THE LIVING NATURE OF A MODERN TREATY:

Preparing for the Maa-nulth Treaty's First Periodic Review

Onyx (Vanessa) Sloan Morgan, ReAnne Kennedy, Heather Castleden, and Huu-ay-aht First Nations

> [Maa-nulth Treaty Nations] struggled with both federal and provincial negotiations for some time to get them to understand that our [Maa-nulth] perspective of what a treaty is totally differs from theirs. (Gary Yabsley, former lead Maa-nulth Treaty Society negotiator, interview, June 2021)

In 2011, the Maa-nulth Treaty came into effect, replacing the Indian Act with the Maa-nulth Final Agreement: a 320-page legal document that took over twenty years to negotiate. The five Maa-nulth Nations – Huu-ay-aht First Nations, Ka:'yu:'k't'h'/ Chek'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe, and Yuułu?iɬ?ath First Nation – moved out from under the Indian Act and implemented their own constitutions that outline self-governance by breathing life into the dense legalese of the treaty through the expression of Nuu-chah-nulth principles as recognized by common law (Calabretta 2017).[1] The treaty outlined a new relationship between the provincial British Columbian, federal Canadian, and Maa-nulth governments. Tucked in the first section of the treaty is section 1.13.1, the "periodic review."

[1] Toquaht legal scholar Johnny Mack (2009) points to the asymmetrical nature of modern treaty negotiations. In regard to the negotiation of the Maa-nulth Treaty, Mack highlights how Nuu-chah-nulth legal principles could only be permitted in these agreements if they were recognizable to a narrow, colonial understanding of what constitutes decision-making and self-governance. Observations shared by Mack have been echoed through various critiques of the colonial politics of recognition (e.g., Coulthard 2014). Our use of language here, such as "recognizable," intends to acknowledge these critiques and concerns while, at the same time, investigating the implementation of modern treaties.

Here is enacted the "Living Tree" doctrine – a foundational legal principle that directs and sets precedent for colonial common law in Canada. Specifically, the Maa-nulth Treaty states: "The Parties recognize and acknowledge that this Agreement provides a foundation for an ongoing relationship among the Parties and commit to conducting a periodic review of this Agreement in accordance with 1.13.2 through 1.13.8" (Maa-nulth First Nations 2007, section 1.13.1). The emergence of the periodic review in the Maa-nulth Treaty was among the first of its kind in British Columbia.[2] The former chief negotiator for Maa-nulth reflected:

> Around 2004–2005, I was talking to [the late chief negotiator for Maa-nulth Nations] George Watts, and we said, "We need some acknowledgment of [the living nature of treaties], even if they say in the preamble to the treaty that 'this is not a release, cede, and surrender instrument, it's a modification to existing Aboriginal rights.'" We need more to make it clear that this is a living instrument, that this is something that grows a society, grows and changes when society changes. (Gary Yabsley, interview, June 2021)

From summer 2021 to winter 2022, Sloan Morgan conducted twenty-five videoconference interviews with Maa-nulth Treaty implementation team members from the Maa-nulth Treaty Society, the federal and provincial governments, and the Alliance of British Columbia Modern Treaty Nations.[3] Our interviews focused on implementation, with a specific focus on preparing for the periodic review.[4] The impetus for these interviews came from a long-standing research partnership between Castleden, Sloan Morgan, and Huu-ay-aht First Nations that

[2] In 2009, the Tsawwassen First Nations treaty came into effect. The first treaty negotiated through the British Columbia Treaty Commission's six stages of negotiation, the Tsawwassen agreement was the first in British Columbia to include explicit language and provisions regarding a periodic review (see Tsawwassen Final Agreement 2007, 202–3). The Maa-nulth Treaty came into effect two years later (2011) with periodic review language similar to Tsawwassen's, yet adapted according to Maa-nulth negotiations.

[3] In July 2018, seven modern treaty Nations in what is now known as British Columbia formed the Alliance of BC Modern Treaty Nations (the Alliance) and signed a Memorandum of Cooperation to bring a unified voice forward to address BC-specific issues with modern treaty implementation (Alliance of BC Modern Treaty Nations 2018). These seven Nations are the Maa-nulth Treaty Nations of Huu-ay-aht, Ka:'yu:'k't'h'/ Chek'tles7et'h', Toquaht, Uchucklesaht, and Yuułu?ił?ath First Nations, whose treaty was implemented in 2011; Tla'amin Nation, whose treaty was implemented in 2018; and Tsawwassen First Nations, whose treaty was implemented in 2009. In November 2018, Nisga'a Nation, whose treaty was implemented in 1999, also joined the Alliance (Wesley et al. 2019, 58–59).

[4] During the informed consent process, participants expressed whether they wished to be identified and to review their quotes in context. This being the case, some participants are identified and others are not per their explicit requests. Additionally, quotes used here have been reviewed by participants for accuracy.

has been exploring the negotiation and now the implementation of the Maa-nulth Treaty. When defining research priorities in 2019, the Huu-ay-aht First Nations Executive Council, the ḥaw'iiḥ Council, the Peoples' Assembly, and the Research Advisory Committee reaffirmed the importance of exploring the relationships Huu-ay-aht First Nations has with treaty partners and how these relationships can be improved. This priority was due both to the spirit of the ever-evolving "new relationship" under treaty (Government of British Columbia and the Leadership Council Representing the First Nations of British Columbia 2005; Sloan Morgan, Castleden, and Huu-ay-aht First Nations 2018) and to the fast-approaching first periodic review scheduled for 2026.[5] The priority to look at government-to-government relations under a modern treaty also aligns with filling a significant gap in the literature:

> Virtually nothing has been written on the dynamics of modern treaty implementation, which involves federal, provincial/territorial, and Indigenous actors working to put into practice constitutionally-protected provisions relating to the management and governance of Indigenous lands and peoples. (Alcantara 2017, 328)

We begin with outlining the language of living treaties, contextualizing this concept within the modification of rights and title alongside previous "release," "cede," and "surrender" language prevalent in historic treaties, and the living nature of Canada's Constitution (Borrows 2012; Borrows 2017). We then share findings from our thematic analysis of the interviews before discussing these in relation to the current socio-political and legal context in British Columbia. Our aim is to contribute to the scarce research on community perspectives regarding modern treaty implementation in Canada (3ci CU 2022; Irlbacher-Fox, Abele, and Simpson 2019; Nadasdy 2012; Nadasdy 2017) and even scarcer research on implementing modern treaties in British Columbia (exceptions include Blackburn 2021; Huu-ay-aht First Nations et al. 2019; Sloan Morgan, Castleden, and Huu-ay-aht First Nations 2019; Wesley et al. 2019). Above all, this article highlights the living nature of treaties and how relationships between First Nations, federal, and provincial governments change. To echo one Maa-nulth negotiator: "this is a living instrument, … this is something that grows a society, grows and changes when society changes."

[5] The periodic review is scheduled to occur every fifteen years. Participants who were interviewed, however, expressed that this review could happen when signatories found it necessary.

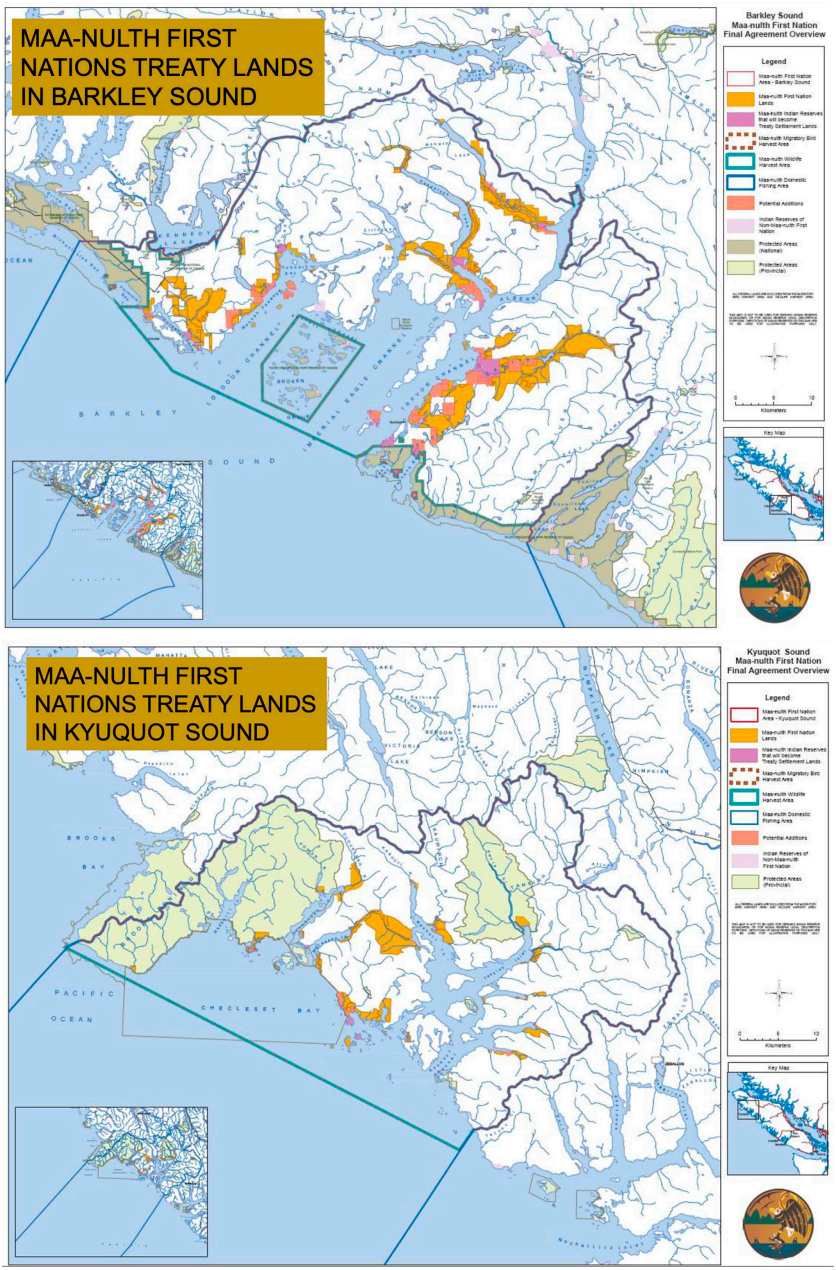

Figure 1. Huu-ay-aht First Nations, Toquaht Nation, Uchucklesaht Tribe, and Yuułu?iłʔath First Nations treaty lands (*top*); Ka:'yu:'k't'h'/ Chek'tles7et'h' First Nations treaty lands (*bottom*) (Maa-nulth First Nations 2008). For detailed maps of Maa-nulth First Nations treaty lands, see Maa-nulth First Nations, Government of British Columbia, and Government of Canada 2009.

FROM RELEASE, CEDE, AND SURRENDER TO RECOGNITION AND RECONCILIATION OF RIGHTS

Modern treaties, also referred to as comprehensive land claims, are one way that the unsettled "Land Question" is addressed across Canada (3ci CU 2022; Blackburn 2021). One federal representative of implementation in British Columbia described modern treaties as having "two primary portions: establishing or recognizing a self-governing First Nation or Indigenous partner as a government in Canada and … settling the comprehensive land claim" (interview, November 2021). By addressing self-governance and land claims, the federal and BC provincial governments have called treaties "the preferred methods of achieving the reconciliation of Crown title and the inherent titles of Participating Indigenous Nations, and the reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty" (Government of Canada 2019, "Principles," section 18). Modern treaties seek to address a lack of historic treaties while also moving Nations away from confining aspects of the Indian Act. A discourse of "certainty" has long permeated these agreements (Pasternak and Dafnos 2018). Through establishing certainty (e.g., "Certainty" in section 1.11.0, Maa-nulth First Nations 2007), federal, territorial, and provincial governments seek to clarify how rights to land can be enacted and by whom. This tactic is key to reducing perceived risk by investors seeking to capitalize on Indigenous lands through (but not limited to) resource extraction, thereby opening Indigenous territories to broader economic initiatives (Pasternak and Dafnos 2018). For First Nations in British Columbia, modern treaties recognize self-governance, "modify" existing Aboriginal Rights, and transform portions of traditional territory into fee simple forms of property (Blomley 2014). One research participant commented on the role of fee simple and modification of rights, highlighting that "one of the important stigma elements around the existing treaty process is this notion the land is only being returned to the Nation in fee simple, not as some kind of title" (Tom McCarthy, chief negotiator for British Columbia's Triple R policy, interview, August 2021).

Modern treaties, while being heralded by some as a "preferred method of achieving reconciliation" (Government of Canada 2019), have been scrutinized by others for entrenching colonial legal principles into First Nations governments by way of requiring a democratically recognizable form of government (Mack 2009). Formerly, Indigenous Title had to be extinguished for comprehensive land claims to be implemented, but shifts

have occurred in this legal requirement.[6] Up until 2019, modern treaties depended on Indigenous Nations "modifying" Aboriginal Rights and Title (see Maa-nulth First Nations 2007, sections 1.11.2–1.11.5).[7] Research participants spoke to the history of modifying rights, observing that

> this whole notion of what happens to your Aboriginal Rights after you sign a treaty and, you know, the treaties are not extinguishment, they haven't been for years, that kind of stigma persists. Treaties, I would say are maybe best described right now as a kind of a modification approach, where the Nation agrees those Aboriginal Rights are modified into a Treaty Right, and may only be exercised consistent with that Treaty Right … consistent with the way they're described in the treaty. (Tom McCarthy, interview, August 2021)

For decades, commissions, reviews, and reports of the comprehensive land claims process in Canada contested previous requirements to extinguish and, to a lesser extent, modify Aboriginal Rights and Title. For instance, in 2015, Eyford's report, *A New Direction: Advancing Aboriginal and Treaty Rights*, which was commissioned by Indigenous and Northern Affairs Canada, found that

> previous reviews of the comprehensive land claims policy, including the Coolican, Hamilton, and Royal Commission Reports, have emphasized the importance of negotiations being grounded in the recognition of pre-existing Aboriginal rights and not their surrender or extinguishment. (Eyford 2015, 45)

The Maa-nulth Treaty's periodic review extends, in part, from concerns that reflect release, cede, and surrender language used in historic treaties,

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[6] Modern treaties encompassing First Nations territories across British Columbia do not include "extinguishment" language. Comprehensive land claims across Canada, however, do include explicit language on extinguishment. For instance, the James Bay and Northern Quebec Native Claims Settlement Act (1976–77, section 3), the first comprehensive land claim agreed upon in Canada, proclaims: "Extinguishment of claims: All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as to those resulting from the Indian Act, where applicable, and from other legislation applicable to them from time to time."
In 2008, the British Columbia Treaty Commission released the *Common Table Report* (British Columbia Treaty Commission 2008), and representatives from sixty First Nations across the province highlighted six overarching concerns inherent in the treaty process, with "Recognition/certainty, including overlapping claims/shared territories" being one such concern. As one of our anonymous reviewers helpfully pointed out, changes to the modern treaty process are in part a response to these larger concerns, albeit occurring in a drawn-out fashion.

[7] For a discussion of modification and certainty in the Maa-nulth Treaty, see Sloan Morgan, Castleden, and Huu-ay-aht First Nations (2019).

plus the recognition that Indigenous and Crown relations change. In 1985, the Coolican Report suggested periodic reviews for comprehensive land claims: "A periodic review should be built into each agreement to examine its performance against its objectives. Flexible elements of agreements should be adjusted to ensure that objectives are being met" (Coolican 1985, 96). However, this language was not inserted into agreements across Canada immediately, nor were Canada or British Columbia amenable to the idea at the outset. A lead negotiator for Maa-nulth reflected on the legal perspectives of treaty:

> We saw treaty as the genesis … because back in the 1980s when we were doing Constitution patriation, the big debate at that time, and it was a debate between provinces like BC and Alberta and Aboriginal leaders across the country, was whether the Constitution was in fact frozen in time, or the alternative legal theory called the Living Tree doctrine. They were diametrically opposite [legal perspectives]. One said these rights are frozen, they never change in this relationship once you submit it with a treaty, it's done; dusted and done. First Nations said, "No, hang on, these are instruments of a growing, evolving relationship, and we have to see them as such." Doing so … dictates what goes into them [treaties] and how assurances are provided that these are living instruments and this is a living relationship. (Gary Yabsley, interview, June 2021)

The same participant continued, reflecting on how the need for living agreements was in opposition to historical treaties' requirements for cessation and surrendering rights and title:

> From the beginning of treaty making and certainly from the constitutionalization of Aboriginal Treaty Rights … it always boiled down to the long-standing fight over release, cede, and surrender, and entering into agreements whereby you give up your rights for all time and how offensive that was to First Nations. (Gary Yabsley, interview, June 2021)

Language concerning release, cede, and surrender permeated pre-Confederation and numbered treaties across Canada. In those agreements, rights were released to then be "given back" by the federal government (Coolican 1985). Modern treaties have attempted to address the finality of cessation approaches, with varying degrees of success. The participant who spoke to the constitutionalization of Indigenous Treaty Rights above provided an example of how cessation in perpetuity was and continues to be weaponized by colonial authorities against Coast Salish Nations who signed the Douglas Treaties:

> With the Douglas Treaties here on Vancouver Island, you know, the fraudulent nature of many of those treaties and the fact that First Nations had no … representation in undertaking their own historic land-relationship, [Nations] didn't even contemplate the concept of ownership. [Suddenly] white guys come along and say, "Well, your ancestors signed this agreement, right here, they agreed to give us all the land and … in return they got three blankets." So in making treaty in a modern sense, the debates are both between governments and First Nations … when governments were coming to terms with the unacceptability of this: that these agreements could not be simply land transactions that were done and completed and everybody walked away like a house sale. That isn't what these things are. (Gary Yabsley, interview, June 2021)

There have been and continue to be changes to the modern treaty process representing shifting Indigenous-Crown relations. In the early 2000s, discourse changed from "extinguishment" to "modification." For instance, Nisga'a Nation's treaty, implemented in 1999, states that "the Parties intend their relationship to be based on a new approach to mutual recognition and sharing, and to achieve this mutual recognition and sharing by agreeing on rights, *rather than by the extinguishment of rights*" (Nisga'a Nation 1999, 2 [emphasis added]). This shift in language demonstrates how First Nations land rights and legal principles are themselves living in spirit and intent.

The most recent reflection of changes in legal principles can be seen in the federal government's Recognition and Reconciliation of Rights Policy for treaty negotiations in British Columbia, known as the "Triple R" policy (Government of Canada 2019). The Triple R policy outlines principles that now guide "constructive agreements" in British Columbia, with modern treaties among them. These principles recognize non-extinguishment of rights and title, stating that agreements "do not extinguish the rights, including title of Participating Indigenous Nations, in form or result" (9c). Acknowledgment of the living nature of modern treaty relationships is also reflected in the Triple R policy: "Constructive arrangements … [can] evolve based on the co-existence of Crown and Indigenous governments and the ongoing process of reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty" (9d).[8]

[8] A 2018 report by the Standing Committee on Indigenous and Northern Affairs (Mihychuk 2018), titled *Indigenous Land Rights: Towards Respect and Implementation*, released a series of recommendations based upon Indigenous Nations' experience with land claims. Recommendation three proposes "that Indigenous and Northern Affairs Canada recognize that land claims agreements are living documents and that the comprehensive land claims process be recognized as an ongoing relationship moving towards reconciliation" (57).

Such principles represent a substantial turnabout in the fundamental legal premise of modern treaties that are to be negotiated in British Columbia. However, whether these principles apply retroactively to First Nations who are implementing their agreements is yet to be seen.

Regardless of how government bodies approach treaty negotiations, First Nations have long made clear the inalienable and inherent nature of Indigenous Rights. For instance, Huu-ay-aht First Nations' Constitution rejects the notion of "surrender" by asserting self-determination:

> From our historic existence, our value system and our membership in the community of man, we possess certain fundamental and inalienable human rights which have never been extinguished, ceded or surrendered. These include: a. the right to our traditional territory including the waters and beds of water; b. the right to the resources of our traditional territory; c. the right to govern within our traditional territory; d. the right to utilize and protect our language; e. the right to practice, protect and enhance our culture; f. the right to the wealth of our traditional territory and a sound economic foundation; g. the right to protect our spiritual sites; h. the right to preserve our family and kinship systems; and i. the right to define ourselves and the criteria for [identifying] our citizens. (Huu-ay-aht First Nations 2012, 6–7)

Tracking how federal and provincial governments represent modern treaties over time reflects a shift in understanding about the government-to-government relationships that flow from agreements. For example, the federal government legislated the Maa-nulth Treaty into law by declaring "the Maa-nulth First Nations, the Government of Canada and the Government of British Columbia have negotiated the Agreement to *achieve* this reconciliation and to establish a new relationship among them" (Government of Canada 2009 [emphasis added]). Since the Maa-nulth Treaty went into effect, the sentiment that reconciliation is an ongoing process (versus an "achieved" act) is being taken up among Crown representatives. For example, British Columbia's former premier John Horgan conveyed this shift when he called treaties "important living documents that provide a foundation for renewed relationships and certainty for all First Nations in the Treaty process" (Office of the Premier 2022, para. 3). Horgan also pointed out that "the challenges with all ministries across federal and provincial governments [is] understanding that treaties involve all arms of government … Upholding these sacred agreements through a whole-of-government approach, with engagement and support from all ministries, is paramount in meeting

our shared commitments" (Office of the Premier 2022, para. 3). Horgan's statement highlights the challenge of many Crown representatives believing that modern treaty implementation is solely the responsibility of the BC Ministry of Indigenous Relations and Reconciliation or the federal department known as Crown-Indigenous Relations and Northern Affairs Canada; in actuality, treaty-related responsibilities fall within most BC ministries and federal departments as reflected in the "whole-of-government" phrasing.[9]

LIVING TREE DOCTRINE AND A BLUEPRINT FOR RIGHT RELATIONS

Canada's position on Indigenous Nations relinquishing title and rights has long been criticized by Indigenous leaders, scholars (e.g., Mack 2009; Nadasdy 2012), and via reports commissioned by the federal government itself (Coolican 1985). Critiques have outlined the need for a "living" legal approach that affirms Aboriginal Rights. Indeed, a living interpretation of rights aligns with the living nature of Canada's Constitution. As Anishinaabek legal scholar John Borrows (2012, 357) explains:

> Living tree analysis is also consistent with Canada's broader constitutional tradition because the country does not have a singular founding moment. Canada's Constitution gradually evolved; it adapted to reflect changing social and political values throughout its history.

Borrows calls on a number of legal decisions to demonstrate this point, while rooting the evolving nature of rights in Canada to a Judicial Committee of the Privy Council's decision in the 1930s. The "Person's Case," Borrows (2017, 123) explains, "characterized Canada's Constitution as a living tree … [whereby] Canadian women were found to be qualified to be seated as senators in the Canadian Parliament." Such an evolving interpretation of Canada's Constitution and associated rights has led

[9] In earlier research, we explored the barriers and challenges with whole-of-government implementation (Sloan Morgan, Castleden, and Huu-ay-aht First Nations 2018). It is worth noting that these challenges persist in day-to-day implementation. For example, one interview participant spoke of whole-of-government implementation as "one of the biggest challenges … Canada is a big animal and BC is a big animal … they've got so many departments. It must be a huge challenge for them to get that information through to those other departments. Because ten years in, I'm still getting stupid decisions, like, from Forests, that we're applying for a forest permit and they say, 'Well, what's your reserve number?' And I say, 'Well, I don't have a reserve number.' 'But what's your band number?' 'Well, we don't have a band number, we're a Treaty Nation government.' Then all of a sudden, 'Well, we can't fill in your permit'" (Scott Coulson, chief administrative officer for Uchucklesaht Tribe Government, interview, November 2021).

to opening up legal interpretations to permit, for instance, same-sex marriage (see Borrows 2012, 355). Borrows (2017, 124) demonstrates how Supreme Court cases have long reasoned that a living interpretation of the Canadian Constitution and associated rights is "the dominant strand of constitutional interpretation in Canada." Yet, as Borrows (2012, 377) demonstrates, courts subject Aboriginal Rights (affirmed by section 35[1] of Canada's Constitution) not to the dominant, living interpretation that acknowledges changing relationships between Indigenous Peoples and the Crown but "an 'original' moment" – an "originalism" that runs counter to all other dominant, legal interpretations in Canada.

Coolican's (1985) report, *Living Treaties, Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy*, advises against an "original moment" negotiation and implementation approach to modern treaties, instead outlining a revised approach to comprehensive land claims. Coolican suggests characteristics of legal agreements that are able to change as needed and are alternatives to extinguishment, all of which are geared towards ensuring certainty for all parties while preventing inalienable rights from being overridden (41–43). Scholars and community leaders alike have long extended this perspective to highlight the living nature of treaties, both historic (Asch 2014; Kiiwetinepinesiik Stark 2010; Thom 2020; Williams Jr. 1999) and modern (Province of British Columbia and Members of the Alliance of BC Modern Treaty Nations 2022). Indeed, the living nature of agreements is reflected in Indigenous legal orders prior to colonial imposition, with parties necessarily coming together to renew relations and responsibilities (Asch 2014; Turner 2006). This sentiment has been carried forward by Indigenous leaders and scholars specifically. For instance, legal scholar and Lumbee Tribe member Robert Williams Jr. (1999) describes treaties as "linking arms together," with agreements established as kinship *and* constitution.

As living agreements, treaties must be renewed to ensure that their spirit and intent are upheld, recognizing that relationships are intended to be enduring while evolving in their commitments. Treaties, however, are not step-by-step guides to how to be in relationship with one another. Legal scholars Hobbs and Young (2021, 236) observe this across modern treaties in Canada, Aotearoa New Zealand, and Australia, stating that "treaties themselves are outlines of a relationship, not a relationship in and of itself." They argue that, "if modern treaty making is to realize its promise, it must confront a broader challenge. Treaties between First Peoples and settler states are both legal and relational instruments, but because modern treaty making occurs within the framework of the

state, the relational dimension can be overlooked" (236). These asymmetrical dynamics affect not only the implementation of agreements (Sloan Morgan, Castleden, and Huu-ay-aht First Nations 2018) but also negotiations (Mack 2009). Indigenous Peoples have long argued against these asymmetrical dynamics by emphasizing the relational nature of treaties. Toquaht Nation taayii ḥaʔw̓iɬ Anne Mack echoes this ethos when, on behalf of the Alliance of British Columbia Modern Treaty Nations, she proclaims:

> Modern Treaties create the blueprint for Indigenous self-governance and effective government-to-government relationships. However, you can't live in a blueprint. You still need to build the house, and then you need to maintain it and expand it as the family grows. That's why Treaty implementation is always a work in progress – it requires ongoing efforts and attention. (Office of the Premier 2022, para. 5)

Treaty making is not a new process for Nuu-chah-nulth Nations. For millennia, Huu-ay-aht First Nations have practised law based on ḥaw̓iiḥ (Hereditary Chiefs) systems of governance and responsibilities to ḥaḥuuɬi (chiefly territories). Through hereditary names, potlatches, songs, oral history, maʔas (family houses) roles and responsibilities, and kinship ties by marriage, legal orders have long been upheld, respected, enacted, witnessed, and renewed through Indigenous legal orders. Huu-ay-aht First Nations' Constitution and four arms of government seek to represent these legal orders, while room for relationship renewal under authority of common law was deliberately inserted into the treaty.

We now turn to the periodic review to profile its inception and intent, and discuss how federal, provincial, and Maa-nulth Nations perceive the review process, which has been described as "core to the treaty, to ensuring that the treaty is a living, breathing, organic document, and forward looking" (Maa-nulth Treaty assistant negotiator for British Columbia, interview, July 2021).

THE EMERGENCE OF THE PERIODIC REVIEW AND THE MAA-NULTH TREATY

Maa-nulth Nations negotiated periodic review language in their constitutionally binding treaty:

> The periodic review language and process was not included in the Nisga'a Treaty. It was in the Maa-nulth First Nations Treaty and the other Nations that were negotiating treaties at that time, Tla'amin,

> Tsawwassen, and Lheidli T'enneh,[10] were very clear that their treaties needed to have … a clearly defined process for the parties to discuss how the treaty was operating … [The periodic review] sets out some basic principles that the parties recognize and acknowledge for the treaty to provide the foundation for an ongoing relationship. (Maa-nulth Treaty assistant negotiator for British Columbia, interview, July 2021)

The basis for the periodic review emerged from Nuu-chah-nulth legal principles and Living Tree doctrines, along with the recognition that federal and provincial governments had a track record of broken promises. A lead negotiator for Maa-nulth explained:

> Maa-nulth First Nations were very clear, there's a history, from their perspective … that the federal government … was not living up to its commitments under other agreements. They needed to have a set of provisions and a process that would allow the parties to sit down and say … "Is this Treaty working for us?" (Gary Yabsley, interview, June 2021)

The negotiator continued describing this intention of First Nations signatories to ensure the spirit of the treaty would be honoured and revisited. In so doing, Maa-nulth Nations prepared for federal and provincial governments to disagree with this approach:

> We [George Watts and I] … took it to Maa-nulth leadership and said, "We think one way to [ensure the living nature of treaty is honoured] is to revisit it every so often." We knew that governments are going to go apoplectic because they're going to go, "Well, hang on, you can't renegotiate." This is exactly what they ended up saying, "You can't renegotiate this every five years," and so, nonetheless, we originally put a proposal on the table that said we will revisit it every … ten years … Then we said, "You know, we're not doing this to renegotiate it, we're going to do it to make sure that the objectives of all parties in the beginning are being met. And then we're going to try to figure out if they're not being met, why? And if they're not being met and we know why, how can we better assure that they will be met?" So we're going to go back to the underlying principles and truths of entering this document and we're going to breathe life into it in that way we originally required and sought, much more than we ended up getting in terms of the fifteen-year review. (Gary Yabsley, interview, June 2021)

[10] Members of Lheidli T'enneh First Nation voted down their proposed final agreement twice. The vote against the final agreement in 2018 resulted in Lheidli T'enneh leaving negotiations.

As Yabsley describes, Canada and British Columbia initially saw the insertion of a periodic review as antithetical to the "certainty" of the treaty. From the perspective of Crown governments, certainty could be undermined by revisiting provisions in the treaty. Yet Maa-nulth Nations were unwavering in the need to revisit relationships and ensure that the negotiated agreement, which began in 1993 and concluded in 2011, reflected relationships as they progressed. A lead negotiator for Huu-ay-aht First Nations reflected on how this need was used to the advantage of Canada's and British Columbia's negotiation teams:

> The fifteen-year review, we all favoured it, all the negotiators. The downside … was that the fifteen-year review was used as a tool by Canada and BC to get a quicker agreement. I would have preferred that we toughed it out, and got what we were after, but we were a collective team. Huu-ay-aht was … holding out for more. And the reason we held out for more was that we knew that we needed more to do the tasks that were being identified [and five First Nations all held different positions financially]. I always say Canada and BC really drove a wedge in, you know, offering [different] things [to different signatory Nations] … I would tell people to be very careful when you go into a collective, you may think it's going to get you one voice, but it gets you more [voices, which can lead to division]. (Huu-ay-aht First Nations former negotiator, interview, January 2022)

Although language in the treaty concerning the periodic review was watered down through negotiation strategies that created a division between Maa-nulth First Nations, the spirit and intent of being able to revisit the treaty became embedded. Admittedly, not all treaty parties were – or are – satisfied with the provisions:

> I really had to choke back because I thought we should have been given more but, at the end of the day, it was one of those concessions you sometimes make in negotiations. We ended up persuading [Canada and British Columbia] that it was in their best interest to have a fifteen-year review, and it was in their best interest at some point to be able to have scorecards or report cards on whether treaties are working or not. Why else would you do it? You're not going to have a Royal Commission every time somebody says the treaties don't work, you build it into the … agreement and say, "Yeah, we're in this together, we're in this together over time." (Gary Yabsley, interview, June 2021)

The periodic review became embedded in the treaty, its intent to ensure the agreement was effectively implemented. As one participant synthesized: "It's periodic, it's an opportunity to have a check in" (former acting director of implementation for Huu-ay-aht First Nations, interview, February 2022). At the same time, however, it is not the only vehicle for revisiting implementation. One Maa-nulth Nations representative for Ka:'yu:'k't'h'/Che:k'tles7et'h' Nations reflected: "There's also nothing stopping any of the partners from considering those things outside of the periodic review process" (interview, November 2021). While a periodic review may seem straightforward, the reality is much more complicated. The Maa-nulth Nations representative continued: "Holding on to a bunch of stuff until it's actually at this very arbitrary date doesn't make sense" (interview, November 2021). Questions about the arbitrary date of the review are helpful to consider alongside the historical memory of the negotiation itself. Leadership and staff turnover are key challenges when shifting from negotiation to implementation. For example, the federal government and British Columbia's Ministry of Indigenous Relations and Reconciliation each has a different arm of their ministries dedicated to implementation versus negotiation. Maa-nulth Nations were also required to have an election six months after the implementation date (Maa-nulth First Nations 2007, section 13.7.2). For many First Nations, this mandatory election can see substantial changes in leadership and a loss in institutional memory between those who negotiated agreements and those who now are tasked with implementation (Sloan Morgan, Castleden, and Huu-ay-aht First Nations 2018). A Maa-nulth Nation representative mentioned these challenges and raised a fundamental concern:

> I think we actually have bigger problems internally about the periodic review … and that is that I'm not sure that there's a cohesive understanding within Maa-nulth about what a periodic review might look like in terms of amendments to the treaty, changes to the treaty. (interview, November 2021)

This ambiguity was a common refrain among participants: for some, the periodic review represented a checklist of implementation tasks, and for others it meant a fundamental revisiting of the spirit and intent of the treaty.

The Intent of the Periodic Review

The Maa-nulth Treaty defines the periodic review as follows: "The Parties recognize and acknowledge that this Agreement provides a foundation for an ongoing relationship among the Parties and commit to conducting a periodic review of this Agreement under 1.13.2 through 1.13.8" (section 1.13.1). During our interviews with implementation teams, it became clear that existential questions persisted regarding how the review should and will function. According to a representative for British Columbia's Treaty Relations, Implementation, and Policy:

> I would say that we are still trying to figure that out … I know our treaty partners have been thinking about this for a much longer period of time. I think our treaty partners, if I'm not mistaken, have been thinking about this almost since the treaty was concluded in terms of negotiation and thinking about this long term. For us [British Columbia], I think, like with implementation, we don't necessarily always have that roadmap perfectly mapped out for us so that when we get to the fifteen-year review, "this is what it's going to look like." We're still building that ourselves within the provincial system. (Nedinska Donaldson, interview, July 2021)

Soon after the Maa-nulth Treaty went into effect, core indicators were developed to support First Nations in assessing key aspects of the treaty. These indicators reflect negotiated aspects of the treaty (such as fish catch and harvesting allocation). However, the efficacy of these core indicators as assessment tools has come into question by signatories on all sides:

> We viewed the periodic review under the treaty as a chance to see how we are doing in a "treaty world" and to see how our lives and living conditions are changing and hopefully improving. Core indicators and core value indicators were established, but I think one of the challenges we faced is that we didn't have the baseline data to be able to measure accurately. Our treaty partners, Canada and BC, however were leaning towards assessing or measuring how the parties were doing in achieving the "obligations" listed in the treaty. Whether we meet the specific obligations in the treaty isn't necessarily the measure of how the treaty is working. The measure is in how we are using and implementing the tools in the treaty to make our lives better. (Angela Wesley, Maa-nulth Treaty implementation committee member and Commissioner, British Columbia Treaty Commission, interview, February 2022)

It is becoming clear, at least for the Huu-ay-aht participants in this study, that what was initially considered baseline data through the core indicators is insufficient to assess the effectiveness of the Maa-nulth Treaty:

> The only things that are required of that periodic review are very … you've seen them, "how many fish were caught, how much gravel," right? Which doesn't actually tell you anything about treaty success. (Crystal Jack, Huu-ay-aht First Nations director of implementation and former Maa-nulth Treaty Society administrator, interview, June 2021)

It is also clear that the core indicators are not capturing Nation-to-Nation dynamics or how the treaty trickles down to individual members:

> The [Maa-nulth] Nations realized very quickly that we need to track our own well-being … From the Maa-nulth table level … it just seemed like there was a different focus in what information was important. From a director of treaty implementation level, when I got a little more involved at the technical committee … it's become very clear that the well-being factors matter more. (Crystal Jack, interview, June 2021)

Another Huu-ay-aht participant questioned indicator-based approaches to assessing treaty relationships:

> The idea is we're supposed to have this very comprehensive set of information to present to the federal and provincial government. And that we're … going to learn at a very basic and foundational level all of the things that we tried to do, what [we were and weren't] successful at … The list of that last one is going to be pretty big. (John Allen Jack, Huu-ay-aht First Nations councillor and former implementation portfolio holder, interview, June 2021)

Answering questions about the indicator-based approach to the periodic review, Canada reiterated the importance of understanding what the priorities are for Maa-nulth Nations. One representative for Canada's Crown-Indigenous Relations and Northern Affairs implementation branch explained:

> Looking at indicators, what kind of indicators could we use to assess where we're at, and how we're moving forward? I think that's one of the challenges right now: nailing down what do we want to measure? And I think that's kind of one of the things I'm looking forward to

> [with] the periodic review discussion, because I'm still a bit fuzzy … I think Canada's perspective is more … around what it is Maa-nulth [Nations are] looking forward to see[ing] as a metric for the periodic review. You could take it in so many different ways. (interview, June 2021)

Although the suitability of the core indicators as an effective mechanism has come under question, the overall intent of revisiting the treaty remains. While the periodic review is set to take place every fifteen years, Huu-ay-aht's director of implementation reminded us: "It doesn't have to be fifteen years, it has to be no later than [that]" (Crystal Jack, interview, June 2021).

The periodic review provides an opportunity not only to revisit the Nation-to-Nation political relationship of a treaty but also to review and renegotiate specific treaty provisions:

> The periodic review is important because it seems as though that would be the point at which you would reopen the treaty in a way that would be acceptable to the Nations and the … Crown government to make improvements in regards to what was there, and so that needs to be based on a lot of information that is not subjective. So, a lot … of the information gathering, a lot of the context, it matters because we want to insulate this from being purely political in nature. We want an actual objective, increasing the efficiency and effectiveness of self-governing Nations and, under the Maa-nulth Final Agreement framework, we need to be able to see improvements in how things are conducted. The side agreements [like the Fiscal Financial Agreement], but beyond that, as well as anything that is within the treaty, are there ways that we can compel activity? (John Allen Jack, interview, June 2021)

Renegotiating and revisiting specific provisions of the treaty relationship was an option through the periodic review shared by all implementation teams. Discussed as "opening up" the treaty, perspectives on doing this varied, particularly between those who had taken part in the hard-fought battle of negotiation in the early 2000s and those who are now primarily involved with implementation. One reason for some hesitation around this issue was: "once you open [the treaty] it's not open just for what we want, it's open for what [all governments] want" (Angela Wesley, interview, February 2022).

Opening Up the Treaty in an Era of Rights and Recognition

Within the context of the Living Tree doctrine, and since its implementation in 2011, changes to the understanding of the Maa-nulth Final Agreement are apparent even in the title:

> I call it a Treaty even though it's a Final Agreement … [Provincial governments are] not using the language of a Final Agreement anymore in any of our negotiations. And I think periodic review is part of that shift away from full and final settlement and exhaustively addressing all the matters in the reconciliation of Crown and Indigenous interests. (Maa-nulth Treaty assistant negotiator for British Columbia, interview, July 2021)

As one participant shared, the periodic review provides an opportunity to revisit frustrations that emerge from implementation, with treaty making being "unfinished business":

> I hear frustration sometimes from some of the Maa-nulth representatives, but frustration is just built into this game … The proof will be whether or not what comes out of that periodic review identifies and addresses the shortcomings today … The treaty processes will always be unfinished business. (Gary Yabsley, interview, June 2021)

Over the last ten years, substantial changes have occurred in modern treaty provisions, among them the inclusion of the Triple R policy, which, in part, recognizes pre-existing Aboriginal Rights and Title in addition to other changes to the negotiation process:

> There's been so many changes in the treaty process in the last four years, especially. There's this rights and recognition policy that's there that among other things calls for, collaboration and co-development of mandates among the parties, loan forgiveness – something we fought hard for during negotiations and continued after the effective date of treaty … Those are huge changes in the process. We haven't really seen how those are going to play out. You know, as expected, I think that there's a lot more open thinking about what might go into treaties now than there was at that time when Maa-nulth First Nations were negotiating. Again, we anticipated that, we always knew that things would change and improve over time and that the boundaries of negotiations, such as expanded mandates, would be expanded as time goes on. It was our hope and expectation that we would continue to negotiate for full and honourable implementation of our treaty. (Angela Wesley, interview, February 2022)

Participants emphasized that the periodic review is not the only mechanism for changes to the Nation-to-Nation relationship. Indeed, many participants were quick to point out that the federal government had, in a sense, diverged from the terms of the treaty in 2018 when it decided to waive First Nations negotiation loans:

> Technically, Canada and BC are already diverging from the treaty because they've waived the requirement to repay loans. Who would have thought that would be considered diverging from the treaty, right? We certainly don't think that way. (Angela Wesley, interview, February 2022)

Indigenous Nations in the treaty process have long advocated for loan forgiveness. Negotiations often span more than two decades largely due to delays with federal and provincial negotiators' gaining necessary ministerial and departmental permissions to move forward. Many First Nations emerge from the treaty process – or are stalled in negotiations while continuing to incur debt – owing millions to federal and provincial governments.[11] In the federal government's 2018 budget, treaty loans were "forgiven." By waiving the debt, the federal government technically diverged from the Maa-nulth Treaty, which embedded loan repayment in its agreement.

In August 2022, the British Columbia Treaty Commission, which is an independent tripartite oversight body whose mandate is to facilitate reconciliation and treaty negotiations, announced new changes that will affect all modern treaty signatories, including those under the Maa-nulth Treaty. A standing provision that requires modern treaty Nations to implement property and transactional taxes on previous reserve (now treaty) lands will be lifted for Nations in stages of negotiation. When the Maa-nulth Treaty went into effect in 2011, Maa-nulth signatories were required to phase out section 87 of the Indian Act, the "Property exempt from taxation" section. Section 19.5.1 of the Maa-nulth Treaty (Maa-nulth First Nations 2007) outlines this condition as follows: "Section 87 of the Indian Act will have no application to a Maa-nulth-aht."[12] Transaction, property, and all other taxes are instated eight and twelve years, respectively, following implementation. The federal and BC provincial

[11] In 2018, it was estimated that First Nations involved in the comprehensive land claims process were buried under $850 million in negotiation debt. Many Nations have stalled in negotiations for multiple years, if not decades, while debt continued to be incurred (Mihychuk 2018).

[12] "Aht" in Nuu-chah-nulth roughly translates as a person of a specific Nation. In this case, Maa-nulth-aht refers to an individual who is on the Enrolment Register of a Maa-nulth First Nation (Maa-nulth First Nations 2007, 293).

governments' course change on this requirement means that "phasing out Section 87 of the Indian Act will no longer be a requirement under Modern Treaties" (British Columbia Treaty Commission 2022, para. 1). These changes are another "divergence" from the current Maa-nulth Treaty, albeit a seemingly positive one for the Maa-nulth signatories.

While exciting, how and when this change will roll out is yet to be determined: "Implementing this change for agreements under negotiation and existing modern treaties requires further work" (British Columbia Treaty Commission 2022, para. 5). The modern treaty negotiation process is indeed evolving, which will have impacts on the modern treaties that are already being implemented. Many "standoff" positions imposed by the federal government were highly contentious from the perspective of the Maa-nulth signatories, such as exemption from section 87 of the Indian Act. At the time, continuing to attempt to negotiate rather than acquiescing to the federal position meant that tremendous debt accumulated during the negotiating period. For First Nations currently negotiating treaties, the new announcement of debt relief and title no longer being modified as before will likely be welcomed. However, what these welcome changes mean for First Nations who are implementing their agreements, rather than going through stages of negotiation, is unclear.

Besides changes to the formal negotiation process, Indigenous and Nation-to-Nation relations are constantly evolving. For example, in 2018, British Columbia adopted Bill C-41: the province's Declaration on the Rights of Indigenous Peoples Act (DRIPA). This committed British Columbia to implementing the United Nations Declaration on the Rights of Indigenous Peoples. Requiring Indigenous Nations to relinquish title is incompatible with DRIPA. Yet, much like the removal of the tax exemption clause, how these changes will affect existing modern treaty holders remains to be seen. When one Huu-ay-aht participant was asked about these changes to Indigenous-Crown relations, he responded:

> I did ask one of our litigating lawyers. I said, "Is there a way that we could say to Canada and BC, look, you guys forced us into negotiation … you know, is there a way [changes that are happening outside of treaty contexts can be retroactive]," and she said to me, "Well, I'll think about it." And she hasn't gotten back to me. So, I'm guessing there is no way … [T]here isn't because the agreement says certain things in there that accept some impossibility for us to renegotiate elements in the treaty. So, all I wish is [that] DRIPA was around when we were negotiating. That's [one disadvantage] of being an earlier treaty [Nation]. (Huu-ay-aht First Nations former negotiator, interview, January 2022)

Huu-ay-aht participants also highlighted how the Nation now holds treaty lands privately and that its consent is required for any activities on its treaty territories. Excluding early modern treaty holders from changing political contexts in British Columbia would be antithetical to the rightful relations and reconciliation seemingly brought about by treaty.

This tension about rightful relations was also apparent when Maa-nulth participants spoke about the Triple R policy. When asked about whether their Nation was concerned about changes in the BC or federal governments (see Sloan Morgan, Castleden, and Huu-ay-aht First Nations 2018), one participant reflected: "The Triple R policy makes commitments to getting to treaties in a different kind of way, in a more flexible, incremental, sort of various constructive arrangements way [that is] trying to deliver benefits earlier." McCarthy continued: "I anticipate modern treaty Nations will sort of look at [this policy] and say, 'Well, great … maybe it helps get more treaties, or half treaties, or whatever in place across the province, but we're already at the fully baked treaty, so that's not going to be much benefit to us.'" When asked to elaborate on changes to title specifically, he noted that "the policy also makes commitments to substantive changes … around, say, recognition of title … I would anticipate that we might be treating the notion of treaty land differently from a legal context … relative to how it is treated in existing treaties, or we might be interested in doing things like shared decision-making agreements across the broader non-treaty land base." Participants from all sides of the treaty table saw the Triple R policy as shifting ability for treaty negotiations in the interim, not as an answer to translating Aboriginal Rights into Treaty Rights comprehensively: "I don't think that the policy sets out a comprehensive response to those really important questions. I think it gives permission to … explore and to find a creative resolution to those [title- or rights-based] issues" (Tom McCarthy, interview, August 2021).

A prominent example referenced was a litigation case brought forward by Ahousaht First Nation concerning commercial fishing rights. During negotiations, Huu-ay-aht and all Maa-nulth Nations had to drop out of litigation as a condition of treaty, despite Huu-ay-aht First Nations initially being involved in Ahousaht's litigation for commercial fishing rights. However, a "me too" clause was negotiated to ensure that the outcome of the Ahousaht litigation would apply to Huu-ay-aht First Nation (see Huu-ay-aht First Nations 2019). A participant used this example to explain the impact of the Triple R policy:

> If there is a new right that is proven in a court setting or context … the Ahousaht litigation is a good example of that … after the signing of the treaty, that there is a kind of a renewal context or approach where a new right that's proven can be brought into the treaty, so it can be transitioned into a kind of Treaty Right, with a particular relationship, including jurisdiction and other sort of negotiated relationships to provide stability to everyone … and to kind of define what that right is in the context of the treaty. So, we do have that ability and that's sort of the general answer, I think, is that you make these treaties able to adapt to accommodate new rights that might be proven … in the context of litigation or through other kinds of recognition means. (Tom McCarthy, interview, August 2021)

If the Maa-nulth Treaty is opened at the periodic review, all provisions – some of which were incredibly difficult to negotiate and involved tremendous compromise – may be up for discussion. However, provisions in the treaty dictate all parties must agree to changes being made, preventing unilateral force of changes: "For greater certainty, none of the Parties is required to agree to amend this Agreement or any agreement contemplated by this Agreement as a result of the periodic review contemplated by 1.13.0" (Maa-nulth First Nations 2007, section 1.13.7). Several Maa-nulth participants, particularly those who recall hard-fought discussions at the negotiation table, pointed to this section of the treaty while reflecting on the understandable hesitation to open it:

> The language in the treaty itself, both sides have to agree. So, if there's no agreement, there's no ability to … force arbitration. And then, if the government didn't come and … talk in good faith, we might have some remedy through the courts. But that would be so difficult … I am hopeful that the shift that we are experiencing … within the broader society on Indigenous issues will continue [in] what we consider to be a positive direction. And that shift will continue to be reflected through the government representatives. (Brent Lehmann, implementation and legal counsel for Maa-nulth Treaty Society, interview, July 2021)

The weight of changing the treaty was not lost on participants who took part in the research, one of whom commented:

> One of the biggest things is understanding the importance of [changes to the treaty], in that how important every decision is and the ramifications … it's understanding the importance a small decision can

> mean. I think that's the biggest thing is understanding the importance. That it can really change someone's life and I take that very seriously. And I know my government takes that very seriously. And that's what it's all about, that's what treaties are all about, is changing those lives. (Scott Coulson, interview, November 2021)

When contextualized around the participant's quote and the magnitude of work involved with implementation, the periodic review provides an opportunity to revisit Nation-to-Nation relations and, ideally, to improve the treaty so that it better respond to the priorities of Maa-nulth-aht.

Priorities, Implementation, and the Periodic Review

Whereas all participants expressed a general willingness to revisit core aspects of the treaty, participants from the Maa-nulth Nations expressed exhaustion with implementing the treaty itself and needing to be strategic in terms of energy based on the treaties' poor funding. As one participant phrased it: "Obviously, something like fisheries is sexier than the fifteen-year review, right? And so, you know, [the periodic review has] kind of fallen" (Scott Coulson, interview, November 2021). Many participants shared similar reflections and subsequently highlighted the need to prioritize treaty topics, including funding, effective whole-of-government implementation, enforcement of laws, and fisheries. When asked how the Nation was thinking about and preparing for the review in 2026, one Huu-ay-aht participant replied that the Nation is "not [doing] too much. We've been focusing on implementing. You know, what can we do to maximize our return?" The participant used the example of the now defunct Kwispaa LNG project that was proposed on Huu-ay-aht ḥaḥuuƚi and treaty lands in partnership with Steelhead LNG. The Nation invested significant energy and capacity, in the words of this participant, "getting what we [could]" from the pre-development phase, knowing that the project may not move forward (Huu-ay-aht First Nations former negotiator, interview, January 2022).

The Uchucklesaht Tribe's chief administrative officer echoed this perspective on being preoccupied with implementation:

> We really haven't put a lot of time into [the periodic review]. [Seven or eight years ago, when discussing the review,] we thought, it's important … but it gets lost in everything else, right? And so, you have the capacity to, you know, do certain functions of the government and this

> is one that I can say that we're probably neglecting. We should probably put more time into it as a government. (Scott Coulson, interview, November 2021)

Maa-nulth Nations face challenges not only with implementing treaty as self-governing Nations but also with navigating often frustrating relationships with federal and provincial governments. Even ten years into the modern treaty relationship and with a federal cabinet directive that requires federal representatives to consider modern treaty obligations in decision-making (Indigenous and Northern Affairs Canada 2015), Maa-nulth Nations still experience issues with having self-governance recognized:

> Canada and British Columbia still treat you as a little bit of a white elephant. They don't know really how to work with you, in many cases. Systems aren't designed to accommodate it, you know, in many cases. We need more treaties so that we can kind of normalize what it looks like for governments to have relationships with treaty Nations … and for local governments and other communities to have relationships with treaty Nations as well. They're sort of this special beast, and that's not a good thing. We got to shift that narrative. (Tom McCarthy, interview, August 2021)

Maa-nulth participants echoed each other on the importance of having enough resources to fund self-governance provisions. Indeed, the Maa-nulth Treaty was the least funded treaty in British Columbia's history (Scott Coulson, interview, November 2021). Having a lack of financial resources was challenging for the five Maa-nulth Nations who were drawing from earmarked funds based upon populations, and some Nations had limited pre-existing infrastructure and human resources. This led to Maa-nulth Nations staff holding multiple roles early in the treaty implementation phase with limited financial, material, and staffing support. Reflecting on this reality and its bearing on the periodic review, a participant for Uchucklesaht observed: "Doing your day-to-day functions are hard enough, let alone thinking … what [do]we really need to do for treaty?" (Scott Coulson, interview, November 2021).

When asked about further priority items in addition to capacity and funding, participants noted that the relationship with Canada's Department of Fisheries and Oceans (DFO) was dysfunctional and in need of improvement. Implementation teams from across all tables (British Columbia, Canada, and Maa-nulth) reflected on the prospective

challenge of revisiting conversations or having treaty obligations upheld by DFO. For example, a Maa-nulth Nation representative admitted:

> I've always had a frustration dealing with DFO. And I think so do the other departments, federally, you know. They list … decisions or … bureaucratic nonsense that comes out of them, and they don't understand it … It's like you signed a deal with Canada, and maybe there should have been somebody at DFO at the table, as well. You know, that's kind of how you feel, like they're outside of that framework almost and I don't think that's fair. (Scott Coulson, interview, November 2021)

Our research team has experienced challenges recruiting DFO representatives to voluntarily take part in our research, despite a newly formed arm of the federal department called Reconciliation and Partnerships. At the guidance of our Research Advisory Committee, and with endorsement from Huu-ay-aht's Executive Council, a public letter was sent to the minister of DFO expressing concern about the lack of cooperation given the importance of this research in relation to preparations for the periodic review. (At the time of publication, we received a response from DFO; we are speaking with DFO and are optimistic representatives will contribute to our research).

PERIODIC REVIEW: LOOKING FORWARD TO THE NEXT 150 YEARS

When entering Huu-ay-aht First Nations ḥaḥuuƚi, a territorial sign recognizes the long-fought battle with colonial authorities to reclaim decision-making abilities respected by the Crown. Stating "Hish uk Tsa Wak. Welcome to our territory. Owners for 10 000 years. Stewards again after 150 years. Please treat our children's inheritance with respect," Huu-ay-aht First Nations is evoking sacred Nuu-chah-nulth principles that drove the decision to move forward as a modern treaty Nation (see Figure 2; see also Calabretta 2017).

Implementing a modern treaty is a never-ending process. The periodic review was embedded into the Maa-nulth Treaty as a way to ensure that the evolving nature of Indigenous-Crown relations would be reflected in Nation-to-Nation relationships, providing an opportunity for the agreement to be revisited as needed. Our research shows that the format of the periodic review is itself subject to consideration. No guide for how to approach the review exists, with some parties understandably hesitant

Figure 2. Entering Huu-ay-aht First Nations territory. *Source*: Photo by the authors.

to open the treaty up for renegotiation. Across our interviews, federal and provincial representatives were quick to point out that the nature of the periodic review will be at the discretion of Maa-nulth Nations. While those who participated in our research reiterated the living nature of modern treaties, scholars and community leaders alike have long echoed concerns about "originalism" and its narrow interpretation of Indigenous Rights, including Treaty Rights (e.g., Borrows 2012; Borrows 2017). We are hopeful, however, that the living, Nation-to-Nation nature of the Maa-nulth Treaty will be reflected in constructive dialogue as guided by Maa-nulth emerging priorities and evolving understandings of modern treaties in the first periodic review, scheduled for 2026 and every fifteen years thereafter.

While the review was scheduled to occur every fifteen years, Huu-ay-aht First Nations director of implementation reflected on how "there was a lot of optimism when the treaty was written and not a lot of understanding about how long it would take to get things in place" (Crystal Jack, interview, June 2021). Negotiators were able to agree on a fifteen-year marker for the periodic review, the assumption being that assessing the unfolding of treaty relationships through time would be sufficient: "It maybe feels like, fifteen years in, we should be further ahead on a lot of things. But for everybody, it's been a bit of an eye-opener, how long it actually takes to [see the impacts of] implement[ing] the treaty" (former acting director of implementation for Huu-ay-aht First Nations, interview, February 2022). Language around the treaty has indeed changed in the first decade of implementation, representing a shift in understanding about the living nature of the agreements. The

shift away from calling the Maa-nulth Treaty a "final agreement" is emblematic of such a change. When viewed in this light, it becomes clear that implementation is a task not only for First Nations but also for federal and provincial governments as well. This includes understanding that departments and ministries across governments have obligations under these lasting agreements.

Nuu-chah-nulth Nations have a long history of renewing relationships through kinship ties and traditional forms of governance recognized through legal orders, cultural protocols, and now constitutions of each Nation. The living nature of agreements is captured in these processes and must be actively renewed, with parties coming together in good faith. If treaties are truly considered the preferred means of reconciliation in Canada, and given the compromises made by Maa-nulth Nations for agreements to be implemented, it is in Canada's and British Columbia's best interests to demonstrate their obligations to right relations. These obligations exist not only for Maa-nulth Nations but also for all First Nations in British Columbia who are considering their paths forward.

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