

Lheidli T'enneh Final Agreement

Background Presentation

April 1 – 3, 2016

Rick Krehbiel, J.D.



Cautions

- Complex material and concepts
 - Specialized, negotiated by a team
 - Some new ground => some uncertainties
- Approach with an open mind
 - Misinformation
- Many years of background
- Huge responsibility!

Background – Introduction

- Review LTN post-contact history
- Review Treaty Processes
 - Review Lheidli T'enneh participation in treaty processes
- Review Aboriginal and Treaty rights

Background – LTN History

- June 19, 1793 – Contact!
- 1807 – Fort George
- 1871 – Confederation
- 1892 to 1895 – Reserves surveyed
- 1911 to 1914 – IR 1 Surrender & relocation
- July 30, 1914 – McKenna McBride
 - Request Tabor Lake and Salmon River lands
- “A lot of things happened, most of them bad”

Background – Treaty Process

Treaty Processes in BC

- Pre-confederation “Douglas Treaties”
 - 1850 – 1854
 - 14 on Vancouver Island
- Numbered Treaties
 - 1899 – 2000 adhesions (e.g. T8TA, McLeod Lake)
- Comprehensive claims process
 - Carrier and Sekani Declaration and Claim, 1982
 - Nisga'a Final Agreement, 2000
- B.C. Treaty Process, 1993 – present

Background – Treaty Process

- BC Treaty Process
 - Premier's Council 1990
 - BC Claims Task Force Report, June 28, 1991
 - 19 Recommendations,
 - “New Relationship” based on negotiations
- BC Treaty Commission Agreement
 - Sept. 21, 1992
 - “Keeper of the Process”
 - 6 stage process
 - Statutory enactments

Background – Treaty Process

BC Treaty Process: 8 Ratified Final Agreements

- Tsawwassen Final Agreement
 - In Effect April 2, 2009
- Maa-Nulth Final Agreement (5 FN)
 - In Effect April 1, 2011
- Tla'amin Final Agreement
 - In Effect April 5, 2016
- Yale Final Agreement
 - “On hold”

Background – LTN Negotiations

- December 15, 1993 – Statement of Intent
- August 26, 1996 – Framework Agreement
- July 26, 2003 – Agreement in Principle
- August 2, 2006 – Final Agreement
“Understanding”
- October 29, 2006 – Final Agreement Initialed
- March 2007 – Ratification votes
 - Final Agreement defeated: 111 - 123
 - Constitution accepted: 121 - 112

Background – LTN Negotiations

LTN Approach to Negotiations

- Base Mandate: 15 Guiding Principles, October 1, 1996
- Lheidli T'enneh Vision and Purpose
 - February 23, 1997
 - Vision Statement
 - 6 Strategic Goals
- CTC: Family reps, youth, elders, Band Council
 - Developed ongoing mandates
 - Procedural decisions – AIP, Ratification, etc.

Background – LTN Negotiations

Lheidli T'enneh Vision and Purpose

Establish a future that will ensure a high quality of life while flourishing with the environment

Six Strategic Goals

- Opportunities for education, skills and employment
- Trust and effective communications
- Responsible stewardship of resources
- Accountable and effective financial management
- Strong and viable economy
- Effective, accountable & continuous infrastructure

Background – LTN Final Agreement

- Preamble
- Definitions
- General Provisions
- Eligibility and Enrolment
- Ratification
- Lands
- Land Title
- Access
- Roads and Rights of Way
- Forest Resources
- Water
- Fisheries
- Wildlife
- Migratory Birds
- Environmental Protection
- Lheidli T'enneh Rights and Roles Outside LT Lands
- Culture and Heritage
- Governance
- Local Government Relations
- Transition
- Fiscal Relations
- Capital Transfer and Negotiation Loan Repayment
- Resource Revenue Sharing
- Taxation
- Implementation
- Dispute Resolution

Background – Rights and Title

Aboriginal Rights

- Basic Principle: based on pre-contact use and occupation of a territory
 - Pre-1846, not arising from colonial contact
- Definition: An element of a practice, custom or tradition of central significance to the distinctive culture of the aboriginal group claiming the right
- Unique, fact and site specific

Background – Rights and Title

Characteristics of Aboriginal Rights

- Unique
- Common law (i.e. not statutory)
 - Evolve through litigation
- Can be justifiably infringed by government
- If extinguished prior to 1982, cannot be revived
- Constitutionally protected

Background – Rights and Title

Constitutional Protection of Aboriginal Rights

- ***Constitution Act, 1982***
 - S. 35(1) "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
 - S. 35(2) Definition of "aboriginal peoples": Indian, Inuit, and Métis
 - S. 25 *Charter of Rights and Freedoms* not to be interpreted to abrogate or derogate from any aboriginal, treaty or other rights and freedoms of aboriginal people

Background – Rights and Title

Proven Aboriginal Rights - General

- Hunting for food, social and ceremonial purposes
- Fishing for food, social and ceremonial purposes
- Gathering
 - little litigation to date
- Commercial fishing
 - very limited potential, one successful case (*Gladstone*)
 - one case in progress (*Ahouset*)
- Self-government
 - two successful BC case (*Campbell, Chief Mountain*)

Background – Rights and Title

Aboriginal Title

- Where proven:
 - “sufficient, continuous, exclusive” occupation
 - a “bundle of rights”
 - a collective, group interest
 - a general interest, burdening the provincial Crown title
 - only the federal Crown can extinguish or acquire
 - right of “exclusive” use and occupation
 - right to choose how land can be used
 - government must “accommodate the participation of aboriginal peoples” in development of resources
 - inescapable economic component

Background – Rights and Title

- “the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations”
- Crown must consult and justify infringement of title “both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group”
- Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group.

Aboriginal Jurisdiction on Aboriginal Title Land

Proven only in *Tsilhqot'in Nation v. BC* 2014 SCC 44

- Test: sufficient, continuous, exclusive historic occupation
- Tracts, not sites
- Pre-proof: *Status quo* Crown consultation & accommodation
- Post-proof: Fiduciary Crown consultation and justification, or consent
 - E.g. *Forest Act*: Crown management but not disposition
- Disposition of land only to Canada
- Not “lands reserved for the Indians” (s. 91(24) *Constitution Act, 1867*)

Aboriginal Jurisdiction on Aboriginal Title Land

- *Tsilhqot'in Nation v. British Columbia* (cont'd)
- Wrong: "The aboriginal group in question has the exclusive authority to decide who uses that land and who benefits from that land and, as a result, provincial laws don't apply." (Pam Palmater, June 26, 2014)
- Right: "[90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982* ." (Supreme Court of Canada)

Background – Treaty Rights

- Aboriginal rights that are set out in a treaty
- Aboriginal rights modified and continued as defined, codified (written) rights in four areas:
 - Self-government
 - Lands
 - Resources
 - Fiscal Relationship

Background – Rights and Title

Relationship between Aboriginal & Treaty Rights

- Judicial direction to negotiate
- Negotiations define uncertain aboriginal rights
- Treaty rights are also constitutionally protected
- Treaty rights can also be infringed if justified but:
 - the treaty defines the process for infringement, and
 - the treaty provides a better balance of power, making infringement less likely
- Negotiated treaty rights are more secure because they are agreed to by all affected parties

Background – Rights and Title

Relationship between Aboriginal & Treaty Rights

- Key Principles
 - Common Law Aboriginal Rights are “modified and continued” as Statutory Treaty Rights
 - Vs. “Extinguished” in historical treaties
 - Constitutional protection
 - Reconciliation with broader social, political and economic community

Thank You! Mussi Cho!

- *Questions?*
- *Follow-up*



rbkrehbiel3@gmail.com