formal for the average person who is not accustomed to these forms of consultation. This structure may leave community members both disconnected from the process and frustrated about their ability to provide input. This frustration is captured in the testimony given by Michael Peryouar, a youth of Baker Lake, during the Kiggavik Uranium Mine hearing of the NIRB. Peryouar stated that:

Our -- our fourth concern is this process. We are very concerned about the Nunavut Impact Review Board process because this setup is not very welcoming to the average person. We think people in the community are not attending because the language is difficult and hard to understand...

“

An integral aspect of this ongoing implementation challenge is the need to understand how to apply Western-style written policy developed from a First Nations-rooted vision of co-governance.”

We started this last week. We were not comfortable with the process, and it was scary to walk into the room, but now that we understand a bit of the process, we can share our concerns with you.^{xvi}

Peryouar’s intimidation and frustration may be a common feeling among community members because the process of conducting hearings is not reflective of Inuit culture, instead it is a modified version of Western quasi-judicial processes redesigned to implement Inuit language and culture. The process itself is imported from Western styles of governance.

Paul Nadasdy, author of *Hunters and Bureaucrats*, describes how the uneven distribution of power is embedded in land claims and co-management frameworks, and that by agreeing to participate in these frameworks: “First Nations peoples are not merely agreeing to engage with government officials in a set of linguistic fields in which they are at a disadvantage. They are also agreeing to abide by a whole set of implicit assumptions about the world, some of which are deeply antithetical to their own”.^{xvii} Nadasdy’s perspective has been critiqued in recent years. In *Keeping the “Co” in the co-management of Northern Resources*, Clark and Joe-Strack argue that while it is easy to criticize current co-management frameworks as ‘neocolonialist’, doing so fails to recognize the agency of Indigenous governments and the progress and commitment made by northerners to improve co-management.^{xviii} The authors add that “when interpreted from a literal Western-style policy stance, the dynamic spirit of partnership and collaboration is commonly lost in the hierarchical delegation of authority and ownership. An integral aspect

of this ongoing implementation challenge is the need to understand how to apply Western-style written policy developed from a First Nations-rooted vision of co-governance.”^{xix} In other words, current approaches to policy development inherently conflict with Indigenous values; a new method of implementation must be developed to better align modern policies with Indigenous co-management parties. Our approach builds on this insight. We recognize the value co-management has offered to communities, but it can be improved.

OPPORTUNITIES TO REFLECT ON AND TRANSFORM CO-MANAGEMENT SYSTEMS

With increasing frequency, many Indigenous nations are undertaking the work of revitalizing their legal orders and codifying their principles. The Indigenous Law Research Unit (ILRU) at the University of Victoria (UVic) is one such institution supporting this work. ILRU works with a nation’s sources of law to draw out and codify their legal principles. Clients have access to a year of free legal services and community members engage in a knowledge exchange focused on researching, applying, and enforcing Indigenous law. While not every nation views codification as the proper forum for communicating their laws, capturing their essence in written form allows them to be asserted in relation to Canadian law. It also transforms them into cognizable existing governance systems, which operate under written law and policy. The value of this exercise is increasingly recognized. These developments provide an opportunity to improve co-management frameworks in the north as envisioned by Clark and Joe-Strack. For example, the policies and procedures used by a co-management board might

assume the style of western policy, but their content can be directed by Indigenous law. Through this process, an Indigenous-rooted vision of co-governance will emerge in a forum that government can engage with.

Fort Nelson First Nation citizen and UVic Law PhD candidate Lana Lowe emphasizes the importance of community-led revitalization initiatives. Lowe describes how other revitalization projects have served as a tool for industry to commence the groundwork for resource development in the area, but also that she believes in the importance of community led legal development work. She distinguishes the other revitalization projects from the work of RELAW, saying “the RELAW Project is different because it is something for us, by us, that is grounded in who we are. We can’t forget who we are as Dene, because this work needs to change and it will change, and either we stay who we are as dene or we forget and I think the RELAW project helps us remember who we are.”^{xx} Lowe’s insights illustrate that process matters just as much as content. It is not enough to support Indigenous law revitalization, the appropriate people must direct the process from the beginning. Communities, as knowledge-keepers of their sources of law, must be at the centre of revitalization efforts. Similarly, Dean Billy from the St’át’imc Nation describes how the RELAW project in his community involved all St’át’imc citizens in a process of identifying legal principles within the nation’s stories to determine how these principles “can and should be used to make decisions.”^{xxi} The process itself encourages community participation. Spencer Greening of the Gitga’at Nation expresses how he hopes the latest resurgence of Indigenous Law will bring on the realization that “the legal world, is bigger than these human-to-human

relationships, that it extends to a relationship, and a responsibility obligation to plants, animals.”^{xxii}

Greater use of Indigenous law in co-management involves initiative and will from both the Crown and Indigenous peoples. Government must be open to transforming protocols to better reflect equitable decision-making. This transformation might involve amendments to legislation, and certainly will involve the ratification of agreements and policies and procedures. Using the tools of western bureaucracy that all parties are now familiar with, northern co-management can evolve to create space for the Indigenous-rooted vision of governance that Clark and Joe-Strack espouse. In addition to these changes, Indigenous groups must engage in an internal process of developing and defining their legal systems in ways that can inform these changes. The more access communities have to their legal traditions, the greater their ability to share and assert their beliefs with their co-management partners. Communities must insist on indigenous laws being built into the foundation of co-management; in turn, government must be willing to listen. To be successful in implementing Indigenous law and cultural norms into co-management processes, Land Claim organizations, the Boards and governments need to be better linked to the implementation of the Land Claim’s objectives or principals that define the relationship of the parties. Additionally, parties need to refocus their efforts to support these objectives and review their interpretation of their respective mandates subject to those objectives. Interpretation of these objectives should be assessed against historical and current cultural practices by the appropriate Indigenous organization when clarity is needed.

1. Fulfilling the objectives of Land Claims through co-management boards and systemic reform through legislative amendments/protocol ratification (**who decides**)
 2. Practice Indigenous culture in Co-management processes (**how decisions are made, how resources are managed**)
 3. Explicitly use Indigenous law in equitable ways (**what is decided**)
-

RECOMMENDATION ONE:

Systemic reform through Legislative Amendment or Protocol Ratification (Who Decides)

PROBLEM

The current regime gives final decision-making authority to the responsible Minister, giving rise to a power imbalance between the Crown and Indigenous governments. Addressing the uneven distribution of decision making authority is vital to building strong co-management systems. This imbalance has led to disputes between Indigenous governments and the Crown. While the courts help to build clarity, litigation impedes both development and implementation, harms relationships, and offers little benefit to any of the parties involved.

CONTEXT

To the extent that final decision-making authority rests with the Minister, the decisions of the Boards are not binding. In other words, Board decisions can be overridden by government. When the decisions of a co-management board are overridden it erodes trust between the Crown and Indigenous governments, relationships fray and the potential for legal conflict rises:

“after seven years of work the Peel Watershed Planning Commission produced a plan in 2011 that was unacceptable to the Yukon government because of the high degree of protection recommended within the watershed. The government’s response was to unilaterally alter the planning process to produce a plan with much less protected land area...That governmental action became the subject of legal action by multiple First Nations and environmental organizations.”^{xxiii}

Examples of similar conflicts can be found across the three territories and Inuit Nunangat. Even where the co-management board has adapted its policies and procedures to better reflect Indigenous knowledge and law, the decision-making process itself must uphold and preserve the ability of these decisions to stand. The ability of a co-management board to manage the issues it is responsible for extends only until the government has a contrary interest. This is why, in conjunction with our other recommendations, structural changes to the decision-making process itself are necessary to ensure co-management decisions made on the basis of Indigenous law are reliably followed.

In the Northwest Territories, unilateral changes to the decision-making structure itself have resulted in legal challenges. Amendments proposed in 2014 as part of the Northwest Territories Devolution Act attempted to restructure the Mackenzie Valley Land and Water Board by creating a “superboard”, amalgamating currently existing boards. The Tłı̨chǫ Government and Sahtu Secretariat Inc sought and obtained an injunction on this change. While the Government of Canada and Government of the Northwest Territories eventually launched consultation processes that informed a revised Bill C-88 in 2018, this process was only initiated after an injunction was granted. Like the Peel Case, legal action was necessary to have the perspective of Indigenous governments be taken seriously within the co-management framework.^{xxiv}

In Nunavut there are two recent examples of federal Ministers setting aside the recommendation of a board after conducting additional directed consultations outside of those envisioned by the Nunavut Agreement: the Minister’s decision¹ to not accept the NIRB’s determination that the Sabina Gold and Silver Corp.’s Back River project not be approved to proceed, instead referring the proposal back to the NIRB for further assessment, and; the Minister’s rejection of the NIRB’s determination that Baffinland Iron Mines Corp.’s Production Increase proposal not be approved to proceed², instead approving the increased production rate subject to terms and conditions. In both cases the responsible federal Ministers expressly relied upon submissions from the Proponent and Regional Inuit Associations provided post-

NIRB assessment, considering information which had not been made available to the NIRB or subjected to an open public discourse and examination. Boards interact with communities on a regular basis during an assessment to understand and address public concerns and have established public consultation and evidence-testing processes enshrined in land claims agreements which inform their decision-making (e.g. public hearings, rules of procedure). In contrast, the directed consultations carried out by ministers’ post-assessment are conducted beyond the public view with the industry proponent and/or other select groups, without clear rules for engagement or testing of the evidence received; this appears in conflict with the co-management approach negotiated through land claims agreements and may undermine both the credibility of the public processes administered by the boards and the final decisions of the responsible Ministers.

OPPORTUNITIES

Recent court rulings, political commitments, and agreements have opened the door for our governments to improve co-management systems through consensus building and moving away from unilateral decision-making. Recent developments include *Canada’s 10 Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*^{xxv}, which formalized a shift in the Government of Canada’s approach.

While they don’t touch directly on co-management, *the Principles* lay the foundation for a redefined relationship between Crown

1 January 12, 2017 Letter from the Honourable Carolyn Bennett to Elizabeth Copland, Chairperson of the Nunavut Impact Review Board Re NIRB File 12MN053

2 September 20, 2018 Letter from the Honourable Dominic LeBlanc and the Honourable Carolyn Bennett to Elizabeth Copland, Chairperson of the Nunavut Impact Review Board Re NIRB File 08MN053

and Indigenous governments. For example, Principal 1 calls for the federal government to base its relationship with Indigenous peoples in “recognition and implementation of their right to self-determination, including the inherent right of self-government”. Without the acceptance and support for Indigenous self-determination, co-management relations will continue to replicate uneven power relations. Thus, Principal 1 may have a great deal of implementation potential within co-management contexts. Other new developments include:

- ▶ The Clyde River Protocol was an agreement attempting the govern relations between the GN and NTI. The agreement sought to foster a working relationship in which the GN and NTI identify shared priorities based on mutual recognition and respect. Decisions were to be made with transparency, cooperatively and constructively, with the view of securing public input and participation. The protocol is valuable for thinking about how, in spite of forming legal relationships and responsibilities, parties might agree to conduct themselves in the spirit of partnership and collaboration. Reiterations of this protocol are the Iqqaanaijaqatigiit from 2004, and the Aajiiqatigiingniq from 2011.
- ▶ The most recent example between the Government of Nunavut and Nunavut Tunngavik Incorporated is the Katujjiqatigiingniq Protocol^{xxvi} where both parties agree to collaborate on priorities through bilateral and trilateral mechanisms, make practical commitments to work together on leadership, oversight and administration, and to fully implement Article 32: Nunavut Social Development Council by developing a policy for

the GN to fulfill these obligations and to develop an Information Sharing Agreement.

- ▶ The Haida Gwaii Management Council (HGMC, the Council) forms part of a framework established under the Kunst’aayah Reconciliation Protocol, a decision-making agreement to encourage more collaborative relationships between the Haida Nation and the province of BC. The HGMC has the authority to make joint determinations with the province. The framework covers land use planning, allowable cut, approval of management plans for protected areas, and developing policies and procedures for conserving heritage areas. The parties operate under their respective authorities and jurisdictions, signaling shared space in which Indigenous law can inform the decision-making process. Specifically, Schedule B of the protocol outlines the decision-making framework for the Council. Decisions of the HGMC are arrived at by consensus. Should a decision not be reached by consensus, it is decided by a vote of the Council. Dispute resolution mechanisms are available where agreement is not possible.
- ▶ Discussion in the North, British Columbia, and elsewhere is now moving beyond co-management to “co-governance” of resources, in which the latter term denotes a sharing of both authority and control, as opposed to simply shared technical duties.^{xxvii} Perhaps this trend stems from growing recognition that even at its fullest expression, co-management is still only a part of what’s required to realize the vision of self-determination that land claim agreements were intended to move society towards. A vital part,

to be sure, but co-management can apparently function in the absence of co-governance,^{xxviii} so disentangling these concepts will become increasingly important. Perhaps too, in the heady early days of land claim implementation, co-management was burdened with unrealistic expectations that accumulated experience is only now making clear. It's possible that such expectations, when unmet, could be contributing to diminished enthusiasm for the term – if not the actual principles and practices of – co-management. Researchers, especially, should reflect on what role we may have had in miscalibrating expectations about co-management, both in the North and outside of it.^{xxix}

Alternative mechanisms can both streamline processes and result in more productive partnerships. A useful partnership example in a non-co-management context that resulted in an out-of-court settlement is the Makigiaqta Inuit Training Corporation (MITC). MITC is responsible for using and distributing \$175 million to enhance training and employment for Nunavut Inuit.^{xxx} The corporation was created through a partnership between Nunavut Tunngavik Incorporated, the Government of Nunavut, and the Government of Canada in 2015. The mechanism by which to distribute funds targeted for Inuit through a shared mandate and a unified strategic plan, allows the partners to focus on funding actions rather than putting time and funds to court disputes.

ANALYSIS

How do we respond to those who say alternative approaches are too difficult? We say 'it's worth it' because there are:

- ▶ Fewer disputes;
- ▶ Clearly defined roles and responsibilities;
- ▶ Stronger, and more sustainable outcomes;
- ▶ Less resistance and more applications for resource development;
- ▶ And it's been done successfully already.

RECOMMENDATION TWO:

Cultural Transformation (How Decisions are Made, How Resources are Managed)

PROBLEM

Co-management boards often don't reflect the culture in which Indigenous legal spaces operate. For Indigenous laws to retain their proper context, they must be understood through their appropriate cultural lens. When Indigenous law is separated from culture, it becomes less intelligible. Misunderstanding and misinterpretation are real dangers in co-management boards where Indigenous knowledge becomes subsumed within the culture of western bureaucracy. Efforts to introduce Indigenous culture elements into the practices and procedures of a co-management boards will establish the proper cultural foundation for Indigenous law to operate.

CONTEXT

As John Borrows reminds us, law is a cultural phenomenon.^{xxxix} He writes, "a Eurocentric approach to legal interpretation must not be allowed to undermine Indigenous legal traditions."^{xxxix} Additionally, "messages 'are a part of culture'...they are expressed in the language of a culture and conceived, as well

as understood, in the substantive terms of a culture."^{xxxiii} Taking culture into account is therefore necessary to properly communicate the substance and form of Indigenous law. Indeed, "to be properly understood, they must be viewed through the lens of the culture that recorded them."^{xxxiv}

This is true within co-management boards. As Nadasdy writes, Indigenous peoples have been required to adopt "Euro-Canadian political institutions" "[...]co-management, and other elements of the new relationship between First Nations peoples and the state simply would not be possible without the bureaucratization of First Nations societies."^{xxxv} Co-management, in terms of its structural foundations, is premised on western bureaucratic methods. To effectively introduce elements of Indigenous law into decision-making, then, requires introducing Indigenous cultural elements into co-management structures. Co-management procedures must account for cultural difference in order to seriously engage with and respect Indigenous ways of knowing.

How a co-management board makes a decision, whether meetings begin with ceremony, whether those who are making the decisions are familiar with the land and water subject to these decisions --all of these features, to the extent that they can access the cultural practices of the Indigenous group, will provide the appropriate cultural lens through which the Indigenous legal principles can be understood. Where co-management simply clones western bureaucracy, a cultural environmental is established that removes Indigenous law from its proper context.³

³ Supporting research:

"First Nations peoples have also had to completely restructure their societies by developing their own bureaucratic infrastructures modelled on and linked to those of the governments with which they must deal. This reorganization has included the adoption of Euro-Ca-

OPPORTUNITIES

We identify two ways in which culture can become embedded in co-management practices. The first is by incorporating cultural elements into the decision-making processes of co-management boards. This process would include opening meetings with ceremony, incorporating consensus-building and deliberation into meeting protocols, emphasizing relationship-building and trust as a precondition for co-management, as well as other relevant practices. The second way is to allow cultural management practices to express themselves in the actual management of the resources. Adaptive management practices are a good example. Adaptive co-management allows local community-based organizations to integrate traditional knowledge in a “learn-by-doing” manner. Rather than western bureaucracy and scientific methods of management, co-management is directed by local communities. Trust is built by applying it practically on the ground. Here are some positive examples:

SUPPORTING RESEARCH⁴

- ▶ In Nunavut, while caribou protection is overseen by the GN, they work collaboratively with communities, Inuit organizations, and industry to monitor and manage caribou populations. For example, Agnico-Eagle’s Caribou Management Plan for the Whale Tail Pit Project reflects the adaptive management approach by using the Terrestrial Advisory Group [TAG] to develop thresholds and share data around observations and impacts to caribou from the project. Organizations such as the Baker Lake Hunters and Trappers Organization are involved both in monitoring by having HTO monitors in the project area to conduct observations, as well as play an advisory role on the TAG, as a means to address local concerns and integrate the use of traditional knowledge in the co-management of caribou specifically related to the project.⁵

nadian political institutions and the creation of a bureaucratic infrastructure – both of which were prerequisites for sitting down at the table across from government wildlife managers and land claims negotiators. Indeed, land claims negotiations, co-management, and other elements of the new relationship between First Nations peoples and the state simply would not be possible without the bureaucratization of First Nations societies. This bureaucratization must be recognized for what it is: an essential aspect of the new structure of Aboriginal-state relations in Canada (Nadasdy, *Hunters and Bureaucrats*, p. 2).

As a result, in many ways First Nations of offices across Canada now resemble miniature versions of federal and provincial/territorial bureaucracies. They are staffed by wildlife officers, lands coordinators, heritage officers, and a host of other First Nations employees who deal regularly with their bureaucratic counterparts in federal and provincial (or territorial) offices. This bureaucratization of First Nations societies has had a number of far-reaching effects. Most significantly, many First Nations people now have to spend their days in the office using computers, telephones, and all the trappings of contemporary bureaucracy. This necessarily takes them off the land and prevents them from engaging in many of the activities that they continue to see as vital to their way of life. Day in and day out, they have to think, talk, and act in ways that are often incompatible with (and even serve to undermine) the very beliefs and practices that this new government-to-government relationship is supposed to be safeguarding (Nadasdy, *Hunters and Bureaucrats*, pp. 2-3).

Yukon’s Umbrella Final Agreement (UFA) may seek ‘to recognize and promote the cultural values’ and the ‘knowledge and experience’ of Indigenous Peoples in co-management processes, however, these process are implemented within a political context where western values and knowledge hold a dominant position (Section 11.1.1.3-4, UFA, p. 93, Retrieved from <https://cyfn.ca/wp-content/uploads/2013/08/umbrella-final-agreement.pdf>).

4 Article by Allan Kristofferson and Fikret Berkes, Chapter 12 in *Breaking Ice*, “Adaptive Co-Management of Arctic Char in Nunavut Territory”. “Adaptive co-management systems are flexible community-based systems of resource management, tailored to specific places and situations, and supported by, and working with, various organizations at different levels” (250). “institutional arrangements and ecological knowledge are tested and revised in a dynamic, ongoing, self-organized process of learning by doing” (250). Lots of opportunities for cultural integration here. Focus of this study is on the arctic char fishery in the Cambridge Bay area. A “rediscovery of traditional systems of knowledge and management”. Co-management requires a level of trust, building relationships and cross-cultural understanding is an important aspect.

5 NIRB 2019 Reconsideration report and Recommendations for the Whale Tail Pit Expansion Project Proposal from Agnico Eagle Mines Limited discusses the TAG and amendments to caribou management plans, can be viewed here: https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=327165&applicationid=125418&sessionid=33u853ihndkve9la1u2j88bbq1

- ▶ In Nunavut, the Government of Nunavut and some Institutions of Public Government obligate cultural training of employees, and provide Inuit Qaujimajatuqangit Days whereby employees are encouraged to participate in Inuit cultural activities either on the land or in the community learning about and practicing Inuit culture as a means to reinforce the significance of IQ in their practices and to educate anyone working with Inuit about Inuit language and culture. Activities on IQ days often include going on land trips to harvest, sewing, making traditional tools, and learning about Inuit history from Inuit. These activities demonstrate IQ in everyday life, in Inuit history, and provide an opportunity for people to carry lessons from IQ into their professional practice and also develop a better understanding of how IQ can be applied in public service in more meaningful ways. This process of enculturation through IQ days allows public servants to actively work towards transforming systems of Eurocentric processes to processes grounded in Inuit values, principles, and ways of being.
- ▶ The Yukon Forum is a quarterly meeting between the leaders of Yukon First Nations, the Council of Yukon First Nations and the Government of Yukon. The Forum was originally established in 2005 under the Cooperation in Governance Act of Yukon^{xxxvi}, however, it seldom met. In 2017, the Yukon Forum was revitalized when the Parties of the Yukon Forum signed a declaration committing them to meet four times a year to find solutions for shared priorities. As part of this revitalization, Council of Yukon First Nations Grand Chief, Peter Johnson, gifted a potlatch bowl to the Yukon Forum.^{xxxvii} Carved by Ken Anderson, the bowl is a symbol of the new relationship that being built between the First Nations and the Yukon Government through the Forum. In Yukon First Nations Culture, the potlatch is an important is a way of bringing people together. At every Forum, the bowl sits at the front of the room, atop a beaver pelt, in between the Primer and the Grand Chief. The bowl has helped to create a sense of tradition around the Yukon Forum, as it is often expressed that the bowls presence is what make the meetings official. The bowl carries a message of honor and respect for one and another, which it imprinted into the operation of the Forum.⁶

⁶ How do we respond to those who ask who this responsibility will fall to? We say: crown government can't dictate what cultural process is but they have a role in making space for it. It is everyone's responsibility to uphold it. Everyone has a role to play.



Premier Sandy Silver and Grand Chief Peter Johnston, as well as Yukon government Cabinet and First Nations Chiefs, met at the fourth annual Yukon Forum in Whitehorse.



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Group Reception

RECOMMENDATION THREE:

Explicit Reliance on Indigenous Law in Decision-Making (What is Decided)

PROBLEM

Current approaches to Indigenous Knowledge incorporation often misrepresent, tokenize, minimize, dismiss, or detach Indigenous legal principles from their original context in co-management practice.

CONTEXT

Where co-management boards operate under policies and procedures grounded in Canadian law and administrative practices, space for Indigenous law to influence decision-making is minimal.

The problem manifests in different ways, some of which are more easily detectable than others. The most obvious is when the basis for making a decision relies on non-Indigenous forms of evaluation or political considerations. Sometimes, however, a decision purports to follow Indigenous knowledge or law, but in effect has only given token consideration to these knowledge systems without relying on them in any serious way. This also limits the ability of Indigenous law to find expression in co-management. Most difficult to identify is when a decision appears to follow Indigenous law, but has decontextualized the substance of that law to such a degree as to change its meaning or intent. The latter is an example of a good-faith effort to incorporate Indigenous law but one that must be guarded against. We must also guard against pan-Indigenous application of law; the depth, nuance and complexity of specific Indigenous legal traditions is too great. Wherever Indigenous law relied on, it must draw from the particular traditions of the relevant Indigenous group.⁷

7 Supporting research:

“Ultimately, it should be expected that administrative boards constituted pursuant to treaties and expressly tasked with consideration of Aboriginal perspectives on resource management may produce rules, decisions, and interpretations that can be differentiated from other regimes. Seen in this light, the provisions of the MVRMA that allow for participation also permit participation to impact its interpretation. Judicial review of a board's decisions without consideration of unique perspectives contradicts the essence of the MVRMA as a legislative attempt to institutionalize such perspectives through participation. That is, while harmonization and differentiation are both very much a part of the MVRMA, they must both account for the incorporation of Aboriginal perspectives in order to be just. Within this suggested approach, limiting the impact of Aboriginal perspectives without recognizing it as such is problematic”. (Sari Graben, living in perfect harmony, page 23).

“Going forward, co-management research should draw more from Indigenous research methodology (e.g., Chilisa, 2013). As LaVeaux and Christopher (2009) point out, an Indigenous research approach differs from community-based, participatory research in a number of ways. Their recommendations for indigenizing research practice are of particular relevance to Northern co-management. These recommendations focus even more on Indigenous sovereignty, overcoming the negative history of research on Indigenous Peoples by stressing attentiveness to the specific history and cultural context of the communities involved, and the utilization of Indigenous ways of knowing. Such an approach would enrich co-management research by grounding it in practitioners' perspectives; it would also create space for reciprocal acts of giving back so that research tangibly enhances co-management practices, policies, and outcomes for those most affected by it (Wilson, 2008). Comparative studies are ambitious but still necessary, and would need to be both long-term and sufficiently resourced to meet Northerners' contemporary and future expectations of research practice, which keep evolving (Korsmo & Graham, 2002; Grimwood et al., 2012; Wolfe et al., 2011) (keeping to co in co-management in the north, jocelyn joe-strack and douglas clark).”

1999 Arctic Bay, Nunavut co-management of narwhals. Experimental program between Nunavut Wildlife Management Board and Department of Fisheries and Oceans Canada. In order to participate, local Hunters' and Trappers Organizations (HTOs) had to develop by-laws to regulate the hunting of narwhals. Knowledge is a precondition for learning through change, yet in many co-management processes the drive to “integrate” indigenous and western science knowledge has simplified the complexity of the knowledge-learning connection. Historically unequal power arrangements disadvantage indigenous knowledge holders. Institutional practices often require their knowledge to fit within a scientific management system even though the knowledge of indigenous people can be fundamentally different from that held by scientists (i.e., oral vs. written, compartmentalized vs. holistic). A fuller account of the role of knowledge in narwhal co-management (see Dale and Armitage, 2011) reveals the complexity of the issue and illustrates how knowledge practices within co-management management institutions are one of the critical mechanisms or processes that enable or constrain opportunities for learning (Derek Armitage et al, “Co-management and Co-production of Knowledge: Learning to Adapt in Canada's Arctic”, *Global Environmental Change* (2011) 995 - 1004 at 998).

OPPORTUNITIES

Enough scholarship and real-world experience has developed around this issue to yield positive examples from which we can learn. Often the problem can be traced to the process through which Indigenous law is incorporated. The structure of co-management might enable Indigenous law to come in, but how things are done is just as important as the willingness to draw from Indigenous law itself. Where co-management boards have implemented good-faith efforts to incorporate Indigenous law into decision-making, there is an opportunity to critically examine the process used by these boards to ensure Indigenous law is being used appropriately in context. When co-management boards allow decolonized methodologies to guide the development of their decision-making protocols and administrative practices, Indigenous law is more authentically present in their operations.

SUPPORTING RESEARCH

- ▶ **Indigenous Administrative Law**
- ▶ **The Qikiqtani Inuit Association's (2018) report on Qikiqtaaluk Inuit Qaujimajatuqangit and Inuit Qaujimajangit Iliqqusingitigut for the Baffin Bay and Davis Strait Marine Environment**
- ▶ **The Kugluktuk Hunters and Trappers Organization, in collaboration with federal agencies and Sabina Gold and Silver Corporation, use the Fisheries Offsetting Plan from the Sabina Gold and Silver Project to restore Bernard Harbour, where Inuit would traditionally harvest Arctic Char.^{xxxviii} This location was chosen by the community because of its historical significance as well as the observed deterioration of the site for traditional fish harvesting. The selection of the site and**

purpose for restoring it are Inuit led. Inuit, using their traditional knowledge and experience, strategically decided how to manage their environmental resources and meet community needs.

- ▶ **Nunavut Wildlife Management Board**
- ▶ **Bluenose Caribou Management in the NWT; "We don't know what the future will hold at this time because what was natural laws before, it kind of has to be mitigated by human nature.- John B. Zoe, senior advisor, Tlicho government."⁸**

While co-management boards currently function within the limitations of Canadian quasi-judicial practices, they can find ways to make their processes more reflective of Indigenous laws and principles. For example: within the NIRB rules of procedure, when considering evidence from Inuit traditional knowledge, "The Board shall give due regard to Inuit traditional knowledge in all of its proceedings. The Board may, in an oral hearing, receive oral evidence from Elders, and shall give them the opportunity to speak at the beginning of a hearing, during a hearing, or at the conclusion of a hearing."^{xxxix}

Additionally, elders and Inuit traditional knowledge holders are considered experts of Inuit traditional knowledge who are not required to substantiate their expertise through the use of resumes. The knowledge Inuit share through the NIRB process is not subject to typical Western forms of cross-examination and fact checking. This is more in line with Inuit culture because as Kublu, Laugrand, and Oosten (1999) state "Elders have always been held in high respect in Inuit society... each elder had his own knowledge and experience and was prepared to acknowledge the value of different opinions and experiences related by others."^{xi}

8 <https://www.cbc.ca/news/canada/north/bluenose-east-caribou-plan-1.5093340>



ANALYSIS

HOW DO WE RESPOND TO THOSE WHO ASK HOW PROCESS WILL DEMONSTRATE FAIR AND EXPLICIT USE OF INDIGENOUS KNOWLEDGE?

Beginning with established Western bureaucratic policies and procedures and then looking to Indigenous law as a source of knowledge (add Indigenous law and stir) is unlikely to produce contextually appropriate use of Indigenous legal principles. Rather policies and procedures must be built from Indigenous-led methodologies of knowledge gathering (use Indigenous law as the foundation for distilling policy instruments). This inverts the process. The final product can still be expressed in terms of written policy, but the process through which the knowledge is derived and ultimately applied allows the legal principles to retain their context.

We can learn from the examples of the UVic Indigenous Law Research Unit's methodology for codifying Indigenous law as well as Linda Tuhiwai Smith's *Decolonizing Methodologies: Research and Indigenous Peoples*.^{1,2}

- ▶ **Step 1:** discover the research question you are trying to answer. Example: how does this Indigenous group respond to harm within the group?
- ▶ **Step 2:** bring the research question to the stories. Example: identify and articulate the legal principle within the story. In law ILRU retells these stories by using the “common law case brief method” to create a body of legal principles using stories expressing Indigenous law. Format is - name of story - issue/problem (what is the main human problem deal with in the story) - what are the facts of the story - decision/resolution (what is decided to solve the problem?) - reason/ratio (what is the reason behind the decision?) - bracket (what do you need to “bracket” or put to the side within the story for yourself?).
- ▶ **Step 3:** Create a framework or legal theory from the collection of stories
- ▶ **Step 4:** Implementation, application, critical evaluation

¹ ILRU's methodology: Hadley Friedland & Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015) 1:1 *Lakehead Law Journal* 17.

² *Decolonizing Methodologies*, Linda Smith – theory. Just talking about Indigenous methodologies is not enough. They must be “done”, or put into action. Learn, think, listen and work in ways that are “centered” in the community. Privileging of localized, community ways to know is crucial. Protocols of “how to be” in the community are particularly relevant and useful. The research & knowledge-gathering itself is inherently political.

How do we respond to those who ask how you protect Indigenous Knowledge and Knowledge Holders in bureaucratic systems?

During the NIRB strategic environmental assessment for Baffin Bay and Davis Strait, the Qikiqtani Inuit Association (QIA) made considerable efforts to structure participation and influence the process itself to be more reflective of Inuit culture. During the assessment, they conducted community tours throughout the Qikiqtani region to talk about the study area. Those consultation activities resulted in the QIA collecting and learning localized Inuit Qaujimajatuqangit about the study area and led to the development of two reports: Qikiqtaaluk Inuit Qaujimajatuqangit and Inuit Qaujimajangit Iliqqusingitigut for the Baffin Bay and Davis Strait Marine Environment and Evaluating the Role of Marine Harvesting in Food Security in the Eastern Arctic. This ground-up approach of developing these reports by starting with what is known, what has been done, and how the environment is currently used is a ground-up approach, they started with specifics and worked towards creating general recommendations that could be supported by the formal assessment process and ultimately used by government decision makers. The QIA reports included community-specific seasonal marine calendars for marine mammals and sea conditions, documenting in a very visual manner Inuit knowledge relevant to the assessment. One of the lessons learned through this process is that many of the gaps in Western science, particularly for an area as chronically under-researched as the Arctic, can be addressed by Inuit knowledge in very pragmatic applications.



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CONCLUSION

Co-management practices in the north began by bridging relationships through land claims, sharing resources by distributing parcels of land, and distributing duties to manage the environment collectively. This leaves a system where there are segments of responsibility between the federal government, territorial governments, and Indigenous organizations. A segmented system can leave things fragmented and make gaps in responsibilities more visible. These gaps are often filled by co-management boards as a way to unify and streamline the management of resources. Now that these co-management boards have been in operation for several decades and as territories are working on devolution, we believe that it is an important time to reflect and learn from historical approaches.

Historically, the co-management processes improved their involvement of Indigenous people by doing consultation in directly affected communities, using Indigenous languages through interpretation, beginning to use traditional place names, making space for Indigenous knowledge, and allowing their processes to incorporate Indigenous values. However, the final authority in the process is still centralized to a government body nowhere near these affected communities, led by people who have not lived and do not live, nor represent people from affected communities. To that end, the system is still colonial.

If the end goal is for Indigenous people to reclaim sovereignty over their homelands and the resources within them, the systems

to manage them still need to be transformed. The power over resources needs to be more equitable, and this is where the authority to decide between the federal ministers and Indigenous bodies has to become lateral, leaving them to decide through consensus. Secondly, within these systems, many people work on interpreting information and placing value on what is worth knowing and using to inform decisions. If the people working in these processes are to understand and value knowledge and resources as Indigenous people do, they need to be immersed into Indigenous culture as a way to understand those positions and perspectives. This can be done, and has been done by doing cultural immersion. People working with Indigenous communities should continue to be obligated to learn Indigenous culture so that they may build their experience with the world from an Indigenous lens. By doing so, they can internalize similar values and carry out their work upholding the same values and goals that Indigenous people hold. Lastly, there is a growing body of knowledge from Indigenous people around how to conduct business within Indigenous frameworks, this needs to be done within co-management systems.

We aim to provide critical recommendations that work towards a more equitable relationship within co-management regimes by promoting the use of Indigenous culture, because it is within the culture that the Indigenous principles and laws are maintained. By implementing these recommendations,

co-management between the federal government and Indigenous peoples moves towards the reconciliation between nations by more fully recognizing the right for Indigenous peoples to both govern themselves and manage the resources within their homelands. It is imperative for co-management models to begin to take these transformative steps towards realizing Indigenous laws and principles within their frameworks so that they may continue towards fulfilling the spirit and intent of land claim agreements with Indigenous peoples in Canada.

As Indigenous people and the federal government develop and implement devolution agreements, these recommendations can be considered as initial insights into how new ways of governing and co-managing may take place where Indigenous law is used in meaningful and legitimate ways.

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