

Reconciling the North: Transit Pipelines and the Pursuit of Self-Sufficient Self-Government in the Yukon

Nicholas J. Wilson

ECONOMIC PARTNERSHIPS AND GOVERNMENT RELATIONSHIPS
ROYAL MILITARY COLLEGE OF CANADA (RMCC)

ABSTRACT

The research investigates how the responsibilities of Self-Governing Yukon First Nations (SGYFNs) regarding Settlement Land under the Umbrella Final Agreement, 1993, can be used to advance pipeline projects on Indigenous land title. In doing so, it challenges the contemporary notion of the Westphalian state system that has come to define the modern nation-state entity. Accordingly, the investigation employs contemporary border theory to examine how the responsibilities and obligations of SGYFNs, the Government of Yukon, and the Government of Canada can solve Aboriginal boundary issues to develop a sustainable Arctic economy in the 21st century, which is on the verge of unprecedented opportunity. As such, it takes transnational pipeline projects in developing countries as the basis of a trans-territorial model within the Canadian context, before concluding that it is equitable, lawful, and fair to provide incentives to reluctant Yukon First Nations to consent to pipeline development projects on Settlement Land.

INTRODUCTION

The U.S. Geological Survey has assessed that 22% of the world's undiscovered petroleum resources currently reside underneath the Arctic (U.S. Department of the Interior, 2008). The industrialization of northern Canada will therefore intensify. Canada's northern regions, adjacent to the vast and untapped material wealth residing underneath Arctic sea ice, present Canada with lucrative industrial and commercial opportunities for future economic growth; specifically, as sea ice retreats in and around the Northwest Passage (NWP). As the Arctic Council member states (Canada, U.S.A., Russia, Denmark, Finland, Norway, Iceland, and Sweden), among other interested actors, vie for claims to extraction entitlements, land adju-

dication on the domestic front will also increasingly become a national security concern in the near future. Primarily, this concern is in regard to Canada's energy security priorities conflicting with land agreements negotiated with the Indigenous communities residing in Canada's north. As Arctic sea ice melts, Canada will steadfastly invest in energy resource development on territory surrounding the Northwest Passage. The Yukon Territory, sitting at the crux of Canada's oil and gas frontier, will play a leading role in northern economic development, as it is the most heavily populated area in the north and marks the entrance to the Northwest Passage on Canadian territory. As a result, the intensifying Arctic energy market poses a potential source of conflict between transnational energy companies/corporations (TNCs) on behalf of the Government of Canada and the Indigenous communities residing in the Yukon. Self-Governing Yukon First Nations, or SGYFNs, who are setting the precedent for Indigenous self-governance across the world, will play a crucial role when frontiers necessitate borders.

In response to mounting disputes over pipeline projects between Indigenous peoples and environmentalists against "Big Oil", the Royal Canadian Mounted Police (RCMP) has labelled these demonstrations the "anti-petroleum movement" and has implied that it represents a "growing and violent threat to Canada's security" (McCarthy, 2015). Additionally, Canadian defence scholars have raised concerns about the possibility of an Indigenous insurrection against energy development projects taking place across Canada. In view of the present tensions surrounding this polarized and highly passionate debate in North America, this policy paper develops a solution to the inevitable opposition pipeline development projects will face in the Yukon and Canada's north. In particular, some Yukon First Nations self-governments may be fiercely supported by environmentalist activists on behalf of Non-Governmental Organizations (NGOs), which continues to make headlines in North America. In response, the policy solution attempts to proactively carve out solutions to an enduring problem that has framed an aspect of Canadian society according to an "us versus them" mentality. This mentality has disintegrated the borderlands between Canada and First Nations communities, which has largely fostered tensions rather than cooperative flows that ease border hostilities. In response, the policy solution seeks to integrate borderlands by drawing upon recent literature concerning the evolving nature of borders within an increasingly globalized world. It then utilizes these findings to rectify the contemporary opposition to pipelines under the umbrella of negotiated Aboriginal land agreements in the Yukon. The solution emphasizes Canada's economic dependence on pipelines and natural resource development while formulating a legitimate avenue for Yukon First Nations to opportunistically enjoy unsanctioned autonomy by entering into concessionary agreements with TNCs. This avenue uniquely extrapolates international models of border porosity in developing countries in Central Asia and northern Africa to the Canadian context. As a result, the application of foreign concessionary agreement models manifests as a primary debate that forms the core of this investigation's reconciliatory efforts; and as such, the solution employs the tenets of the Umbrella Final Agreement (UFA)/Yukon Final Agreements to propose an incentive model. Through the manipulation of SGYFN revenue, this mechanism legally compels pipeline opposed Yukon First Nations to negotiate an equitable reduction in their federal transfer payments if they steadfastly refuse to pursue profitable revenue generating agreements with TNCs. This reduction is hypothesized to positively affect the pipeline decision-making outcome through the creation of porosity along SGYFN and Canadian borderlands. In forecasting the frictional problems related to the incentive model, the investigation seeks to answer the following question definitively:

Are there legal rights and responsibilities in the Umbrella Final Agreement (UFA) that could compel pipeline opposed SGYFNs to act on incentives and permit pipeline construction on Settlement Land?

The policy paper will argue that the Final Agreements, through their negotiation, possess inherent economic incentives for SGYFNs to consent to pipeline construction on Settlement Land — incentives that create border porosity that will ultimately lead to their success in forging truly *self-sufficient self-governments*. This proposition builds on the assumption that SGYFNs distinctively share crucial features of the modern “nation-state” entity. Accordingly, the policy paper will first draw upon theoretical models concerning the changing nature of borders in a world marked by globalization. It uses contemporary border theory to apply concessionary models of resource taxation in developing countries to the Canadian-SGYFN context. The investigation then concludes that it is lawful, fair, and just to incentivize Yukon First Nations to ease their borders and permit pipeline construction on Settlement Land.

CHALLENGING THE WESTPHALIAN “STATE” SYSTEM

The Colonial Context

Disputes over land rights unremittingly define the steadfast opposition to pipeline projects by Indigenous peoples in Canada. Historically, the colonization of what is now the Canadian nation-state began in the 1600s, effectively appropriated the land of prehistoric Indigenous Americans, and carried out what can only be properly referred to as a “cultural genocide” (Truth and Reconciliation Commission [TRC], 2015: 1). Over two centuries, this land was parcelled and negotiated through the signing of treaties with the Government of Canada on behalf of the British monarch. At present, these treaties have largely been recognized through the “assertion of Crown sovereignty” and are enforced by the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) and Indian Affairs and Northern Development Canada (INAC). Correspondingly, the enforcement of these treaties falls under the dominion of the Eurocentric Westphalian state system that has come to define the modern “nation-state” entity. Under this umbrella, the 11 Numbered Treaties (1871–1921) “recognized Canadian sovereignty”, where “Indians were styled as subjects” who surrendered the land on the basis of “powerlessness” (Flanagan, 2008: 145).

Scholar Tom Flanagan has justified the colonial takeover of Indigenous peoples in Canada throughout the 1600s onwards by employing the protracted “Doctrine of Discovery” and *terra nullius* (no man’s land) (TRC, 2015: 46) — a “legal and moral justification for colonial dispossession of sovereign Indigenous Nations” (Assembly of First Nations [AFN], 2018: 2). As such, Flanagan deduces that Indigenous societies do not properly deserve the title of “First Nations” because they do not possess the features of properly defined “statehood” and “nationhood”. He argues, tenably, that Aboriginal societies cannot properly possess “sovereignty” — the core feature of a state — because their societies “were not organized into civil societies” and did not practise agriculture; they only possessed an “uncertain occupancy” that “did not amount to sovereign possession” (Flanagan, 2008: 55). To make this argument, Flanagan employs the 16th-century tenets of philosopher John Locke’s writings on property, where “civil society — the chief end whereof is the preservation of property” (Locke, 1632–

1704: Sec. 85) — was created to protect private property. Private property was understood to be a function of mixing one’s labour with the natural environment, where Locke’s proposition asserts that “Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*” (Locke, 1632–1704: Sec. 26). The establishment of the “State”, therefore, is justified on the concept that mixing one’s labour with the natural environment legally makes it their property; and since the “Doctrine of Discovery” concludes that “[t]hese tribes cannot take to themselves more land than they have a need of or can inhabit and cultivate. [...] [T]he Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they [Europeans] may lawfully take possession of them and establish colonies on them” as agricultural or “civilized” societies (Flanagan, 2008: 55).

Borders: A Reconceptualization

In breaking with convention to embed this investigation within contemporary border theory, the correlation Flanagan makes is entirely valid — that is — from a 16th-century justified belief set. In this way, Flanagan’s reasoning is anachronistic; it is not a truth claim¹ to knowledge about the nature of modern “sovereignty”, which makes its application flawed. The condition of Indigenous civilizations prior to being integrated into European society is undoubtedly distinguished by the absence of large-scale agricultural practices and a centralized governing authority. However, when this lack of “statehood” is disparaged by the notion that “there is only one political community at the highest level”, where subordinate communities and ethnic “groups cannot be nations” (Flanagan, 2008: 7), it trivializes the evolution of bordering practices among human societies over millennia. Today, proximity, not distance, marks the world, and while Flanagan criticizes the notion of “nation to nation” diplomacy between Canada and First Nations, such that Aboriginal societies cannot be “states” with concomitant nationhood, this reasoning overlooks the contemporary fact that non-state actors are increasingly influencing political relationships on the international stage. Moreover, in theory, although self-governing Yukon First Nations share similarities with non-state actors, such as operating independently of a higher (state) authority, they coincidentally emulate features of Westphalian sovereignty and possess a defined territory with a population and [self]-government. This novel form of human organization (the SGYFN) is therefore sufficient within the contemporary field of international relations to be functionally significant. By and large, the meanings of the terms “nation” and “state” are becoming diluted due to “the multitude of flows and interactions produced by globalization that cut across nation-state boundaries” and “destabilize the paradigm of sovereignty” (Scott et al., 2015: 210).

Recent literature on borders has pointed to a re-conceptualization of the traditional understanding of the terms “border” and “state” within an increasingly globalized world. These concepts are being redefined through institutional conduits. Although colonialism and

¹ Way back in an undergraduate epistemology class I studied “truth-claims” as statements or propositions that come from a “justified true belief” (JTB). I use this specific term “truth-claim” to convey to readers how Flanagan’s reasoning is not a claim about knowledge but rather the opposite. In other words, as to my understanding, just because Flanagan believes the claim is true and is justified in believing it is true (from 16th century reasoning) doesn’t mean it is true (the claim has to be true in the first place, which time has shown it is not).

land treaties have physically (and socially) divided First Nations from the rest of Canada, borders, in general, are increasingly becoming more porous due to contemporary market forces and trade flows, among other factors (Brunet-Jailly, 2007: 355). Modern border theory has argued that as governments “pursue institutional arrangements to establish and recognize formal borders” for regulating activities across them, individuals will “consider their own interests in determining whether or not to act in accordance with the intent of such regulations”, whereby their decisions “reflect the strength of the incentives leading to market transactions” (Brunet-Jailly, 2007: 351). In acknowledging the influence incentives have on individuals’ or non-government groups’ decisions, Dr. Emmanuel Brunet-Jailly at the University of Victoria argues that borders are defined by the *expression of “agent power within institutional structures”*, and that *it is the human agency behind the incentives*, interplay, and interdependence of governments and market forces that is critical to understanding the porosity of modern borders era (Brunet-Jailly, 2007: 354). In this investigation, the term “agency” is defined as the capacity to act on self-interest in a political relationship and relates to the United Nation’s (UN’s) *Declaration on the Rights of Indigenous Peoples*; specifically, the “right of self-determination” (TRC, 2015: 187). The sparse literature on the topic of borders has largely focused on international bordering processes and the increasing porosity of borderlands between countries. Consequently, there is a research void concerning the process of bordering within colonial states; specifically, quasi-sovereign “sub-state” Indigenous self-governments with a latent capacity for agency.

Borders in the Northern Context

Regarding the role of human agency in bordering processes, the concept of Indigenous “Self-Governance” in the Yukon emphasizes “building sound governance and institutional capacity that allow Aboriginal communities to contribute to, and participate in, the decisions that affect their lives” (AANDC, 2015). Earlier literature on Yukon self-governance criticized the strength of the agency of SGYFNs by arguing that “self-government” can only achieve the corresponding degree of agent power “to the extent that it can be funded” (Dacks, 2004: 688). This statement remains relevant today because a strong degree of self-determination to achieve self-government will require adequate economic resources. Conveniently, however, it has been suggested that lands and resources under the control of Indigenous self-governments may attract investors and facilitate “partnerships between Aboriginal governments, other governments, and *the private sector*” (AANDC, 2015). Therefore, Aboriginal studies scholar Robert Anderson has argued that mutually beneficial alliances between Aboriginal and non-Aboriginal peoples in Canada and their institutions can play a role in the economic development process within “the context of an increasingly flexible global capitalist economic system” (Anderson, 1999: 2). In other words, “Corporate Aboriginal Alliances” (Anderson, 1999: 97) can be forged in the recognition of Aboriginal land title. This idea would suggest that Settlement Land agreements in the Yukon reasonably constitute institutional structures that could bolster Aboriginal agency, where the UFA and individual SGYFN Final Agreements may possess features that incentivize SGYFNs to enter into partnerships with the private sector as a function of liberal market forces. This is not to say that the principles behind self-government and control over traditional lands can be exploited to serve outside interests. It means that Aboriginal development can be viewed as a self-perpetuating circle where improvements in “Self-Government” can lead to gains in “Control of Resources” that can increase “Self-Reliance” (Anderson, 1999: 12).

The literature on the growing prevalence of transnational energy corporations, or TNCs, especially those conducting operations in Central Asia and northern Africa, has argued that transit pipelines “became the central part of a framework for economic development and conflict resolution” and were essential in boosting the legitimacy of “cash-starved central governments” (Hill, 2004: 4). These models, however, have not yet seen rigorous applications to quasi-sovereign “sub-state” governments existing within colonial states. In relation to bordering processes, transit pipelines have been shown to empower weak governments to gain legitimacy and are viewed as a function of agent power within institutional structures interacting with market forces. Accordingly, the decision to permit Canadian energy development projects on Yukon Settlement Land will likely reflect what border theory identifies as the strength of economic incentives that lead to “market transactions and trade flows, as well as to movements of people, capital, and currencies (Brunet-Jailly, 2007: 351). Similar to the international level, the growth of TNCs has compelled some states to create new “sub-state borderings” that facilitate economic networks and spur prosperity and international cooperation (Diener and Hagen, 2012: 73). The void in the literature relating to bordering processes and supranational energy development projects has not yet acknowledged this application to quasi-sovereign governments existing within colonial states. Accordingly, the innovative concept of the SGYFN presents a blank canvas upon which to embed the contemporary literature on bordering processes, and the porosity of borders in a world transformed by the forces of globalization. Accordingly, the research undertaken for this project suggests that Yukon First Nations could partner with transnational energy companies to create “sub-state” porous Special Economic Zones (SEZs) to attract “foreign” investment and generate economic growth, all while fostering cooperation between First Nations communities and the Canadian nation-state (Diener and Hagen, 2012: 73).

THE INCENTIVE MODEL: FINDING A WAY

Necessary pipelines and other energy infrastructure will likely traverse some of the eleven SGYFN territories when Arctic oil and gas deposits are tapped by the end of the 21st century. In appealing to the intent of land regulations, there are conflicting ideologies among First Nations communities in Canada regarding the prospect of energy development projects taking place on Indigenous land. At the core of this debate is the fact that some First Nations will exercise their right to permit pipeline construction on Settlement Land while others will strictly oppose it by exercising their right of ownership over the surface and subsurface. In referencing a current Canadian case study regarding these conflicting views among First Nations peoples, we can look to an ongoing dispute concerning pipeline construction in British Columbia’s interior as a point of reference for potential conflicts in the Yukon. Eleven proposed pipelines passing through BC’s interior (including the Enbridge Northern Gateway project that has since been rejected by the Trudeau government) has caused tense standoffs between First Nations clans and environmentalist activists occupying Wet’suwet’en traditional territory. As a result, energy companies in Canada have pre-emptively responded to “the rise of pipeline activism” or the “anti-petroleum movement” by meeting with the RCMP about their security concerns before the next pipeline might be approved in BC (Bakx, 2016). Although the standoffs on Wet’suwet’en territory have been largely peaceful, they have garnered international attention as a symbol of resistance to the corporate domination of marginalised Indigenous groups by “Big Oil”. Complicating matters is the fact that

although Wet'suwet'en bands are bound by ancestral ties, they remain divided over the prospect of natural resource and energy development on Wet'suwet'en territory. Of particular importance is that some bands actively support pipeline development projects in BC because energy projects will enable more individuals in their communities to participate in the wider economy:

We have the choice to either maintain the status quo in our community, keep things as they are, keep the social issues and people on high rates of income assistance, or we could look at this as an opportunity to move our nation forward. — Chief Karen Ogen, Broman Lake Indian Band, Wet'suwet'en. (Pablo, 2014)

In exercising their agency, pro-pipeline bands are appealing to the economic prospects that a partnership with a TNC or a consortium of energy companies would bring to their community. On the contrary, however, other Wet'suwet'en bands, such as the Unist'ot'en clan, have disputed the territory belonging to pro-pipeline clans and have claimed that the land belongs to them. Typically, pipeline opposed Indigenous groups such as the Unist'ot'en cite environmental hazards as the greatest concern relating to pipeline construction on Indigenous territory. As such, the Unist'ot'en have argued that proposed pipelines will primarily impact water quality, fish habitats, and wildlife abundance and that the potential risk of a rupture outweighs the suggested benefits (Office of the Wet'suwet'en, 2011). Members have also argued that it threatens their way of life, culture, and future, and have made conservationist statements arguing that “we cannot teach the history as it used to be; without the land, we cannot continue to live as we do today” (Office of the Wet'suwet'en, 2011). Although these justifiable objections are not rooted in formalized scientific risk assessments, they appeal to the notion that land rights and concern for the welfare of the land are the leading factors driving grievances with pipelines traversing Indigenous territory.

The Practice of Bordering

The objections above underlie the fact that the Wet'suwet'en conflict embodies what is referred to as “the practice of bordering” that concerns how human beings organize space. This process of territorialisation involves the division of land between social entities and assigning specific symbolic meanings to those resulting spaces (Diener & Hagen, 2012: 59). In contrast with the jurisdictional conflicts between Wet'suwet'en First Nation clans in BC, Self-Governing Yukon First Nation communities have successfully established legal zones of territorial ownership, whereby these zones are enshrined in the Yukon Final agreements. However, it is likely in the Yukon, as with the Wet'suwet'en conflict in BC, that some SGYFNs will support pipeline development projects, while others will starkly oppose such projects taking place on Settlement Land. In essence, some Yukon First Nations will assign meanings to the land that value economic prosperity while others will assign meanings that value conservation of the land and the local environment. From a purely behavioural perspective, some will find economic incentives in Settlement Land agreements to permit pipeline construction, while others will find a basis in the aforementioned land regulations to oppose energy development projects.

Nevertheless, the original intent of the Yukon final agreements — to define the rights and responsibilities of SGYFNs in regard to the land — will remain steadfast. Consequently, these opposing views pose challenges for potential pipeline projects that will likely traverse

multiple SGYFN territories. This foreseeable duality in the Yukon will present the Government of Canada with an intensifying problem concerning the expeditious economic development of Canada's North as the Northwest Passage thaws, and northern energy development intensifies. At the core of the issue, pipeline opposed SGYFNs will create zones of severely inefficient project development, and hostilities or insurrections by aggrieved Indigenous clans could even threaten proposed or pre-existing pipeline infrastructure. As a result, pipeline decision-making processes "may be both lengthy and costly" due to a number of factors including "uncertainty with respect to Aboriginal rights and title claims" (Hinte, Gunton, and Day, 2007: 131). Thus, Indigenous land claims under the UFA will likely hinder expedient solutions to transfer energy resources from Canada's North for export to foreign markets, specifically to the lucrative and growing economies of Asia. Consequently, staunch opposition to proposed pipelines will necessitate redirecting projects around pipeline opposed territories that could cost unprecedented amounts in additional material and construction expenses. In most cases, redirection around entire territories would be time-consuming and severely cost inefficient.

This efficiency dilemma presents challenges to the Government of Canada for effectively regulating the delivery of public goods (fossil fuels) because natural resources are common goods (impure public goods), and according to the National Energy Board (NEB) of Canada, the delivery of public goods via pipelines is in the public interest and relates to a concept called "energy security", which will be discussed in detail in a forthcoming section. The NEB is an independent regulatory agency created by the Government of Canada in 1959 to "oversee international and interprovincial aspects of the oil, gas and electric utility industries" (National Energy Board website). The agency states "it is the responsibility of the National Energy Board to consider all aspects of the project in order to determine if the pipeline project is in the public interest" (Van Hinte, Gunton, & Day, 2007: 131). As a result, the development of pipeline projects by private companies is regulated by the Government of Canada in accordance with what the NEB determines is in the public interest. In considering all aspects of the project, this policy solution holds that the NEB will acknowledge that borders can reflect "the strength of incentives" to individuals that lead to market transactions and the movement of capital (Brunet-Jailly, 2007: 351). Pipelines can mutually benefit SGYFNs and Canada's public interest due to the fact that economic incentives have been argued to create porosity within borderland communities, and that Canada relies heavily on the industrialization of natural resources for international trade. Accordingly, the very nature of borders between SGYFN territory, the Yukon, and Canada — as artificial barriers to the achievements and goals of human beings — possess the vital capacity for accommodating porosity. In overcoming the hurdle of conflicting values among Yukon First Nations, it is essential to emphasize the practicality of economic incentives — specifically, those contained within land agreements under the Yukon's UFA — and how pipeline construction can benefit SGYFN's endeavour towards becoming truly self-sufficient self-governments. As stated in the background to this policy solution, the UFA and respective Final Agreements represent institutional regulations that offer pathways for capitalizing on the market incentives offered by pipeline development projects traversing Indigenous borders in remote regions of Canada. In essence, the UFA mechanizes an economic incentive; it is the amalgamation of institutional and fiduciary regulations negotiated by the Government of Canada, the Yukon Government, and the eleven SGYFNs.

The UFA and SGYFNs

As previously discussed, Indigenous territory in the Yukon is comprised of 11 recognized self-governments, termed “Self-Governing Yukon First Nations” or SGYFNs. Yukon land claims within SGYFN territory are enshrined by the UFA, which was signed by the Government of Canada, the Government of the Yukon, and the Council for Yukon Indians in 1993, where 11 out of 14 SGYFNs signed on (INAC, 2008). The UFA “forms the basis for the negotiation of each First Nation’s Final Agreement”, where the Final Agreement(s) provide for the negotiation of self-government agreements and allow SGYFNs to make decisions in relation to their lands, resources, governments, and programs (INAC, 2008: Introduction). In the Yukon, SGYFN territory has been negotiated through land claims, and those claims are enshrined by the Final Agreement(s) which entail the rights and responsibilities of various interested parties concerned with “Settlement Land.” The parties include the respective SGYFN, the Yukon provincial government, and the Government of Canada. “Settlement Land” is defined as land that does not belong to the Yukon province or Canada. The definition of “Settlement Land” came to fruition as a result of the landmark *Calder* decision, a federal policy that was adopted in 1973. It was a ruling that essentially stated that

[t]he Supreme Court of Canada in 1973 first recognized land rights based on Aboriginal title [and that] Aboriginal title is based on an Aboriginal group’s traditional use and occupancy of that land. (Anderson, 1999: 57)

As a result of the *Calder* decision, each Yukon First Nation is “owner of the Settlement Land” and has a series of powers regarding the land’s management (UFA, s. 5.5.0). Accordingly, Settlement Land falls under two designations in the Yukon and is defined in the UFA as “Category A Settlement Land, Category B Settlement Land or Fee Simple Land” (UFA, chap. 1). In relation to Rights of Access and Mineral Rights to the land, Category A acknowledges that the First Nation has ownership of surface and the subsurface, while Category B Settlement acknowledges that the First Nation has ownership of the surface but does not have ownership of Mines and Minerals nor the Right to Work Mines and Minerals. In distinguishing Category B Settlement Land from Category A, “The Government of Yukon retains administration and control of the subsurface” in Category B designations (Yukon Government, 2009: 2). In the Yukon, two-thirds of these lands are Category A Settlement Lands, and the remaining third are Category B Settlement Lands (Yukon Government, 2013). However, both designations of Settlement Land pose significant problems for northern development by private interests on behalf of the National Energy Board (NEB) and the Government of Canada. First, although Category B Settlement Land grants the Yukon Government “administration and control of the subsurface,” Section 18.6.0 of the UFA states that Access to Settlement Land for an Existing Mineral Right has a number of “Conditions of Access.” Primarily, the UFA establishes Rights of Access that are subject to the following conditions: there should be no significant damage to the Settlement Land or improvements on the Settlement Land (s. 18.6.1.1), and no permanent structures can be erected on the settlement land (s. 18.6.1.3). This requirement would conform to the Category B Settlement Land designation stating that the First Nation or SGYFN owns the surface land. As a result, any form of pipeline development without the proper/official consent of the SGYFN would be in direct violation of the UFA.

Consequently, if an SGYFN refuses pipeline construction, there are no explicit lawful avenues contained in the UFA/individual SGYFN Final Agreements to circumvent the legal restrictions regarding access to Settlement Land. Accordingly, solutions must appeal to the agreed-to principles contained in the UFA/self-government Final Agreements concerning Settlement Land and the rights and responsibilities of Yukon First Nation's self-government and their legislated relationship with the province of Yukon and the Canadian Federal Government. This investigation reveals that solutions can be found within the UFA and the Final Agreements of Yukon First Nation self-governments. These solutions constitute lawful courses of action to incentivize pipeline development on reluctant SGYFN Settlement Land by harnessing the rights and responsibilities of Yukon First Nations contained within the UFA. Notably, SGYFNs possess the rights to taxation.

THE INCENTIVE MODEL: FUNDING THE RIGHT OF SELF-DETERMINATION

The Power to Levy Taxes: A Lawful Solution to an Enduring Problem

Contained within the UFA and in the Final Agreements for individual SGYFNs is the power of these self-governments to tax Settlement Land. Self-governing Yukon First Nations share taxation powers with the Government of Yukon and the Government of Canada and can tax interests on Settlement Land (INAC, 2008: 15). According to the UFA, Yukon Indian Self-Government Settlement Land is "subject to the power of the Yukon First Nation to levy and collect fees for the use or occupation of Settlement Land, including property taxes" (s. 21.2.1). Importantly, the UFA and underlying Final Agreements also obligate SGYFNs to assume responsibility for the delivery of local government services (INAC, 2008: 13). Accordingly, SGYFNs receive financial assistance from the federal government and the Yukon provincial government to support the provision of these services to their respective communities. Financial assistance comes in the form of government transfer payments to help SGYFNs fulfill these responsibilities. As part of individual self-government Final Agreements, there are Programs and Services Transfer Agreements (PSTAs) and Self-Government Financial Agreements that structure Provincial and Federal financial assistance to SGYFNs.

PSTAs "enable self-governing Yukon First Nations to assume responsibility for federal or territorial program areas falling within the SGYFNs law-making authority" (INAC, 2008: 13). PSTAs effectively transfer and legislate the authority for providing services such as health, housing, and social services from the federal government to the SGYFN. In conjunction with PSTAs, Self-Government Financial Transfer Agreements provide the mechanism for funding the programs and services under the PSTA's legislative mandate. Self-Government Financial Transfer Agreements assume that financing for SGYFNs is a shared responsibility among federal, territorial, and self-governing Yukon First Nation Governments, where these agreements are the primary funding instrument between the Government of Canada and SGYFNs, and "provide the financial mechanism to flow funding to SGYFNs" (INAC, 2008: 12). The objective of self-government transfer agreements is to provide the SGYFN with resources to enable it to provide public services

for which it is responsible at levels “reasonably comparable to those offered elsewhere in the Yukon, at reasonably comparable levels of taxation” (INAC, 2008: 14). In 2014–2015, the Ministry of Indian Affairs and Northern Development Canada allocated \$12,489,992 in transfer payments from PSTAs to the 11 SGYFNs. A “transfer payment” was defined as a “grant, contribution or other payment made by the Government for which no goods or services are received” (Government of Canada website). Of particular significance is that “a self-government financial transfer agreement considers the revenue capacity of the SGYFN and reduces Government of Canada funding to the SGYFN according to an agreed-to formula” (INAC, 2008: 15). Notwithstanding Selkirk First Nation, who was granted \$9,212,530 in 2014–2015, on average a Yukon First Nation received approximately \$380,036 in federal transfer payments to fund programs and services previously managed by other governments.

Historical Convention vs. Present Need

To assess the utility of this transfer funding, \$380,036 spread over a fiscal year would amount to \$31,669/month for previously administered INAC/AANDC programs in health, social services, and housing. When accounting for salaries, equipment, and administration costs, it becomes apparent that PSTAs and Financial Transfer Agreements provide a parsimonious bare minimum to assist Yukon First Nations in maintaining even mediocre programs and services that are essential to sustain their respective communities. Unfortunately, the rationale behind the Government of Canada’s decision to parsimoniously allocate funding is based on historical convention rather than present need. The historical approach to SGYFN funding “assumes that programs and services for Yukon First Nations were adequately funded to meet their needs when they were under the *Indian Act*,” legislation denounced as an exercise in colonial control that takes the form of civilized oppression. For the Government of Canada, however, it would follow that Yukon First Nations receive the same amount they received under the Indian Act (adjusted for inflation and population shifts) and thus, “INAC will not allow the transfer of programs and services to be an occasion for what it terms *program enrichment*” (INAC, 2008: 15). On the contrary, however, Yukon First Nations have rejected this rationale by stating that the appropriate level of funding is not being met to achieve reasonable goals in each program and service area and “that historical levels of funding do not provide for this” (INAC, 2008: 15). Other modes of revenue generation to enrich social programs and services, therefore, would present an opportunity to greatly increase the ability of Yukon First Nations to solve problems related to health, housing, and other social issues that are markedly worse and cause them to suffer disproportionately higher rates of destitution than non-native communities in Canada.

Essentially, in moving towards self-sufficient self-governance, Yukon First Nations and other Indigenous self-governments in Canada can only enjoy the right to self-determination inasmuch as *there are the means to fund it*. Accordingly, the historical limits placed on government funding present a compelling case for economic development (Dacks, 2004: 688). It is true that the fiscal capacity of Yukon First Nations “is directly related to their tax base” and is a critical determinant of their level of self-determination (Dacks, 2004: 688). Economic self-sufficiency, thus, is viewed as being critically important to self government. This sentiment is echoed by former Grand Chief Ovide Mercredi’s statement that “If we gain [political] power for the community but we don’t get the economy, we have power that cannot exercise itself” (Anderson, 1999: 11). Therefore, exercising the right to levy taxes on

Settlement Land unlocks the potential for economic growth and autonomy when pipeline taxation becomes the basis for economic development. In addition, revenue generated from taxation would assist SGYFNs in meeting their mandated fiduciary obligations outlined in the UFA.

Since financing self-government is a shared responsibility among the federal, territorial, and self-governing Yukon First Nation Governments (INAC, 2008: 13), the Self-Government Financial Transfer Agreements are the primary funding instrument between the Government of Canada and SGYFNs and provide the financial mechanism to flow funding to SGYFNs. The mechanism assists land claim implementation funding: funding provided toward the cost of operating self-government institutions, and the allocation of direct and indirect costs to SGYFNs for programs and services previously managed, administered, or delivered by other governments (INAC, 2008: 13). According to these agreements, “the objective of self-government financial transfer agreements is to provide the SGYFN with resources to enable it to provide public services for which it is responsible at levels reasonably comparable to those offered elsewhere in the Yukon, at reasonably comparable levels of taxation” (INAC, 2008: 13). Therefore, in ensuring the most efficient and effective use of those transferred financial resources from Canadian taxpayers the Government of Canada believes that “wherever feasible, Aboriginal governments and institutions should develop their own sources of revenue in order to reduce reliance, over time, on transfers from other governments” (INAC, 2010). Thus, self-government financial transfer agreements incorporate a principle of SGYFN fiscal responsibility and cost-sharing. Of significant importance to the incentive model comprising the core of this policy solution is that the Self-Government Financial Transfer Agreement has a built-in mechanism that considers the revenue capacity of the SGYFN and *reduces the Government of Canada’s funding to the SGYFN according to an agreed-to formula* (INAC, 2008: 15). Accordingly, a Yukon First Nation is legally obliged to take opportunities “wherever feasible” to generate revenue towards becoming less reliant on provincial and federal transfer payments; and when failing to utilize the capacity to do so, has agreed to have its funding adjusted accordingly. In pursuing innovative avenues for revenue generation, Yukon First Nations could exercise their legal right to tax Settlement Land and apply that to “foreign” entities seeking to conduct activities on that land. The taxation of foreign interests is inherently a revenue generating activity; it is the logical extension of being in close proximity to a multi-billion dollar industry. Private pipeline routes in the North, therefore, represent a fiscal opportunity to meet this mandated responsibility effectively.

Transit Fees: A Model from Developing Countries

The practice of charging fees or taxes on “foreign” energy companies’ activities on the sovereign territory is a well-established method for spurring economic growth in developing countries. In particular, this arrangement has been an ongoing phenomenon in the transit of natural resources throughout Central Asia and Northern Africa. In the regions surrounding the Caspian Sea, transit pipelines “became the central part of a framework for economic development, and conflict resolution in the Caucasus [where energy] revenues and transit fees were essential in boosting the coffers and legitimacy of cash-starved [...] central governments” (Hill, 2004: 4). Additionally, local communities were argued to reap the [contested] “trickle-down” economic benefits that created energy related service sector jobs and overall foreign investment (Hill, 2004: 20). Transit “fees” exacted on foreign pipeline infrastructure

were defined as “a reward to the transit country for sacrificing its sovereignty” (Omonbude, 2013: 6). These rewards came in the form of diverse contract formats regulating various transit fee arrangements. Various forms include “Fee per Barrel” contracts (a toll based on physical production); production-sharing contracts, in which the host country receives a reward in the form of the physical oil produced (as seen in the country of Georgia); and royalty contracts, in which the foreign company “receives a title to the property (resource) and pays a stipulated percentage of the value of production to the host country (Blitzer et al., 1985: 300).

Since weak First Nation self-governments may not possess the technology, funding and human capital to harvest the financial rewards from pipelines traversing Settlement Land, investment from “foreign” energy companies could be a gateway to self-sufficiency for many, if not all, financially dependent Yukon First Nations. The “ground-breaking” 1977 document, “Together Today for our Children Tomorrow”, spawned the negotiations for SGYFNs and acknowledged the limitations underlying economic development in the north. As such, the appeal implored the Canadian Government to consider outsourcing expertise by arguing:

Many successful companies and corporations are controlled by people who are not experts. They hire experts. Even the Government sometimes hires experts to advise them. The people in control have to separate good advice from bad advice, then make the right decisions. This we can do. (Yukon Indian People, 1977: 22)

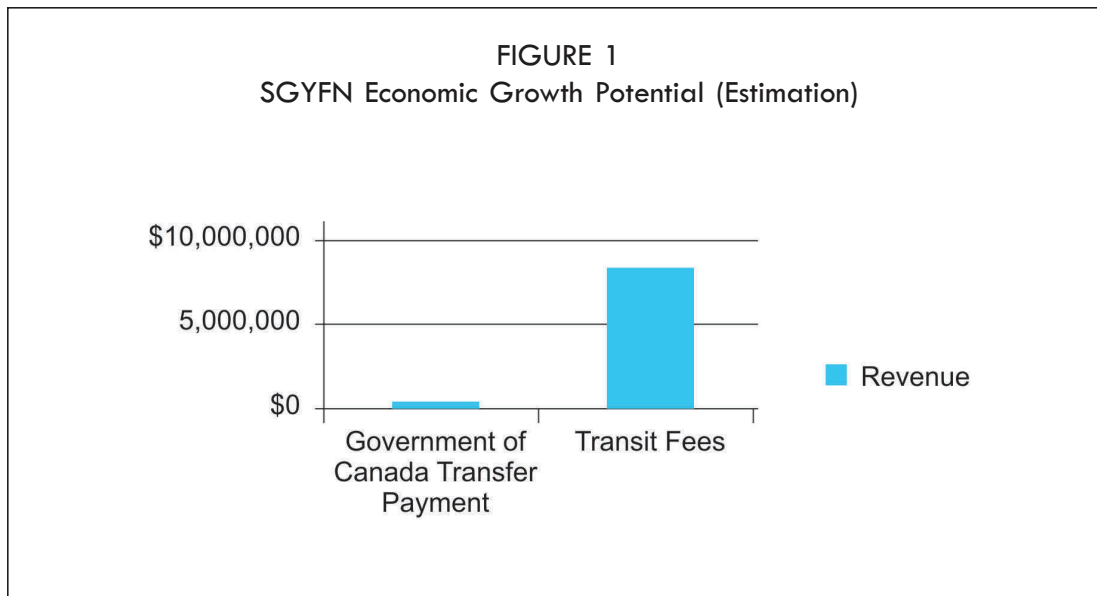
In regard to making the right decisions, for example, according to the aforementioned “Fee per Barrel” concessionary agreement, an SGYFN could grant an energy company the right to operate on the land if they pay a stipulated amount of the production revenue (% per barrel) to the self-government. Here, the company would assume all of the risks/returns for the transfer of raw energy while being taxed to assume those risks/returns (Blitzer et al., 1985: 302). Thus, a reluctant SGYFN could consent to “foreign” pipeline construction on Category A or Category B Settlement Land, which could then be used to levy transit fees/taxes on the production income from private pipeline companies’ extraction projects. The following section outlines a hypothetical growth projection if an SGYFN entered a “Fee per Barrel” concessionary agreement with a “foreign” energy company.

Take, for example, the Norman Wells Pipeline that runs from Norman Wells, Northwest Territories to Edmonton, Alberta. According to Enbridge Company, the subsurface pipeline has a capacity to produce 50,000 barrels per day. In making the simplifying assumption that the pipeline would pump at full capacity for 365 days, the Norman Wells Pipeline could produce 18,250,000 taxable barrels in a year. If a Yukon First Nation self-government were to negotiate US\$0.46 per barrel, then the transit revenue generated would amount to US\$8,395,000 per year. (Note: This is a rough approximation based on federal assistance alone.) When compared to the current income from federal transfer payments, there is a phenomenal increase in revenue.

Potential Percentage Growth Rate with Transit Fees

Potential Percentage Growth Rate (PR)

$$= \frac{\text{Total Potential Revenue} - \text{Total Revenue 2015}}{\text{Total Revenue 2015}} \times 100$$



$$= \frac{8,395,000 - 380,036}{380,036} \times 100$$

$$= 2,109\% \text{ increase in revenue (based on Federal assistance revenue alone)}$$

This enormous percentage increase (2,109 percent) in revenue would represent an approximately \$8 million increase from 2014–2015 levels (based on purely federal assistance alone). Revenue figures approximating this amount could theoretically solve the problem of underfunding from provincial and federal governments, and provide the much-needed levels of funding for “program enrichment” in order to far surpass reasonable goals for programs and services areas. In theory, this could increase the social well-being of Yukon First Nations communities, assuming the revenue is distributed efficaciously and without corruption. Additionally, this magnitude of revenue could enable SGYFNs to enjoy a level of self-determination liberated from the constraining conditions imposed by relying on underfunded federal and provincial transfer payments. Given that some pro-pipeline First Nation self-governments would accept such a contract, in referencing the Wet’suwet’en dispute in BC, those First Nations opposed to the pipeline are also legally obliged to take advantage of this economic opportunity towards becoming a self-sufficient self-government. Under the Umbrella Final Agreement, SGYFNs could use the revenue generated from transit taxes/fees to provide public services for their communities *at levels comparable to those offered elsewhere and at comparable levels of taxation* (INAC, 2008: 14). In other words, pipeline opposed SGYFNs would be incentivized to provide at similar levels as pro-pipeline Yukon First Nation communities. In accordance with the Government of Canada’s fiduciary position, this incentive would enable Indigenous self-governments to develop their own sources of revenue to reduce their reliance on transfer payments (e.g., PSTAs and Financial Transfer Agreements) from the Government of Canada and Government of Yukon. However, the question remains whether transit pipelines will be a welcomed source of revenue.

CONCLUDING REMARKS

This policy paper has investigated Yukon land regulations and extrapolated contemporary border theory to a uniquely Canadian context. In the analysis, it was found that the Yukon Final Agreements contain incentives that would encourage SGYFNs to consent to pipeline construction on Settlement Land. In doing so, it was determined that the Final Agreements represent institutional regulations that enhance a number of social processes. These processes were argued to integrate the SGYFN-Canadian borderland through market forces, which include flows of capital, commodities and people. Likewise, the policy solution integrated concessionary revenue generation models from developing countries in Central Asia and northern Africa and applied them to the First Nations-Canadian context. It was thus determined that globalization and the effects TNCs have on border porosity in developing countries can also strengthen the agency of sub-state quasi-sovereign Indigenous self-governments in Canada. In essence, it was determined that transnational market forces incentivize positive agent action in response to energy development projects on sanctioned territory; specifically, by levying host governments' ability to tax foreign interests. As such, concessionary agreements signed with TNCs were found to be the keystone for creating border porosity in the northern Canadian context. Concessionary agreements ease border tensions by encouraging cooperative flows of capital between Canada and First Nations communities that spur shared economic prosperity. Overall, the broader contribution the investigation makes to border theory is that quasi-sovereign governments existing within established state entities can also be the primary objects of analysis for analyzing relations between human organizations. SGYFNs, by virtue of the Final Agreements, possess an inherent duality that the traditional paradigm of Westphalian sovereignty cannot incorporate. As a result, the investigation advocated that borders are no longer a wholly Westphalian enterprise; they are determined by human agency interacting within institutional structures rather than stagnant, isolated, and immutable conceptualizations of space organization.

Of particular importance is the fact that the incentive model for revenue generation is crucial for transcending traditional views of space organization due to the ultimate goal of self-sufficient Self-Government for Yukon First Nations. While much of the negative rhetoric on pipelines has unfairly lambasted them as being the antithesis to First Nations' capacity for agency, the opposite, in fact, was found to be true. Pipeline development projects instead offer enormous economic benefits for funding self-governments in making the transition from being primarily dependent on federal assistance to being truly liberated from constraining and historically oppressive levels of funding for community programs and services. Accordingly, the investigation supports the creation of a homogenous, cross-borderland region that is defined by a shared interest in the generation of revenue flows to maintain Canada's energy security priorities, and lift Yukon First Nations onto a bona fide level of self-determination within the globalized liberal economy.

BIBLIOGRAPHY

- Aboriginal Affairs and Northern Development Canada (AANDC), Communications Branch. (n.d.) "Fact Sheet: Aboriginal Self-Government" (Last modified April 2, 2015), online: <http://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294> (Accessed: February 6, 2016).
- Anderson, Robert Brent. (2009). *Economic Development among the Aboriginal Peoples in Canada — The hope for the future*. Concord: Captus University Press.

- Assembly of First Nations (AFN). (2018, January). "Dismantling the Doctrine of Discovery", online: <http://www.afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf> (Accessed: August 9, 2018).
- Bakx, Kyle. (2016). "Kinder Morgan braces for Standing Rock-type protests", *CBC News* (Last modified: November 5, 2016), online: <http://www.cbc.ca/news/business/tmx-kindermorgan-bc-oilpatch-pipeline-standing-rock-1.3836489>.
- Blitzer, C.R., et al. (1985, November). "Oil Exploration in the Developing Countries: Poor Geology or Poor Contracts?" *A United Nations Sustainable Development Journal*, 9(4): 293–302.
- Brunet-Jailly, Emmanuel. (2007). *Borderlands: Comparing Border Security in North America and Europe*. Ottawa: University of Ottawa Press.
- Burchill, Scott, et al. (2015). *Theories of International Relations*. Hampshire, UK: Palgrave Macmillan.
- Dacks, Gurston. (2004). "Implementing First Nations Self-Government in Yukon: Lessons for Canada." *Canadian Journal of Political Science/Revue canadienne de science politique*, 37(3): 671–694.
- Diener, Alexander C., and Hagen, Joshua. (2012). *Borders: A very short introduction*. Oxford: Oxford University Press.
- Flanagan, Tom. (2008). *First nations? Second thoughts*. Montreal: McGill-Queen's University Press.
- Government of Canada website. (n.d.). "Detailed information on Transfer Payments, as per the Public Accounts of Canada", online: <http://open.canada.ca/data/en/dataset/69bdc3eb-e919-4854-bc52-a435a3e19092> (Accessed: March 2017).
- Hill, Fiona. (2004). "Pipelines in the Caspian: Catalyst or Cure-all?", *Georgetown Journal of International Affairs* 5(2): 17–25. Retrieved from <https://www.brookings.edu/wp-content/uploads/2016/06/20040301.pdf>.
- Indigenous and Northern Affairs Canada (INAC). (2008). *Building The Future: Yukon First Nation Self-Government* (Last modified: September 16, 2011), online: <http://www.aadnc-aandc.gc.ca/eng/1316214942825/1316215019710>.
- Locke, John. 1632–1704. *Two treatises of Government*, in Jene M. Porter (Ed.), *Classics in Political Philosophy*. Toronto: Prentice-Hall Canada, 2000 [1989].
- McCarthy, Shawn. (2015, February 17), "'Anti-petroleum' movement a growing security threat to Canada, RCMP say", *The Globe and Mail* (Last modified: May 12, 2018), online: <http://www.theglobeandmail.com/news/politics/anti-petroleum-movement-a-growing-security-threat-to-canada-rcmp-say/article23019252/>.
- National Energy Board website. (n.d.). "Who we are" (Last modified: December 1, 2016), online: <https://www.neb-one.gc.ca/bts/whwr/index-eng.html> (Accessed: March 5, 2016).
- Omonbude, Ekpen James. (2013). *Cross-border Oil and Gas Pipelines and the Role of the Transit Country*. London, England: Palgrave Macmillan UK.
- Pablo, Carlito. (2014, April 7). "Wet'suwet'en people disagree about Pacific Trail Pipelines project", *The Georgia Straight*, www.straight.com/news/621226wetsuweten-people-disagree-about-pacific-trail-pipelines-project.
- U.S. Geological Survey, Department of the Interior. (2008, July 22). "90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic", online: <https://www.usgs.gov/media/audio/90-billion-barrels-oil-and-1670-trillion-cubic-feet-natural-gas-assessed-arctic>.
- Van Hinte, Tim, Gunton, Thomas I., and Day, J.C. (2007). "Evaluation of the assessment process for major projects: a case study of oil and gas pipelines in Canada", *Impact Assessment and Project Appraisal*, 25(2): 123–137.
- Yukon Government, Department of Energy, Mines, and Resources, Mineral Resources Branch. (2009). "Definitions of Land Designations and Mineral Rights in the Final Agreements", *Interpretative Bulletin 2009–03 Administration of Mineral Claims in the Traditional Territory of First Nations with Final Agreements (Umbrella Final Agreement)*, Yukon Government, 2009-03. Online: http://www.emr.gov.yk.ca/mining/pdf/ib_2009_03_settlement_lands.pdf.

- Yukon Government, Executive Council Office. (2013). "Hunting on First Nations Land", <http://www.eco.gov.yk.ca/landclaims/hunting.html> (Accessed February 1, 2016).
- Yukon Indian People. (1977). *Together Today for our Children Tomorrow*. Brampton: Charters Publishing Company. Online: https://cyfn.ca/wp-content/uploads/2013/10/together_today_for_our_children_tomorrow.pdf.