

Michael Fleischmann – Final Report on Internship at AAC

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The Road to the Yukon

Checking the Osgoode Hall Career Services website was my favourite thing to do. I would open the webpage as soon as I started my computer, before I shut it down, whenever I was bored in class, and whenever I wanted a quick diversion from homework. Career services would update the page with a list of summer jobs for law students. I was excited about what my first foray into the law jobs market might potentially look like.

The first set of jobs that were published on the website were the Bay Street positions. These spots, reserved for the best and the brightest students, were designed to condition fresh legal minds into 80 hour a week, contract writing, corporation defending, business acquiring, legal warriors. I use “legal warrior” to connote a lawyer for hire to the highest bidder. Caught up in the fuss and prestige, I admit to applying to almost all of the Bay Street firms. I was not offered any interviews.

A seemingly long drought went by, with few new job postings on the career services website. Many firms, at least those offering the summer positions, would advertise such milestones as successfully re-instating doctors found guilty of gross malpractice, defending class action lawsuits for tobacco companies, or joining together corporate giants to create corporate mega-giants. I was beginning to wonder if a gainfully employed lawyer had to “put their faith in the legal system” and not be concerned about who or what cause you are fighting for.

Finally, a very interesting update appeared on the career services page. Canadian Lawyers Abroad (CLA), a charity that tries to get legal warriors to remember the human rights/rule of law/good governance side of the law, was offering some internships. Besides reminding established legal practitioners about these elements of the law, they also try and get law students interested in these areas before they get attracted to the big draw of Bay Street.

One of the CLA positions fit me perfectly. It described the AAC internship. The North and the First Nations were something that always excited me, though I had no experience with either. Lending my skills to a cause in Canada also had appeal. Most of all, I was interested to find out whether legal tools have any practical potential to influence the Canadian policy on climate change mitigation and adaptation.

I did not hear anything for a long while after sending my application. I was worried that my narrow focus on the position with AAC had given CLA the impression that I was not a flexible enough candidate. The day before I had an interview with the Legal Services Branch of the Ontario Ministry of the Environment, after giving up hope on CLA, a lady from CLA phoned me, and expressed great interest in my application. About a week later I was signing the paperwork to secure my spot as an intern with AAC.

I met with Cindy Dickson, my supervisor for the summer, about a month before departure to Whitehorse. I asked her if she was Inuit and told her about this great government climate change program (Aboriginal and Northern Community Action Programme - ANCAP) that I had found. I was about to learn that there is more to northern Canada than the Inuit and ANCAP.

Arrival

My first couple weeks in Whitehorse set the tone for the entire summer thus far. From the beginning, Cindy has done as much as possible to give me a flavour for the work of this office. She has included me in all the meetings, proposals, and gatherings that AAC is involved with, internationally and domestically. When I was with Cindy and Chief Joe Linklater in New York City for a UN conference, I asked them about the reasons behind all the generosity. Being a suspicious person, I thought there must be some ulterior motives. The chief replied, and I'm paraphrasing, "just to learn, to understand our issues and causes, take some extra knowledge away with you about law from the Aboriginal perspective." Learn, I have.

Learning

In the three months that was my internship, I have attended the 5th United Nations Permanent Forum on Indigenous Issues in New York City, the "Achieving Objectives" land claims conference in Gatineau, a Walter and Duncan Gordon Foundation meeting on ways for the foundation to support Yukon First Nations, a Council of Yukon First Nations leadership meeting, a gathering of First Nations forestry stakeholders, the Elder's Panel on Climate Change, a visit to Old Crow, and various meetings to discuss funding proposals and government programs. Rather than try to summarize my point of view on each of these events as I have done in other reports, I will use this space to compare and contrast on how these meetings and delegates approached some general themes.

There is a wide continuum of views on how to integrate the roles and responsibilities of the various governments with respect to Yukon First Nations communities. For example, Elder Agnes Mills observed how there was a division between the Elders on the climate change panel about who to approach for recognition and application of their knowledge on climate change. Some elders thought that the Council of Yukon First Nations would be best able to take the lead and others thought that the federal government, or even the international community should utilize the Elder's recommendations for climate change action. Another example was at the First Nations Forestry Authority meeting where a consulting group presented their paper on the status of Yukon forests and some follow-up recommendations. I heard several people at this meeting remark that the federal and territorial government should get to work on implementing these recommendations. In closing remarks, however, a government representative thought that the First Nations Forestry Authority was well suited to address the recommendations.

Someone who read the Umbrella Final Agreement in a Toronto law school might think that the responsibilities, jurisdiction, and division of power, is already neatly laid out. In

practice, the difficulty becomes whether the First Nation government has been properly equipped to handle the responsibility. I have learned that there is no such thing as a purely First Nation issue because other governments influence the success or failure of the First Nation's attempt with capacity and funding decisions. When the issue is environmental, another sphere of influence exercised by other governments is with development assessments and international agreements that are taking place elsewhere. When the issue is capacity development, another sphere of influence is the degree to which bright First Nations students are attracted to government positions with bigger salaries in bigger cities. When the issue is social and economic development, another sphere of influence is whether partnerships and integration is welcomed by other Canadian governments, corporations and people. When the issue is fostering a sense of identity and cultural heritage for First Nations people, the rest of Canada once again has an influence through the degree to which justice and appreciation of history is built. And so on.

First Nations can also influence territorial government targets. For example, in the Nunavut land claims agreement there is a clause obliging the Nunavut Territorial Government to hire people in proportion to their representation in Nunavut. Since 85% of Nunavut is Inuit people, these people are supposed to have 85% of the government jobs. This target of 85% has not been met because there are not enough Inuit people in Nunavut who meet the educational requirements to qualify for consideration. Determining who is responsible for this is a difficult task. Both First Nations government and the territorial government may need to make changes.

The result is that the Crown and Yukon First Nations leadership can blame one another for failures and take credit for successes. In all the meetings I attended, a lack of funding and unsatisfactory work in some of the other spheres of influence were used as excuses for failure. For instance, a theme at the land claims meeting was the failure by the federal government to implement their side of the agreements. Certainly there are some clear failures. One only needs to consult the objectives of the agreements, which spell out the very reasons for the agreements, to find that there is a long way to go. Objectives such as maintaining Yukon First Nations culture, incorporating traditional knowledge into decision-making, and building the capacity for First Nations to take their rightful place in modern Canadian society, are not being met.

Unfortunately, I cannot appraise the validity of the excuses, just as though I would be unable to evaluate whether the problem lies with ineffectiveness or inefficiency in the First Nations administrative regime. There are too many variables and too much history for me to know who is right. Comments such as "we need more resources" from the First Nations side, and "we need more proposals" from the government side are both not useful. Before I left for Whitehorse, I would be convinced by a person arguing from one angle, and then change my mind when someone from the other perspective gave me their view. The old cliché is true for me: I have learned enough in the last three months to know that I know nothing. I have no general opinion on this, except with respect to climate change, which I will discuss later.

Where to?

One meeting, with the Walter and Duncan Gordon Foundation, gave me some hope on how to move forward. The meeting was organized so that delegates could communicate in a roundtable dialogue with trustees of the foundation. The trustees were trying to get an idea of what projects to fund, and the delegates were telling them what the needs are for the communities. There was no culture of blame between the foundation and First Nation representatives and no one had their guard up, there was just some honest discussion.

In my application to Canadian Lawyers Abroad I wrote about the benefits of well conducted environmental risk communication. This is the communication that is done during the process of making an assessment and management decision about how to handle an environmental risk. The new generation of environmental risks, such as those stemming from climate change and nuclear power, require more and better communication on the part of the experts. The managers and assessors are increasingly unable to effectively analyze environmental risks with science and cost-benefit models. That is because the new generation of risks are typically characterized by a probability of loss and a magnitude of loss that are difficult to calculate. There should be more allowances for input and consultation with the local people that face the risk because these people tend to judge risk with more focus on fairness in distribution of risk, voluntariness of the risk, who benefits of the risk, and degree trust in those who have produced the risk. Though it is difficult to quantify and mathematically analyze the new generation of risks, the factors that are important to the local people that face the risk can still be analyzed.

Another advantage of incorporating local input into decision making is that it increases accountability and trust both between the governments and between the government and the people that it governs. When local people are involved, the government can communicate the budgetary and legal restrictions while the people can communicate their preferred policy response. If a lot of productive work can be done by locally crafted policies, this is an excellent advocacy tool for increasing the budget and scope of the policy and associated programming.

I have really valued getting the chance to use the risk analysis and communication knowledge that I have learned in school and applying it to proposals. One example of where I have used this is on the ANCAP proposal for adaptation funding. Under the rationale section of the proposal I was able to describe the risk analysis theories I have learned and apply them to the project.

Projects I Have Been Working On

Outside attending and adding my input at meetings, my work has centred around making arguments and spreading awareness about the legal duty to consult and address climate change. There are many stages to this process (some of which I had never even considered before this summer), and I have done some work on all of them.

The first stage is getting people's attention when they have a lot of other issues on the go. My involvement in this regard has been to create a climate change resource binder that includes a brief outline of the potential impacts of climate change in the Arctic, the Canadian government's response to these risks, and an introduction to some tools to help advocate for a more robust response. These tools include risk analysis/communication, possible use of tort law, and how the land claims agreements may be affected by climate change.

The next stage is to write proposals for climate change funding and research. A central element that requires funding and research is to understand and implement recommendations from local people. Acting upon recommendations from the people facing the risk of climate change is an effective and equitable way to approach adaptation funding. This approach, including consultation and accountability to the local community members is a duty and objective in the final agreements.

One proposal that I have been involved in writing is for adaptation funding under the Aboriginal and Northern Community Adaptation Program (ANCAP). This project will assess the risks posed by climate change for one Yukon First Nations community by consulting with the local population and identifying their concerns. This knowledge will be integrated with scientific data in order to produce an environmental risk assessment of climate change for that community. The assessment will then be analyzed in combination with the final agreement for the community to see if any of the clauses and objectives of the agreement are impinged by the risks.

A final issue that I have been working on, related to the legal duty to consult and address climate change, is the response if government does not consider and/or follow through on recommendations from the local public, or even solicit such recommendations in the first place. The most promising legal recourse appears to be with reference to the land claims agreements. Climate change was not considered when these agreements were initially signed, so there are no specific obligations on the government with respect to a policy response or a duty to consult and/or build capacity within the First Nations. However, as Thomas Berger, possibly Canada's foremost Aboriginal law specialist and advocate has raised the possibility that the objectives written into the agreements may carry legal force. This is a novel argument because normally only the specific obligations must be met. The justification for giving legal weight to the objectives is that the Supreme Court of Canada has established that the Crown owes a fiduciary duty when dealing with the First Nations. Berger points out that this duty may require the Crown to take steps to honour not only the specific obligations in the agreements but the objectives.

Another task has been applying to have AAC get charitable status. There were two interesting elements in this task, the first being the chance to work with lawyers, and the second being the actual application process. One Whitehorse lawyer, who received a retainer to work on this project a few years ago made progress in spending the money but no progress in completing the work. Over a week and a half I tried to get a statement of his progress on the work and the amount remaining in the retainer. He made no response

so I went to his office unannounced and he agreed to speak with me. It was at his office that I was able to confirm that he had done nothing but charge for emails and phone conversations related to the project. I regret missing the chance to communicate AAC's displeasure with his performance.

Hopefully this lawyer has gotten the message, as AAC has recovered the remainder of the retainer and approached another lawyer associated with the Walter and Duncan Gordon Foundation. I have enjoyed the working relationship that I have developed with this lawyer. His knowledge and enthusiasm for charity law has somewhat rubbed off on me. The crucial issue that Canada Revenue Agency considers in awarding charitable status is whether the work being done is for a purpose that is "charitable" and sufficiently beneficial to the public. Although political activity is beneficial, it is not considered charitable, and this prevents AAC from qualifying. However, a portion of AAC's work, in advancing education and integrating traditional knowledge with science does qualify. Therefore, a new foundation is being established that will now carry out this charitable work. It will hopefully qualify as charitable. An interesting issue is whether the proceeds of this charitable work, be it an Elders Panel on Climate Change or an environmental risk assessment at the community level, can then be used by AAC for political purposes. The answer is yes. So if the Elders or the risk assessment identify an environmental harm that is not adequately being addressed, AAC can use this information for political advocacy and awareness building. By having a separate charitable wing, hopefully more work can be completed, at both the political and education level.

"How?" is the Toughest Question

The response at the consultation, funding, and risk analysis stage to address climate change in the Yukon has been inadequate by the Crown. Due to the fact that AAC is either involved with distributing climate change funding to the communities or is at least aware of much of the funding available, it is easy for me to see that much more needs to be done. The question becomes why the government has lacked foresight on this issue. Maybe the cause of a lack of government involvement is that they do not know *how* to address climate change on an adaptation level. This point was raised by a lawyer working for Justice Canada that I met at the land claims conference. He posed the question, that assuming the government wants to play a role in addressing the issue, how could they get involved?

Environment Minister Rona Ambrose has stated repeatedly that she wants to devote resources to projects and programs that have tangible benefits. It may be difficult for the government to see how money can be wisely spent on adaptation for Yukon First Nations. Does this require a full scale relocation of people? Subsidized food and energy? Compensation? The answer must involve building the capacity of local people to face the risks for themselves. How do we go about doing this?

Assuming that this question can be answered, and the government still refuses to participate, another difficult "how" question emerges: How do we legally oblige them to

participate? The government's lack of action on climate change appears to run contrary to the land claims agreements, so what is the next step? Litigation is costly, time consuming, and there is no legal precedent that has been set on the standard required of the government for implementing the agreements.

Another possibility is to use political means. The Council of Yukon First Nations circulated a proposal at the land claims conference to establish an implementations secretariat that meets to review implementation progress and lobby the government when there are areas that require further progress. The difficulty with using this secretariat is that they would need to be convinced that this is a priority issue. Thus far, CYFN has lacked the funding and resources to research the full consequences of climate change.

Skills I Have Developed This Summer

I have had numerous tasks this summer that have involved written and oral communication. On the written side, I have gained some experience with making funding proposals. I have only had one previous experience with proposals, in the fourth year undergraduate project at the University of Guelph. These projects were done in teams of eight environmental science students, each with a different environmental concentration. This summer has been my first chance to do a real funding proposal, on my own. Another chance to improve my writing has been in working on the Climate Change Resource Binder. I have had free reign to design this binder under the general guidelines that it should be a resource to Yukon First Nations who want more information on the climate change issue. I have also had lots of experience writing reports on the various meetings I have attended.

This summer has also tested my oral communication skills in a variety of settings. I have been gaining comfort in this regard throughout the summer, though there is still room for much improvement. One example of where I really failed to speak up was at the Elder's Panel. The Elders had gone woefully off topic, and I missed opportunities to try and guide the discussion back to issues of relevance. The result was that an opportunity for meaningful discussion was lost, and all sides left with a rather bitter taste in their mouth. Hopefully, however, I am developing the beginnings of networking skills, the ability to assert my opinion in a respectful way, and the confidence to mix professional and social activities to further issues I am working on.

Through a combination of being involved in all the meetings, having some room to guide my own work, and networking with people, this summer has been the perfect environment to work on my leadership skills. Although I have not led a team, I have been able to further some issues that will hopefully still be of relevance to AAC after I leave. I feel like I have taken a leadership role in working on the charitable status application, the proposals, and the resource binder. This has been markedly different than most of my other experiences where my responsibilities were more strictly defined. I have been pleased with my success in this new environment, and feel that some useful work has been completed, or at least started.

Changes to my Perspective and Contribution to my Studies

This summer has certainly given me some guidance and helped me to define some new goals that I will take with me into second year at law school. My goal is to answer the second “how” question that I posed above. Repeated: how can the government be compelled to act in furtherance of the land claims agreements? More broadly: how can a lawyer assist all parties in meeting the objectives of the land claims agreements? Even more broadly: how can individuals, institutions, and governments be held accountable to the agreements, written or unwritten, that they ratify? Most broadly: how can a lawyer contribute to justice? These are the main questions that this summer has made me consider.

I am much more wary of warrior lawyering and blind faith in the law. I think that most lawyers choose a career path and then fit a justification to that path rather than choose some defining goals and then base their career on meeting these goals. The justification for warrior lawyering, as I wrote above, is that participating in the legal process, for any side and on any issue, is justified because it furthers the legal system. This view sees justice as furthered by any sort of participation in the noble and grand legal process. The difficulty with this view, is that in the adversarial process, the law does not come to you, you go to the law. Unless you speak up for your clients, the law will ignore their claim. No more is this true than in climate change and the issues that arise with respect to Yukon First Nations.

The people, meetings, and projects that I have worked on this summer have helped me pose these questions, and given me some direction on the skills I will need to answer them.

Old Crow

The trip to Old Crow, that I just returned from yesterday, was the most interesting experience of a very interesting summer. It had an impact more on my heart than my head.

We made the trip north in order to attend the Vuntut Gwichin General Assembly. Due to a death in the community, however, the assembly was postponed. This left Cindy and I with several days to fill in Old Crow. The first few days were spent walking around Old Crow and taking a boat up the Porcupine River. The environment was all new to me, and I enjoyed the exposure to this different scenery. On the third day of our time in Old Crow, however, my perspective changed from tourist enjoying the view to someone with a slightly richer understanding of what else the land means. I was reminded of something that was mentioned at that Walter and Duncan Gordon Foundation meeting: the “land” to most white people is a place for canoeing, kayaking, and getting back to nature. The “land” for many First Nations people is life. As Cindy’s uncle in Old Crow, Randall Tetlich, said, “there is no too hot, too cold, or too rainy, to go out on the land. It is a matter of survival.”

I witnessed the First Nation's perspective of the land on the 3rd day of the trip. We went back out on the Porcupine River, but traveled a much further distance, and camped out over night at the confluence of the Porcupine and Bell River. The reason for going back on the river again, and further down, was to hunt for caribou. As we were unloading our gear for the night, Cindy spotted a caribou crossing the Porcupine River. Ten minutes later we were dragging the dead caribou out of the water and onto the shore. I watched as Cindy's cousin, Gino, skinned and butchered the animal. The different parts were then smoked over the campfire. There was a lot of skill and practice that went into these acts. Also on this trip, we hiked around a little bit on the tundra above the river valley. To me, the land was beautiful: the smell of tea, the soft tundra ground, the feeling, was all fantastic. However, I could also appreciate that far above beauty was the functionality of the land: the medicine, the berries, the shelter, the wood, the home.

Human Rights

At law school everybody talks about human rights, which are those rights that cannot or should not be taken away by the majority, even if it convenient or beneficial to the majority to do so. In judge's decisions, lectures, class discussions, and exams, we analyze what counts as an inviolable human right, why, and how it can be protected. Most law students never take it further than that. This summer, above all has given me a chance to take it a little bit further, by actually seeing what we talk about at law school. I have found that human rights, at least in the case of Yukon First Nations, is inextricably linked to the land.

In Old Crow, it was clear that the land is a sufficient and necessary support for the culture and livelihood of the people. More than that, First Nation's pride, expression, and societal worth are attached to knowledge and use of the land. I think a student really has to see humans, exercising their rights, in order to understand human rights and the relevant legal issues. Getting a chance to see First Nations people interact with the land shows me the real potential of human rights law, as more than just an element in obtaining one's law degree. All the "I can't believe I'm here" experiences that I've had this summer, which I owe to Cindy, have changed my perspective on the law.