Understanding Aboriginal and Treaty Rights in the Northwest Territories: Chapter 3: Treaty-making Today

In chapter two of this series, we examined early treaty-making in the NWT. This focused on the time period from first contact between European explorers and Aboriginal people to the signing of Treaty 8 and Treaty 11 in the NWT. We learned that the Dene and the federal government (Canada) have different understandings of what was agreed to when Treaty 8 and Treaty 11 were signed. As a result, there is uncertainty as to whether these "historic" or "numbered" treaties fully addressed Aboriginal rights in the NWT.

In this chapter, we will examine "modern" treaty-making in the NWT, from the mid-1970s to the present. The negotiation of these modern treaties covers every region of the NWT, and includes all the Aboriginal peoples of the NWT: the Dene, Métis and Inuvialuit.

The Guiding Policies

Aboriginal peoples and government (the GNWT and Canada) have two options to address the uncertainty respecting Treaty 8 and Treaty 11: they can go to court and ask the court to make a judgement on what the treaty provided for, or they can negotiate an agreement that everyone can rely upon.

Seeking resolution through the courts is expensive and time-consuming. It also might not guarantee a final result, as the courts could direct government and the Aboriginal group back to the negotiating table to find a solution. As a result, the negotiation process has been the preferred method of addressing the uncertainty respecting Treaty 8 and Treaty 11. It is also the approach taken to settle the outstanding Aboriginal rights of groups who were not part of the numbered treaties, such as the Inuvialuit and Inuit of the eastern Arctic.

When government and an Aboriginal group sit down to negotiate to provide clarity and certainty regarding Aboriginal or treaty rights, they usually negotiate one of two types of agreement:

1. Specific Claims
2. Comprehensive Land Claims

Specific claims are claims made by First Nations against the federal government relating to the administration of land and other Indian assets, or the non-fulfillment of promises made by government under the historic treaties. These are also called "Treaty Land Entitlement" agreements, or TLEs.

In recognition of the number of claims being made against Canada by First Nations, the federal government created the Office of Native Claims in 1973 to try and address both specific and comprehensive claims. The slow progress of negotiated settlements led Canada to develop a policy on specific claims and guidelines for the assessment of claims known as the Specific Claims Policy: http://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506.

Specific Claims:

The federal Specific Claims Policy sets out the scope for TLE negotiations. TLEs provide for fulfilling the terms in the written version of Treaty 8 or Treaty 11, and typically include:

- The creation of reserves within the meaning of the *Indian Act*;
- Confirmation of the application of the *Indian Act*;
- Confirmation of a right to harvest renewable resources;
- Confirmation of the tax treatment (of federal taxes) on reserve (an exemption of some kind); and
- A financial component (cash compensation).

In the NWT, First Nations can choose to pursue specific claims to fulfill the promises made to them under the text of Treaty 8 and Treaty 11. To date, only one Treaty Land Entitlement settlement agreement has been completed in the NWT: the Salt River First Nation Treaty Settlement Agreement (signed in 2002), which led to the creation of the Salt River First Nation Indian Reserve in and around Fort Smith. There is one other reserve in the NWT, the Hay River Reserve (established in 1974), which is home to the Kátł'odeeche First Nation. This is a reserve under the *Indian Act*, but it is not accompanied by a completed Treaty Land Entitlement agreement.

Comprehensive land claims are negotiated to provide certainty and clarity regarding an Aboriginal group's asserted rights to land and natural resources. These negotiations are guided by the federal government's Comprehensive Land Claims Policy, which was first created in 1973, and has been amended several times since then: http://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578.

These negotiations can result in modern treaties that provide certainty and clarity surrounding the Aboriginal group's rights to natural resources (e.g. harvesting rights) and their ownership of land. Comprehensive land claim agreements also provide for the participation of the Aboriginal group in renewable resource management and the land, water, and environmental protection regulatory regimes.

Comprehensive Land Claims:

The federal Comprehensive Land Claims Policy sets out the scope for land claim negotiations. The policy framework provides for:

- the selection of settlement lands outside of communities;
- settlement lands to be different than Reserve lands and thus outside of the *Indian Act*;
- a financial component (including some subsurface lands);
- a right to participate in institutions of public government that regulate land, water, the environment, and renewable resources throughout the entire agreement area;
- a confirmation that, with the exception of defining who an Indian is, the *Indian Act* does not apply; and
- rights to harvesting and renewable resources.

In the 1970s, the federal government extended the opportunity to Dene, Métis, and Inuvialuit of the NWT to negotiate comprehensive land claim agreements. This decision was influenced by the *Calder* and *Paulette* court cases and the desire to conclude agreements that met the interests of government and Aboriginal peoples.

Comprehensive land claims may be better suited to the circumstances and interests of the NWT's Aboriginal peoples. Compared to specific claims, the Aboriginal group typically owns a larger amount of land (as collectively-owned and protected "settlement land") outside of communities and has the right to participate in resource management regimes that apply throughout their settlement area.

Comprehensive land claims also maintain the existing "open" nature of NWT communities, where local governments are typically public governments that represent and serve all residents of the community. This contrasts with a specific claim and the creation of an *Indian Act* Reserve, which, by definition, is for the use and benefit of Band members only.

Comprehensive Land Claim Negotiations in the NWT

The first modern comprehensive land claim negotiation process in the NWT involved Canada and the Inuvialuit and started in the mid-1970s. This negotiation process also resulted in the first modern comprehensive land claim in the NWT, the *Inuvialuit Final Agreement* in 1984.

In 1976 and 1977, the federal government agreed to negotiate comprehensive land claim agreements with the Dene and Métis of the NWT. When the federal government indicated that there would only be one claim for both groups, formal negotiation of the joint Dene/Métis comprehensive land claim began in 1981 and included all Dene and Métis groups in the NWT. The goal was to negotiate a single settlement of their outstanding rights to land and resources. An Agreement-in-Principle (AIP) was reached in 1988. However, the process broke down in 1990 just before ratification of the Final Agreement by the Dene/Métis.

Soon after the breakdown of the Dene/Métis process, the federal government agreed to negotiate regional comprehensive land claims with the Dene and Métis. This is known as the "regionalization" of land claims in the NWT. The *Gwich'in Comprehensive Land Claim Agreement* (1992) and *Sahtu Dene and Métis Comprehensive Land Claim Agreement* (1993) were signed soon after. These agreements both included the Métis of the regions, and reflected a regionalization of the draft Dene/Métis Final Agreement.

Recognition of the Inherent Right of Self-government

In 1982, Canada "repatriated" its constitution from the United Kingdom. The new *Constitution Act, 1982* included Section 35, which recognized and affirmed existing Aboriginal and treaty rights for the Aboriginal peoples of Canada. Section 35 also explicitly stated that Indian (First Nation), Inuit, and Métis were all included within the term "Aboriginal people" found in the Constitution.

Section 35 of the Constitution Act, 1982:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Between 1982 and 1986, a series of special constitutional conferences was also held for the purpose of discussing Aboriginal constitutional matters. The Aboriginal right of self-government was the most prominent subject in these discussions. Although there was a great deal of support for the idea of self-government as a constitutionally protected Aboriginal right, there was not sufficient agreement to reach a constitutional agreement on the right of self-government for the Aboriginal peoples of Canada.

The recognition of self-government was discussed again at the failed 1987 Meech Lake and 1992 Charlottetown constitutional accords. The Charlottetown Accord would actually have recognized self-government as a constitutionally protected Aboriginal right. Throughout the Charlottetown Accord discussions, as in earlier constitutional conferences, the GNWT supported a constitutional amendment that would have entrenched Aboriginal self-government into the Constitution. However, the Charlottetown Accord dealt with many issues besides self-government and, in the end, it was rejected in a national referendum.

In 1994, the Government of Canada proposed that instead of amending the Constitution to explicitly recognize the inherent right of self-government, it would negotiate self-government agreements on the understanding that the inherent right of self-government is an existing right already recognized in Section 35 of the *Constitution Act, 1982*. In this way, the federal government acknowledged and recognized that Aboriginal peoples of Canada have an inherent right of self-government.

In 1995, the federal government released its policy guide "Aboriginal Self-government – The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-government", often referred to as the "Inherent Right Policy": http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844. This policy stated that:

> "...the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources."

The Inherent Right Policy

The federal Inherent Right Policy sets out the scope for self-government negotiations. It acknowledges that the inherent right of self-government is an existing Aboriginal right under Section 35 of the *Constitution Act, 1982*. The framework provides for:

- A list of issues for negotiation (e.g. establishment of governing structures, adoption, child welfare, social services, culture, etc.);
- The Charter of Rights and Freedoms to be binding on all governments;
- A list of law-making powers that will remain under the exclusive domain of the federal government; and
- A special mention of the NWT, where the inherent right of self-government can be implemented through public government.

Prior to the Constitutional discussions that eventually resulted in the 1995 Inherent Right Policy, the federal government was not prepared to acknowledge self-government as an Aboriginal or treaty right under Section 35 of the *Constitution Act, 1982*. The federal government recognized some ways for Aboriginal peoples to exercise self-governance, but these were only under federal legislation and any arrangements could not be constitutionally-protected. As a result, comprehensive land claim agreements negotiated prior to 1995 did not address self-government, other than through commitments to negotiate self-government under separate agreements.

Since 1995 and the recognition of self-government as an inherent right, comprehensive land claim agreements could include self-government and law-making powers for Aboriginal governments over internal matters such as culture, education, and social programs for their citizens. This was the case in 2003, when Canada, the GNWT, and the Tłı̨chǫ signed the *Tłı̨chǫ Agreement*, the NWT's first combined land, resources, and self-government agreement. In addition to addressing land and resource rights, this agreement established the Tłı̨chǫ Government and its law-making powers.

Conclusion: The GNWT's Evolving Role

The GNWT's role in Aboriginal rights negotiations has evolved over the last 30 years. During *Inuvialuit Final Agreement* negotiations, the GNWT was part of the federal negotiating team and only participated in discussions on subject matters that it had some responsibility for, such as renewable resources. While the *Inuvialuit Final Agreement* is a bilateral agreement between the Inuvialuit and Government of Canada, the GNWT and Yukon also signed the Agreement on behalf of Canada.

A similar approach was taken in the negotiation of the Dene/Métis comprehensive land claim, and in the regional land claim negotiations that followed. While the GNWT was represented by its own Chief Negotiator, it was still part of the federal negotiating team. This was also the approach during negotiation of the *Nunavut Land Claims Agreement*. However, Nunavut land claim implementation negotiations were trilateral, with the GNWT becoming an independent party to the Implementation Plan for that agreement.

In 1998, the GNWT released its Aboriginal Land Claims Policy, its first and only formal policy dealing with Aboriginal rights negotiations: http://www.gov.nt.ca/publications/policies/executive/Aboriginal_Land_Claims_(11.51).pdf. This policy states that the GNWT will represent the NWT's public interest in Aboriginal land claim negotiations.

With the release of the federal Inherent Right Policy and the prospect of self-government negotiations, the GNWT recognized that it needed to be an independent party to self-government negotiations. With Tłı̨chǫ negotiations including self-government, these negotiations became trilateral and the resulting *Tłı̨chǫ Agreement* is between the Tłı̨chǫ, Canada and the GNWT. The GNWT continues to represent the interests of all residents of the NWT as an independent party to Aboriginal rights negotiations.

In the next chapter in this series, we will explore the land, resources, and self-government negotiations that are currently underway in the NWT.

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Dene drummer in Fort Simpson, National Aboriginal Day 2011 – GNWT; Dan Heringa/GNWT;
Inuvialuit dancers in Tuktoyaktuk – J.F. Bergeron/GNWT; Dan Heringa/GNWT;
Youth fiddler in Fort Simpson, National Aboriginal Day 2011 – GNWT; Dan Heringa/GNWT