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ORIGINAL ARTICLE

A Sami land-claims settlement? Assessing Norway's Finnmark Act in a comparative perspective

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Abstract

The Sami, the Indigenous peoples of Fennoscandia, assert ownership-, use-, and management-rights to their traditional lands. Norway's 2005 *Finnmark Act* is the only legislation so far to broadly respond to those assertions. How to interpret the act has long been contested, and is now the subject of a legal case before Norway's Supreme Court. Despite parallels between the land-rights assertions of Sami and those of Indigenous peoples elsewhere, and despite abundant legislation responding to Indigenous land-rights assertions elsewhere, the *Finnmark Act* has seldom been analyzed comparatively. In this article, we study the act against the backdrop of Indigenous land-claims settlements in Canada—the state where such legislation is most institutionalized. We find the *Finnmark Act* features many of the same institutional and procedural elements as Canadian settlements. However, we also find that in Norway those elements have been legally integrated, and practically implemented, in a different and less coherent way, rendering the act dysfunctional. We conclude by drawing lessons from the Canadian example to prescribe adjustments to the understanding and ongoing implementation of the *Finnmark Act*, to potentially put the accommodation of Sami land-rights on a smoother path.

INTRODUCTION

In April 2023, a much-anticipated court decision was handed down in Finnmark, the county in Norway where Europe's only Indigenous people, the Sami, are most culturally and politically prominent. The case hinged on how to understand the *Finnmark Act*, the only legislation so far to broadly address Sami land-rights. The decision in effect affirmed Sami title to the lands

encompassing the municipal district of Karasjok, home to the Sami Parliament and a hub of traditional Sami reindeer-herding. The decision may moreover result in Sami ownership of additional areas in Finnmark, altogether providing them control of an area the size of Wales. A loss in the case would have dashed hopes for Sami territorial authority, and might have unraveled the *Finnmark Act*, setting back Indigenous land-rights in Finnmark and elsewhere in Norway. Yet the legal battle is not over: It has been appealed to Norway's Supreme Court. Underscoring the high stakes involved in the "Karasjok case," Norway's leading Sami newspaper called it "the trial of the century" (Ságat, 2023), while an editor of the region's main Norwegian news paper deemed the prospect of a Sami victory "dangerous for Finnmark" (Fjellheim, 2023).

Norway is the state where Sami are most numerous, were most aggressively assimilated, and where threats to their distinctive land-use practices, particularly reindeer-herding, have gained the most attention. It is also where the modern Sami-rights era began, when, four decades ago, Sami rebelled against a state dam-building project in the heart of their traditional territory. In this, Norway's Sami are not alone: Indigenous peoples around the world now resist domination of their homelands, making appeals broadly conceptualized as "land claims." Yet in Norway, "land-claims" is a concept seldom used, even in reference to the aforementioned *Finnmark Act*. This is not because the *Finnmark Act* has been ignored. Dozens of studies have examined it, documenting the challenges involved in drafting it, the complex and evolving institutions it established, and the ongoing feuds over its implementation. Yet these studies have treated the *Finnmark Act* as unique—a "completely exceptional law" (Hernes & Selle, 2021, p. 18). With the exception of our own previous, more narrowly focused work, concentrating on environmental comanagement in the *Finnmark Act* (Spitzer & Selle, 2019), the act has seldom been examined comparatively, and almost never against the backdrop of Indigenous land-claims elsewhere. Moreover, past assessments of the *Finnmark Act* have been superseded by recent, consequential events, especially the "Karasjok case."

These gaps in research, we suggest, limit understanding of, and impair political and legal decision-making about, the *Finnmark Act*. With the act now effectively on trial, such understanding and decision-making are critical, with multiple consequences. Most obviously, how the *Finnmark Act* is understood and implemented affects Sami (and non-Sami) interests in the Sami heartland, Finnmark County. Affected too is the articulation, negotiation, settlement, and implementation of Sami claims beyond Finnmark, in other Sami-populated areas of Norway, Sweden, Finland, and Russia. And, these gaps may limit what land-claims students and practitioners outside Fennoscandia can learn *from* the act.

Hence, we aim in this article to examine the *Finnmark Act* in a way that is both contemporary and comparative. We will assess the act against the backdrop of the "Indigenous land-claims settlement model" familiar in

Canada—the state where such settlements are most numerous, have encompassed the most territory, and have become most institutionalized. We do so to explore whether, and how, the *Finnmark Act* is structurally and functionally akin to settlements in Canada, and to use that comparison to help diagnose the challenges facing the *Finnmark Act*.

In the next section, we introduce the case of the Sami generally and the *Finnmark Act* and "Karasjok case" specifically. In the section "The Canadian land-claims model," we lay out the matrix of interconnected features comprising the Canadian land-claims-settlement model. In the section "The *Finnmark Act* against backdrop of the Canadian model," we assess the *Finnmark Act* and "Karasjok case" against the Canadian model. In "Conclusion and recommendations," we discuss challenges facing the *Finnmark Act*, propose ideal solutions drawn from the Canadian experience, and conclude.

THE SAMI

Today, as many as 100,000 people worldwide identify as Sami, the majority in Norway and especially in Finnmark County, where they comprise from one-quarter to one-third of the population. Finnmark and adjoining areas of northern Norway, Sweden, Finland, and Russia have been occupied by Sami since written record-keeping began more than a millennium ago. Until the 1900s, Sami typically lived in small seminomadic kin-groups, herding reindeer, hunting, fishing, and gathering. Over centuries they experienced in-migration by, and loss of land and control to, ethnic Norwegians and other outsiders (Sillanpää, 1997). Unlike in many settler-colonial encounters, Norway's incorporation of the Sami involved little documented violence or demonstrative resistance. Norway did not sign treaties with the Sami, nor allot them reserved lands, nor assign them group-differentiated status. From the outset, Sami were, legally, Norwegians. To make Sami *culturally* Norwegians, they were subjected to a century of intensive assimilation, including by way of a residential-school system much like that in Canada (Minde, 2003). Unilingual Sami-speakers were denied property ownership, Sami lifeways were denigrated, and Sami land-use practices—including their most distinctive practice, reindeer herding—were constrained by settlers and the state.

The modern Sami-rights era began in 1979, with the Alta Uprising, when thousands of Sami protested state plans to dam Finnmark's Alta River. Through rallies, sit-ins, hunger strikes, and even attempted sabotage, Sami resisted the proposed flooding of an iconic Sami community, the disruption of reindeer pasturelands, and the longstanding denial of Sami control over their homelands and lifeways. Norwegian officials responded with force, clearing the protest camp and arresting demonstrators. The Norwegian public backed the state, as did Finnmark's county council, which was dominated by the county's

non-Sami majority. But from abroad came criticism, prompting concessions. The dam's environmental footprint was reduced and a government panel, the Sami Rights Commission, was formed to study Sami demands.

Acting on recommendations by the Sami Rights Commission, Norway in 1987 established the Sami Parliament, which represents Sami across Norway, advises the Norwegian government on Sami affairs, administers funds for Sami-oriented programs, and exercises nonterritorial jurisdiction over matters relating especially to the Sami language and culture. In 1988, Norway amended its constitution, for the first time recognizing the Sami as a distinct people and committing to foster their language, culture, and way of life. In 1990, Norway became the first signatory of international legislation protecting Indigenous peoples, the International Labor Organization's Indigenous and Tribal Peoples Convention, ILO 169.

Among other things, ILO 169 requires that signatory-states identify and protect Indigenous rights to land and natural resources. Norwegian law, meanwhile, had long characterized Sami ancestral lands as "ownerless" (Sillanpää, 1997) and Sami reindeer-herding as "tolerated use" (Bjørklund, 2021). In 1997, the Sami Rights Commission concluded that Norway's approach to Sami land-rights violated ILO 169. The Norwegian government pursued a solution, at first unilaterally and then, following Sami protest, by including the Sami Parliament, as well as the Finnmark County Council, in negotiations. These negotiations were of a "nation to nation" character, making them unprecedented in Norway (Josefsen et al., 2016). They produced the 2005 *Finnmark Act*, a constitutionally binding "pragmatic compromise" (Semb, 2012), incorporating, and aiming to reconcile, the interests and obligations of Norway, the Sami, and Finnmarkers at large.[1]

The Finnmark Act

The *Finnmark Act* applies, as the name suggests, only to Finnmark County (similar legislation for other Sami-inhabited regions has so far not been initiated). The act's opening chapter states, "Through prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark" (Government of Norway, 2005, section 5). To determine what exactly those rights are, which specific lands in Finnmark they apply to, and to facilitate and protect their exercise—while also respecting the natural environment and the rights of non-Sami—the act established three novel institutions.

The most impactful of these has so far been the Finnmarkseiendom—the "Finnmark Estate," or FeFo. The act makes FeFo, instead of Norway, the owner and manager of Finnmark's public lands, which cover 95% of the county—an area larger than Denmark. FeFo's duties are diverse, including regulating use of fish and wildlife and assessing and permitting development.

FeFo may also engage in, and profit from, development, for example by selling commercial timber, leasing cottage-lots, or investing in the establishment of windfarms. The act constitutes FeFo as a shared-rule body, cogoverned by the Sami and Finnmark's general public. To this end, FeFo's board of directors consists of six members, three appointed by the Finnmark council and three by the Sami Parliament, one of the latter of whom must specifically represent reindeer-herding interests. Upon appointment, board members are supposed to act independently of their appointing bodies, though this rule has been increasingly ignored. Tie-votes are broken by the board chair, a position rotating annually between Sami and county appointees. On key land-use questions, supermajoritarian voting rules ensure Sami interests are over-weighted in Karasjok and four other heavily Sami municipal districts, which are collectively called Inner Finnmark. Conversely, in Outer Finnmark, where Sami are less populous, the interests of Finnmarkers at large are overweighted. By law, FeFo must treat individual Finnmarkers in an "ethnically neutral" (Government of Norway, 2010, p. 43) manner, taking no account of whether they are Sami. But FeFo also—arguably counterintuitively—must manage Finnmark's lands "particularly as a basis for Sami culture" (Government of Norway, 2005, section 1). While FeFo's board members serve only part-time, convening periodically for information-gathering and decision-making sessions, FeFo also employs a much larger, full-time administrative staff that provides technical expertise and conducts the institution's day-to-day operations.

When first proposed, FeFo was intensely controversial, with many Finnmarkers denouncing it as discriminatory toward the county's ethnic-Norwegian majority, both because of FeFo's Sami-oriented mandate and because, by giving Sami one-half of the seats on the board, non-Sami are underrepresented per capita. Since then, however, the county majority has come to grudgingly tolerate FeFo. This is in part because FeFo has displayed little, if any, overtly pro-Sami bias (Spitzer & Selle, 2019). Indeed, several of the board's key decisions—including approving development of a copper mine and opposing devolution of land-management authority to a Sami community—were criticized by the Sami Parliament and especially by Sami reindeer herders. In line with this, criticism has been levelled at the board's longtime executive director, who, though a prominent Sami, publicly championed these and other controversial decisions. To stave off similar decisions, the Sami Parliament tightened control over "its" FeFo appointees. However, the county did the same, so votes now commonly follow ethnic lines, producing three-three ties, with victory going to whichever side happens to hold the tie-breaking chairmanship that year (Selle & Falck, 2021).

The second institution created by the *Finnmark Act* is the Finnmark Commission. The commission was added to the act late in negotiations, due to Sami insistence that FeFo alone would not fulfill Norway's obligations under ILO 169. (Ole Henrik Magga, perhaps the most famous modern Sami leader,

likened the government's FeFo-only proposal to "spitting on the Sami people" [Semb, 2021, p. 54].) The Finnmark Commission comprises five commissioners, who are tasked with surveying Finnmark's vast commons, parcel by parcel, to clarify where precisely, and to whom exactly, land ownership and usage rights apply. The commission looks for rights entrenched through official processes, such as historic deeding, but it also considers rights acquired over time, through significant, continuous, "immemorial usage" (Government of Norway, 2005, section 5). The commission may find such rights to apply to Sami but also to non-Sami, either individually or collectively. Once rights-holders are identified, they assume secure title and, if they choose, management-authority, unless there are successful legal objections from FeFo or other plaintiffs.

The commission began its survey-work in Outer Finnmark, progressing slowly. After a decade it had identified no lands as belonging collectively to Sami, which alarmed the Sami Parliament, the United Nations Special Rapporteur on the Rights of Indigenous Peoples (United Nations, 2016), and various scholars (e.g., Ravna, 2015), who suggested Norway remained in breach of ILO 169. Then the commission turned its attention to Inner Finnmark, and specifically to Karasjok, an area unlike those previously surveyed. Comprising 5500 square kilometers, Karasjok is Norway's second-largest municipal district, exceeded in size only by the neighboring municipal district of Kautokeino. Karasjok is also second only to Kautokeino in its proportion of residents who are Sami (roughly four-fifths) and its integral association with Sami culture (again, it is the seat of the Sami Parliament). Finally, like most of Inner Finnmark, Karasjok came under Norwegian control later than other parts of the country, having been in Swedish hands until 1751.

In late 2019, the Finnmark Commission released its findings on Karasjok (Finnmarkskommisjonen, 2019). All five commissioners agreed that, before Norwegian annexation, Karasjok's residents collectively owned the local land. Two commissioners, a minority, concluded that after annexation, local ownership was "broken down" and assumed by the Norwegian state, which in turn transferred ownership to FeFo under the *Finnmark Act*. But the three-commissioner majority disagreed. In their controlling decision, they held that ownership in Karasjok had *not* been broken down by the state, and thus still belongs to the local populace. The people of Karasjok—most of whom are Sami—were deemed to be the collective owners of the land.

This finding was unprecedented in Norway and indeed in any other Sami region of Fennoscandia. It was immediately hailed by many Sami. Karasjok's municipal council unanimously affirmed the decision, as did the local affiliate of Norway's leading Sami political party, the Norske Samers Riksforbund (NSR). Also celebrating were Sami in those other parts of Inner Finnmark annexed in 1751. Following the commission's logic, those areas too were presumably locally owned, implying the possibility of a *de facto* Sami-controlled region encompassing 20,000 square kilometers—roughly 5% of Norway.

But other observers, especially non-Sami Finnmarkers, condemned the commission's decision. Many attacked the commission's reasoning (Svala, 2021): Before 1751, they argued, the Karasjok region's seminomadic populace did not—and did not even claim to—own the land. To the degree that Sami reindeer-herding groups, called *siida*, had actively managed usage of the land, *siida* boundaries did not correspond with the municipal boundaries of present-day Karasjok. Moreover, land-use had never been exclusive to locals; neighboring people, too, had utilized Karasjok's lands. After 1751, new people, Sami and non-Sami, had moved in, disrupting any continuum of ownership. And, after 1751, locals had consented to, or at least acted in a manner implying consent to, state ownership.

Other criticisms targeted not the logic informing the Finnmark Commission's decision but potential consequences flowing from it. Local ownership would violate rights, abridging hunting, fishing, and other land-use entitlements of nonlocals (Kåven, 2021). It would prove unworkable for Karasjok. Competing local stakeholders, especially reindeer herders, would descend into in-fighting. It would also prove impractical for Finnmark County as a whole. Authority over Finnmark would fragment, spurring conflicts between county residents (Niemi, 2022), causing overlaps as well as gaps in managerial authority, and ultimately harming Finnmark's environment and the users thereof.

The *Finnmark Act* obliges FeFo to take a position on all Finnmark Commission findings; in the case of the Karasjok findings, FeFo was as usual split along ethnic lines. In a November 2020 vote, FeFo's county-appointed board members voted to reject the findings while the Sami-appointed members voted to accept them. The Sami-appointed chair cast the tie-breaking vote and so the Karasjok findings were affirmed. However, just weeks later, in the new year, when the chairmanship rotated to a county appointee, a revote was called. The prior decision was overturned: FeFo would now keep control of the land in Karasjok. This move was defended on two grounds. The first defense was ostensibly practical. In the words of FeFo's executive director, "Splitting Finnmark would be a disaster" (Utsi, 2020). The second defense was in line with the conclusion of the Finnmark Commission's minority, that ownership in Karasjok was long ago taken over by the state (Larsen, 2020).

In response, a variety of Sami individuals and groups vowed legal action. Their grievances coalesced into two lawsuits, both opposing FeFo but differing in their views of the Finnmark Commission's findings. In the first suit, the main plaintiffs were the Karasjok municipal government and the local affiliate of NSR, arguing that the commission was largely correct: Karasjok's land belongs to the local populace. But they added a caveat: membership in that populace hinges not simply on residence in Karasjok but on respecting Sami "customs and legal opinions related to the traditional use and management of land" (Karasjok, 2021). The second suit, involving fewer Sami plaintiffs, went further:

The land in Karasjok belongs only to residents who are Sami (Henriksen, 2021). To find otherwise, they maintained, would violate Sami rights under ILO 169 and risk losing ownership of Karasjok to a future influx of ethnic Norwegians.

These two legal claims, along with FeFo's claim to still be the rightful owner of Karasjok, together comprise the "Karasjok case." The tribunal that adjudicated the case is the Utmarksdomstol, or "Outland Court"—the third of the three institutions formed by the *Finnmark Act*. All disputes over land ownership and authority arising from *Finnmark Act* are heard first by the Outland Court; subsequent appeals go directly to Norway's Supreme Court. As noted, the Outland Court issued its decision in April 2023. The court's three-judge majority affirmed the findings of the Finnmark Commission, concluding that the collective people of Karasjok own the land within their municipal district. The two-judge majority disagreed, maintaining that local ownership had been previously taken over by the state and then transferred to FeFo. FeFo promptly appealed the decision to the Supreme Court. A final ruling is expected within the next year.

THE CANADIAN LAND-CLAIMS MODEL

Norway is not alone in experiencing—and struggling to accommodate—calls for greater Indigenous control over lands and resources. Though some states have ignored or rejected these Indigenous land-claims, others, in time, have admitted their validity, accepting Indigenous claimants into "land-claims processes." Where these processes have achieved agreement between the parties, establishing new regimes of Indigenous title and authority, they have been called "land-claims settlements."

Nowhere have land-claims settlements been so common, encompassed so much territory, and become so institutionalized as in Canada. There, since 1975, the Canadian state and more than two-dozen Indigenous claimant-groups have reached settlements, ceding the claimants' expansive but legally "undefined" land-rights in exchange for delimited but secure Indigenous title within, and powers over, settlement areas together exceeding four million square kilometers—the size of the European Union. These settlements share much in common, enacting a now-familiar matrix of institutions, processes, rights, benefits, and forfeitures. This matrix is the "Canadian land-claims model." As a time-tested structural and functional system (not necessarily a normative ideal), it is a model against which, we suggest, Indigenous claims elsewhere may be productively understood and assessed.

All habitable areas of Canada were once exclusively occupied by Indigenous peoples. Following European contact, colonial powers began projecting control, sometimes peaceably (through trade) and sometimes illiberally (including by killing Indigenous inhabitants, by promulgating treaties that supposedly expunged Indigenous title, or by ignoring the

possibility of Indigenous title altogether). Thus, by the 1920s, Canada had achieved what it felt was secure tenure over all lands within its boundaries. To the degree that any Indigenous land-rights existed, they were "acquired rights," created by, rather than predating, the state, and granted under strict conditions to Indigenous peoples.

Indigenous peoples disagreed, insisting their land-rights were instead primordial, expansive, and unextinguished, springing from, and enduring because of, their timeless ties to their homelands. As early as 1913, the Nisga'a Nation sought to make this case in court, defending their authority over Nisga'a territory in northwest British Columbia. Their request was thwarted, with Canada prohibiting Indigenous peoples from hiring lawyers to pursue land-claims. When, decades later, that prohibition lapsed, the Nisga'a filed *Calder v. British Columbia*, which rose to Canada's Supreme Court. In effect, *Calder* posed two questions. The first, which we call the "whether question," concerned whether Indigenous title had ever existed in what is now Canada, and, if so, whether it had survived the coming of the Canadian state. If yes, then came the "where question": Did the Nisga'a, in particular, retain such title? In 1973 the court ruled, answering yes to the "whether question" but failing to reach a verdict on the "where question." Though a setback for the Nisga'a, the decision precipitated a flood of similar Indigenous lawsuits. Chastened, Canada accepted the possibility of enduring Indigenous title, admitted that state tenure is thus insecure, and pledged to work to settle Indigenous land-claims.

The first such settlement came two years later, in northern Quebec, under conditions mirroring those of Norway's Alta Uprising. Quebec provincial officials, pursuing a massive hydro-electric project, encountered legal action by the region's Inuit and Cree, who claimed undefined rights to their vast and unceded homeland. Hurried negotiations produced the *James Bay and Northern Quebec Agreement* (JBNQA), applying to a "settlement area" of 1.1 million square kilometers. The Inuit and Cree dropped their claims in exchange for clear title to key parcels of land, extensive hunting, fishing, and trapping rights, an enhanced role in regional administration and environmental comanagement, and a cash settlement of $225 million (Wilson et al., 2020).

The JBNQA became the prototype for all subsequent land-claims processes in Canada (White, 2019, p. 24). Scores of Indigenous groups have since filed claims. So far, 27 settlements have been reached (Alcantara, 2017, p. 330). Some settlements have been modest, such as that of the Kluane First Nation, which won title to 906 square kilometers of the southwest Yukon. Others have been sweeping: The Inuit of the Eastern Arctic ceded one-fifth of Canada in exchange for $1.14 billion, outright ownership of 350,000 square kilometers of land, and *de facto* control of a new federal territory, Nunavut. But no matter their variations in geographic or political scope, Canadian claims have come to feature a set of common elements—institutions, processes, rights, benefits, and concessions. Those elements moreover tend to be woven together in the same

pattern, to form a familiar, integrated matrix. This matrix is the Canadian land-claims model.

Because *Calder* resolved the "whether question" in the affirmative, finding that Indigenous title survives in Canada *in principle*, the first substantive step in the land-claims model is for new claimants to pass the "where question," showing that they *in particular* retain such title. In this they face two tests. The first test is the official one: To have their claim accepted, they must show the government that their title was never extinguished, that their land-occupation has been continuous and exclusive, and that they are a recognized Indigenous group. While stringent on its face, this test seems to be judged generously. It is the second, unofficial test that presents a higher hurdle, in effect asking if the claim can be feasibly resolved. The importance of this test is evident from the facts on the ground: Claims-settlements in Canada occur almost exclusively in areas where development is sparse, nonIndigenous residents are few, and thus clashes of rights and interests are relatively uncommon.

Claimants meeting these historical, legal, and practical criteria find themselves on the well-trodden, relatively fixed path of claims-negotiation. In the first stage of this journey, they work with the Canadian government to develop a framework for discussions, identifying what issues will be on the table and how and when talks will proceed. Then the hard work begins, with the claimant and the state, as well as the relevant provincial or territorial government, spending years or even decades hashing out an agreement-in-principle. The claimant then takes the agreement-in-principle to its membership for ratification. If this succeeds, the parties negotiate a final settlement, working out fine details. Once complete, the settlement is signed, enacted into law, and implemented. Implementation is an ongoing process, conducted collectively by all treaty parties but ultimately the responsibility of the federal government.

An enacted land-claims settlement is not a run-of-the-mill Canadian law but rather "a solemn, binding covenant between sovereign entities" (White, 2019, p. 23), entrenched in Canada's constitutional framework. At the same time, it is, quite prosaically, a "deal," struck between pragmatic actors, whereby each gives up something to get something. The key Indigenous concession is their blanket assertion of rights and immemorial title over all of their homeland—the "settlement area." The state receives secure tenure over most of that area—the "ceded lands." In exchange for this concession, the state grants the Indigenous party a package of "defined" rights and benefits. These are realized through the establishment of a set of institutions, which engage in, and interact via, common processes. As noted, these concessions, rights, benefits, institutions, and processes form a familiar matrix. Four features of this matrix are here most salient,[2] relating to: (1) land title, (2) usage rights, (3) environmental comanagement, and (4) financial transfers.

Concerning land title, the typical claims-settlement in Canada provides the Indigenous party with immediate, secure title to between 15% and 30% of the

settlement area, and often to subsurface rights over a smaller area. This land is not assigned by the state but rather "selected by the claimant group in negotiations with government, on the basis of economic potential, cultural and spiritual importance, environmental sensitivity, and related factors" (White, 2019, p. 26). Selection takes place during claims-negotiations. The selected land may comprise a contiguous block or, alternately, an array of disconnected parcels. Title is held collectively rather than severally, and is all but inalienable. It may be held by the Indigenous group as a whole and/or by subcollectives thereof, such that, for example, each Indigenous community in the settlement area controls its own immediate surroundings.

Concerning the second common settlement feature, usage rights, Indigenous land-claims beneficiaries are typically granted special rights to hunt, fish, trap, gather, and so forth, throughout the settlement area (White, 2019, p. 26). In places these rights may be exclusive, while in others they may simply be "preferential," insuring, for example, that in the event of resource scarcity, Indigenous use will be prioritized over commercial or recreational use.

Concerning the third common feature of the Canadian settlement model, the Indigenous claimant-group typically acquires the right of environmental comanagement. This right covers the whole settlement area, with different management guidelines applying to the Indigenous-titled vis-à-vis ceded lands. Comanagement typically includes fish-and-wildlife management, land-use planning, and development assessment and permitting (White, 2019, p. 26). These functions are usually achieved through establishment of "claims-based comanagement bodies," more than 30 of which are presently operating in Canada (Natcher, 2013). Typically, such bodies are at arms-length from, and occupy a legal nexus between, Indigenous authorities and public governments (White, 2008). These bodies are on one hand professional institutions: They employ staffs of administrators, biologists, land-use planners, lawyers, and the like, who are held to political neutrality and tasked with conducting technical studies about, and holding extensive public hearings on, development applications, proposed wildlife-management changes, and so forth. On the other hand, comanagement bodies are also shared-rule authorities: Decisions on permit approval or land-management changes fall to the body's governing board, the members of which are often appointed in equal shares by the Indigenous group and the federal, and sometimes provincial/territorial, government (White, 2008). Each board includes a full-time, in-house chairperson, chosen either by the other board members or by the federal government. In most cases, board decisions can by law be vetoed by the federal minister, though in practice they seldom are. In general, claims-based comanagement bodies have been credited with bolstering the quality and perceived legitimacy of, and Indigenous influence over, land-and-resource management in Canada.

Concerning the fourth common feature, financial transfers, land-claims settlements in Canada typically provide the Indigenous party with a one-time cash payment—in effect, a buy-out for surrendering most of their ancestral territory. Typically, this money is invested in trust funds and economic-development projects, with the interest paying for political, cultural, and social projects. In addition, land-claims settlements may include government promises of ongoing financial support for a variety of Indigenous institutions and programs. Too, settlements may guarantee to the Indigenous party a share of any resource royalties the state earns from natural-resource development, such as mining or oil-and-gas extraction, on ceded lands.

These four features—title identification, usage rights, comanagement, and financial transfers—typically come into effect simultaneously, upon the enactment of the settlement. They are intended to operate in concert, each a seamless component of the post–claims system. This is not to say the implementation of Canadian settlements goes smoothly. Fights are common especially concerning the adequacy of state funding of claims-based institutions such as comanagement bodies, the generosity with which the state interprets Indigenous user rights, and the habit of the state to continue treating its Indigenous treaty-partners as subjects. Moreover, even when well-implemented, settlements rarely achieve all the claimants hoped for. Settlement benefits are at best modest and slow to materialize (Wilson et al., 2020), while their detriments, especially the co-optation of Indigenous peoples into Western, capitalist, bureaucratic, scientific systems, have received extensive critique (e.g., Coulthard, 2014; Nadasdy, 2017). Yet the Canadian land-claims settlement model evidently has a certain appeal, with scores of claimants currently striving to negotiate agreements, and with the model in ways emulated abroad.

THE *FINNMARK ACT* AGAINST BACKDROP OF THE CANADIAN MODEL

As noted, a wealth of scholarship has characterized the *Finnmark Act* as *suis generis*. Those studies have trenchantly noted the act's outlier status, both vis-a-vis Norway, where commitment to universal citizenship and unitary governance is at odds with the *Finnmark Act's* regional and ethnic focus, as well as vis-a-vis the Sami, to whom no similar legislation applies. Yet there has been very little analysis of the *Finnmark Act* as a possible land-claims settlement, and no comparison of it to such settlements abroad, including in Canada. This section strives to fill that gap.

First, briefly, on the origin of the *Finnmark Act*: In essential ways it parallels the origins of Canadian settlements. This is true in at least four ways. The first parallel regards *why, legally*, the act was created: Because Norway, in subscribing to ILO 169, had in effect answered yes to the "whether question," accepting the possibility of Indigenous title and thus necessitating the state to

move on to the "where question," addressing uncertainty regarding state vis-à-vis Indigenous land tenure by identifying and accommodating any particular instances of enduring Sami title. A second parallel regards *why, politically*, the *Finnmark Act* was created, to reconcile state-versus-Indigenous conflicts over ownership and management of a region that was historically Indigenous. The third parallel between the origins of Canadian settlements and the *Finnmark Act* regards not why but *how* the act was created, through what in effect were treaty talks, in which Norway's two constituent peoples, the state majority and Indigenous minority, hashed out a constitutionally binding land-deal. The fourth parallel regards *who* is party to the treaty: As in Canada, the *Finnmark Act* has three treaty parties, the state, the regional government, and the Indigenous group—though unlike in Canada, in Norway the state, after setting the act in motion, largely walked away, leaving ongoing implementation to the other parties, to the act's own institutions, and to political pressures within Finnmark.

If the origins of the *Finnmark Act* in many ways mirror those of Canadian settlements, however, the same is less clear regarding the *Finnmark Act's* features. As we will show, the act shares all four of the aforementioned salient features of Canadian settlements. Yet in Norway, those features have been differently emphasized and integrated, or indeed have even clashed.

The first of the features of the Canadian model, concerning recognition of Indigenous title and clarification of land tenure in the contested claims-settlement area, is elemental to the *Finnmark Act* as well. As with Canadian settlements, the *Finnmark Act* aims to clarify who owns what, by sorting Finnmark into securely Indigenous land on one hand and unambiguously common land on the other. The act does this, however, through a mechanism, method, and schedule that are distinctly non-Canadian. The *Finnmark Act*'s mechanism for recognizing title and clarifying land tenure is the Finnmark Commission. The method the commission uses is not land-selection and -cession, as in Canada, but land-*investigation*, studying the historical and legal circumstances of each acre of Finnmark to determine what belongs to Sami vis-à-vis to others. And such determinations, instead of being made *before* the claims-agreement was signed into law—as in Canada—are instead occurring afterward, having now stretched on for nearly 20 years since the passage of the *Finnmark Act*. As noted, these determinations were unremarkable until the explosive findings concerning local, *de facto* Sami, title in Karasjok.

In addition to making such findings, the Finnmark Commission also has a hand in the second key feature of Canadian settlements, that of granting user rights. As noted, in Canada, Indigenous claims-beneficiaries acquire special hunting, fishing, and other rights within the settlement area. Similarly, the *Finnmark Act* grants special user rights, doing so in a variety of ways. First, it directly gives all Finnmarkers, including Sami, certain preferential user-rights vis-à-vis non-Finnmarkers, thus excluding those who live outside the county

from hunting big game, harvesting cloudberries, and gathering timber. Second, the act, while not explicitly mentioning the Sami, protects "special rights to local utilization" (Government of Norway, 2005) by county residents whose livelihoods involve traditional land-use practices. Third, the act empowers the Finnmark Commission to identify not only lands where Sami have title, but also where, in lieu of such title, they have special user rights, deriving for example from "immemorial usage" (Government of Norway, 2005). In this manner, the *Finnmark Act* has produced in Finnmark a patchwork of special user rights, some of which privilege Sami individuals, groups, or practices.

Tasked with guarding those usage rights, and with performing the third key feature of the Canadian claims-model, that of environmental comanagement, is FeFo. Indeed, as we have concluded elsewhere (Spitzer & Selle, 2019), FeFo is a claims-based comanagement board, akin in essential ways to the many such boards in Canada. This is true in at least three dimensions. First, it is true functionally: FeFo, like Canadian boards, has taken over from the state the management of fish and wildlife, environmental planning, and development assessment and permitting. It is also true structurally, in at least three ways: FeFo is legally arms-length from its "parent authorities," the Sami Parliament and Finnmark council; is governed according to the principle of ethnic parity, facilitating shared rule between the Sami and Finnmarkers at large; and is a professional institution employing a cadre of technical staff including land-use planners, biologists, and lawyers. Finally, FeFo is also similar to Canadian boards geographically, albeit with one small difference: While Canadian boards are the permanent managers of the entire settlement area, albeit governing the Indigenous-titled portion and ceded portion according to different rules, FeFo only governs the entire settlement area *initially*. Under the *Finnmark Act*, FeFo must surrender governance of that portion of Finnmark found to be Sami-titled, retaining only the remaining ceded portion, unless the Sami titleholders decide to leave management of their land in FeFo's hands.

Structurally *different* from Canadian comanagement boards, however, is the glaring absence of the state from any role in FeFo. The Norwegian state is not among FeFo's "parent authorities," does not appoint a share of FeFo's board members, and cannot veto FeFo decisions. Also structurally different is the fact that FeFo's board chair is not a permanent, full-time, in-house employee of the comanagement institution. Perhaps because of this, FeFo's board is comparatively weak. Though by law **"**[t]he board is responsible for management of Finnmarkseiendommen" (Government of Norway, 2005, section 9), in practice it seems to have abdicated that role, allowing FeFo's longtime executive director and his administration to lead the board rather than vice-versa (Selle & Falck, 2021). As noted, this director, unlike the overtly apolitical chief bureaucrats who administer Canadian comanagement institutions, has frequently acted as a partisan advocate. Moreover, though he is Sami, land-use positions he has advocated have been prominently at odds with those of the

Sami Parliament and its board appointees. Sami observers have suggested this violates the spirit, if not the letter, of the *Finnmark Act* (Larsson, 2017).

FeFo also differs from Canadian comanagement bodies in that it is *more than* a comanagement body. Unlike in Canada, FeFo does not simply regulate the settlement area's non-Indigenous land but simultaneously *owns* it. As noted, the *Finnmark Act* transferred Finnmark's "commons" from the state to FeFo. As the ceded-land owner, FeFo thus plays the land-claims-settlement role which in Canada is fulfilled by the state. This difference has had important, even dramatic, consequences for how the *Finnmark Act* has played out.

The most significant consequence of FeFo's owner-role is high-stakes disagreement concerning how—and when—it should perform that role. Regarding how: Just like the state landowner in Canada, FeFo also has the freedom to act as a land *developer*. Moreover, it feels pressure to do so. This pressure comes from outside FeFo, for example from several growing, land-hungry communities in Finnmark that have begged FeFo to sell them property (Eikeland, 2021). But pressure also comes from within FeFo. This is first because, unlike Canadian comanagement boards, FeFo is not state funded, so must generate its own operating funds, whether by selling fishing licenses or developing natural resources. Second, FeFo's drive to develop is tied to the fourth of the aforementioned Canadian land-claims features, financial transfers. While the *Finnmark Act* did not give Sami a "payout," it does, as in Canada, allow settlement parties to earn royalties from resource development on non-Indigenous-titled lands. In Norway, FeFo, as the landowner, is the recipient of any such royalties. The available surplus from these royalties has so far been meager, amounting to roughly US$1 million annually. The *Finnmark Act* explicitly states that FeFo can—and many observers assumed it would—disburse those royalties to the two settlement parties, Finnmark County and the Sami Parliament. But so far FeFo has refused, instead keeping part of this revenue for itself while distributing the rest to Finnmark-based cultural and social organizations.

Further complicating FeFo's landowner role are questions concerning *when* it can act as a developer. These questions arise in relation to the aforementioned title-identification role played by the Finnmark Commission. As noted, unlike in Canada, the commission's identification work did not begin until after FeFo had already assumed responsibility for the entirety of the settlement area. This timing has resulted in a clash between the Sami-title-securer role of the Finnmark Commission and the owner/developer/comanager role of FeFo—a strange dynamic, especially because FeFo by law must comply with the *Finnmark Act*'s "purpose and other provisions," including those provisions empowering the Finnmark Commission (Government of Norway, 2005, section 6).

This clash has manifested in two ways. First, FeFo has developed land before it could be investigated for Sami ownership, thus thwarting the work of

the Finnmark Commission. This has outraged the Sami Parliament, which insists FeFo has a duty of trusteeship with regards to unsurveyed land: that it should not engage in land-development unless, and until, the commission has found the land to be free of Sami rights (Selle & Falck, 2021, p. 162). Second, even after the commission has made findings of Sami rights, FeFo has formally opposed them. This opposition may in part be attributable to "historical institutionalism." FeFo, having had responsibility for the totality of the Finnmark settlement area for nearly the past 20 years, is institutionally entrenched, and seems loath to relinquish its powers or domain. (In this, FeFo is not alone even among land-claims institutions: Wilson et al. [2020] have documented very similar institutional clashes with regards to Canada's JBNQA.) If this is FeFo's motive, it also has a means. As noted, the *Finnmark Act* has given FeFo the option to reject the Finnmark Commission's findings. It was exactly this option that FeFo's county-council-appointed majority exercised in January 2020, setting off the "Karasjok case."

Again, this decision to reject the Finnmark Commission's Karasjok findings spurred Sami legal action. The major Sami lawsuit opposed FeFo, embraced the commission's finding of local ownership of the land in Karasjok, but added the caveat that such ownership hinges on respect for Sami culture. The minor Sami suit also opposed FeFo but took the position that Karasjok's lands belong exclusively to the Sami. In this dispute, the Canadian model can provide little guidance, as all of the above positions have precedents. Most Canadian title-recipient groups are comprised exclusively of Indigenous members, in line with the minor Sami lawsuit. However, at least one Canadian settlement, the 2005 Labrador Inuit agreement, included many longtime Labradorians who are non-Indigenous. Like the Finnmark Commission's apparent motivation regarding Karasjok, this was a choice driven by "realpolitik" (Kennedy, 2015)—non–Indigenous Labradorians are geographically intermingled amongst the Inuit, making their exclusion impractical. This pragmatic decision was moreover defensible on the grounds that the non-Indigenous Labradorians, being longtime residents, were attuned to Inuit culture—the same expectation articulated in the main Sami lawsuit. Meanwhile, FeFo's position, too, has some precedent in Canada: Again, Canadian comanagement boards have responsibility for the entire settlement area, including the lands to which the claimant-group has title. Environmental management is thus streamlined, just as FeFo's county-council majority claimed to desire when it rejected the Finnmark Commission findings.

But if streamlined management was FeFo's expressed desire at the time of rejection, its later legal response to the Sami lawsuits was based on quite different rationale. FeFo's key argument to the Outland Court was that Karasjok's populace does not qualify for Indigenous title under the "where question"—that if they ever held such title, it no longer survives, having long ago been absorbed by the state (Finnmarkseiendommen, 2021). Unsurprisingly,

Sami have characterized this argument as colonial (Svala, 2023). In Canada, as noted, the "where question" must meet two tests, the first legal/historic and the second based on countervailing rights. Both were posed by FeFo in its legal response. First, FeFo argued that Sami authority in Karasjok has neither been continuous nor exclusive, so their title does not survive. Second, FeFo argued that neighboring peoples have rights within Karasjok which local title would impair—making Karasjok akin to most areas of southern Canada, where, given the prevalence of non-Indigenous residents, land-claims settlements have so far been difficult to achieve. The implications of this argument are dramatic. If Norway's Supreme Court does not affirm the ruling of the Outland Court—if it denies the existence of Indigenous title in Karasjok, the Sami political capital, where demographics, culture, and sentiment are overwhelmingly on the Sami side—then it is hard to see how Indigenous title would survive anywhere else in Fennoscandia.

CONCLUSION AND RECOMMENDATIONS

We end by summing up the key similarities we found that liken the Canadian land-claims model to Norway's *Finnmark Act*, by highlighting the key differences of the *Finnmark Act* and the seeming consequences thereof, and then by prescribing adjustments that might, in theory, smooth implementation of the act.

First, it is clear the *Finnmark Act* has similar origins, objectives, and actors as Canadian land-claims settlements, and shares all four salient features of the Canadian model: Indigenous title recognition and tenure clarification, user rights, environmental comanagement, and, to a limited extent, financial transfers. From this, we conclude the *Finnmark Act* is indeed an attempt at a land-claims settlement—the first on Sami traditional territory and indeed anywhere in Europe.

At the same time, we conclude the *Finnmark Act* is not a *successful* settlement. It has in several ways been dysfunctional. Whereas the features of Canadian settlements have been designed and integrated to form relatively functional systems, the *Finnmark Act* has, in our assessment, been pieced together less coherently. Like a machine with ill-fitting components, it seems on the verge either of gradually shaking apart or dramatically breaking down.

Such a breakdown could be precipitated by the Supreme Court's eventual ruling in the "Karasjok case." If the judges find in FeFo's favor, Norway's answer to the "where" question will in effect be "nowhere"—Indigenous title will have been determined to be all-but-nonexistent within Norway's borders. Such a finding would dash hopes for Sami land jurisdiction. It would also render the Finnmark Commission largely obsolete. Formed to resolve a land-clash between two constituent peoples, the Sami and Norwegians, the commission would be left only to deal with run-of-the-mill disagreements

between individual landowners—a role not requiring a land-claims institution. The obsolescence of the Finnmark Commission could, in turn, prompt the Sami Parliament to back out of the *Finnmark Act*, arguing that one of the fundamental terms of the agreement, the fulfillment of Norway's international obligation to identify and protect Sami lands, has been betrayed.

But even if the system that is the *Finnmark Act* survives the "Karasjok case," it would seem a tune-up is in order. Of course, the act exists in a specific institutional, legal, and political context that might complicate or impede such a tune-up. It is beyond the scope of this paper to determine what exact challenges that context presents. Rather, we here make a case for what such a tune-up, if unimpeded, might ideally entail.

First, the tune-up would be overseen by the duty-bound treaty party: the state. A land-claim settlement is a promise and a plan, but it is not in itself the fulfillment of either. The Norwegian state has so far had a hands-off role in fulfilling the *Finnmark Act*. Yet for Norway to discharge its legal obligations under ILO 169 it seems unwise to simply leave fulfillment to chance, or to clashing local political pressures. Rather, Norway should work to more scrupulously *implement* the act, fulfilling its commitments both in law and spirit. To do this, it will need to understand what has so far gone wrong.

When viewed against the Canadian model, it seems that in the construction of the *Finnmark Act*, decisions were made that had unforeseen negative consequences. First and most notably, whereas land-tenure clarification in Canada takes place before the enactment of a claims-settlement, in Norway it is occurring afterward. This sequencing has resulted not in collaboration but competition between the comanagement institution, FeFo, and the tenure-clarification mechanism, the Finnmark Commission. This competition unfortunately maps onto, and thus exacerbates rather than reconciles, Finnmark's ethnic and political divide: Non-Sami, and the county council, side with FeFo, while Sami, and the Sami Parliament, champion the commission.

Though this sequencing decision cannot be undone, its damage is amplified by an array of factors, some of which can perhaps still be addressed. Certain of these factors are seemingly quirks in the text of the *Finnmark Act*, or in the interpretation thereof. First, it is unclear why FeFo was given the option to reject Finnmark Commission findings. Functionally it makes little sense to empower one component of the land-claims settlement to undermine the work of a complementary component. The same passage of the *Finnmark Act* that created FeFo also commands it to work in concert with the other institutions and processes the act sets in motion. Second, for relatedly reasons, it is strange that FeFo expresses such conviction regarding its own rightful ownership of Finnmark's land. After all, the reason the state transferred its holdings to FeFo—indeed, the very reason for FeFo's creation—was because ownership of Finnmark's land was in question, requiring clarification. Hence we suggest that FeFo, rather than behaving as a confident, independent, often adversarial

land-rights holder, instead approach its work as a cog in the larger *Finnmark Act* machine, acting as a cautious and potentially temporary custodian of lands of uncertain tenure.

Other divisive factors are peculiarities of practice. If FeFo hopes to retain political legitimacy in the eyes of the public and especially the Sami, its administration should avoid behaving as an overtly political actor, taking public positions prior to, and striving to guide, board decisions. Relatedly, we suggest FeFo's board could be strengthened, so it has the capacity to direct FeFo's administration instead of being directed by it. This could perhaps be achieved though micro-adjustments (making the board-chair position full-time, in-house, and better-resourced) or through macro-adjustments (when FeFo was being created, there were suggestions for a seventh, watchdog member of the board, appointed by the state—an idea which now seems prescient). And then there are institutional dynamics: No institution, once established, staffed up, and given a broad scope of duties and powers, is keen to cede ground to other authorities; hence it seems FeFo's board, or its parent institutions, the Finnmark council and Sami Parliament, or indeed its "grandparent," the Norwegian state, must reign in FeFo's natural tendency toward institutional self–aggrandizement.

Other factors placing the Finnmark Commission and FeFo at loggerheads are more structural. A key structural challenge is FeFo's dual role, as both comanager (akin to Canadian claims-based boards) and ceded-land owner (akin to the Canadian state). There is a reason why in Canada these roles, so often contradictory, are separated. Balancing them within one institution is made even more difficult by the fact that FeFo, unlike Canadian boards, is not financially supported by the government but instead has been directed to self-fund, giving it not merely the ability but the impetus to develop natural resources. This problem, however, could perhaps have been obviated had the *Finnmark Act* placed on FeFo (or had FeFo place on itself) what seems like, from a Canadian perspective, an obvious responsibility: to behave as a trustee, guarding lands from sale, lease, or development unless and until they have been surveyed and found to be clearly non-Sami. At the same time, another Canadian-style structural innovation might moderate FeFo's fears. As in Canada, FeFo could have by law (and indeed still could through Sami consent) retain managerial authority over Indigenous-titled lands even as it relinquishes *ownership* of those lands. Hence, Sami could receive title to areas like Karasjok while FeFo's managerial bailiwick would be undiminished: a possible win-win solution.

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ENDNOTES

[1] Alongside this core mission, the *Finnmark Act* has been harnessed to fulfill other public objectives only tangentially related to Norway's international obligations to the Sami. These objectives—such as resolving title conflicts between individual landowners in Finnmark, and promoting economic growth—are not explored in this article except where they have conflicted with the act's core mission.

[2] There is another common feature of Canadian settlements not salient to this article. Most settlements provide the Indigenous party with enhanced authority—"self-government"—over their own affairs. In Norway, such authority over Sami affairs is not addressed in the *Finnmark Act*, having been set in motion through other channels, including establishment of the Sami Parliament.

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