Land Claims and Self Government Agreements in Yukon

by Tony Penikett, MLA

The experience of negotiating land claims and self government agreements with Yukon's fourteen First Nations over the last twenty years may be instructive for other jurisdictions beginning the process. The Yukon claims settlement in many ways resembles other modern treaties. Many difficult questions faced the negotiators for all three parties. Given the time and energy invested by the parties, especially the Federal Government in working through these problems, one can safely predict that Ottawa will propose similar solutions to other claimant groups.

The Yukon Land Claims Settlement provides that First Nations receive title to 41,000 sq. km. (more than all the Indian reserves in Canada put together), $260 million plus dollars for training, conservation and implementation, co-management of wildlife, and a commitment to negotiate self government. These provisions will be shared among the fourteen First Nations. The self government agreements will replace the *Indian Act* with individual first nation constitutions that describe the land-based local government powers and the power to provide services for First Nations citizens.

The Yukon agreements make history in several ways. For the first time a treaty with aboriginal peoples provides constitutional protection for wildlife. For the first time a land claims agreement creates a constitutional obligation to negotiate self government agreements. For the first time the complete extinguishment of aboriginal title was not a condition of the claims agreement. Never before, in any region, has the aboriginal, or Third Order, of government been so clearly established in law. Yukon negotiators also broke trail with a relatively open negotiating process and the use of consensus working groups on specific issues.

> ***Among the complex issues addressed at the Yukon negotiating table were the problems of eligibility, conservation, secrecy, self government powers, financing and entrenchment.***

Eligibility

The question of who ought to be allowed to benefit from a claims settlement needed to be resolved before negotiations could begin in earnest. Most of the territory was not covered by any treaty and the Kaska Nation in the southeastern corner believed they would have been included in Treaty 11 without their consent. There was no question that the Indians on the band lists of the Federal Government had a legal claim. Their non-status cousins' position was not so clear. The Federal Government was reluctant to assume responsibility for meeting the needs of this group in the territories while maintaining that their counterparts south of the sixtieth parallel were under the jurisdiction of the provinces. As they had in the provinces, the Federal Government had funded two separate aboriginal organizations in the territory, the Yukon Native Brotherhood for Status

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Indians and the Yukon Association of Non-Status Indians for the rest. However, strong feelings persisted that the *Indian Act* unnaturally divided the aboriginal community and that an Indian who had been "enfranchised" during military service ought to be as entitled to advance a claim as the non-Indian who had married into a first nation. Consequently the two organizations resolved to form a third, the Council for Yukon Indians, that would represent the whole native community at the negotiating table.

Since construction of the Alaska Highway in 1942, many Indians had married non-Indians. The new organization argued that descendants of these marriages should be eligible beneficiaries under the claim and adopted a rule certifying anyone who could prove they had an Indian grandparent living in Yukon in 1942. Some 8000 first citizens will benefit from the settlement.

Underlying the need to define beneficiaries was the question of numbers. In the past, land quantum and money had been calculated on a per capita basis. When the Yukon negotiators abandoned this approach in 1986 in favour of reconciling the interests of all parties, the concerns about numbers were significantly reduced.

Conservation

In 1973 Prime Minister Trudeau accepted this organization's statement "Together Today for Our Children Tomorrow" as the basis for a claim to land and resources in the Yukon and serious negotiations began. The amount of settlement land continued to invite controversy throughout the talks, especially with opponents of the process. An equally contentious issue troubling the aboriginal leaders was the question of land tenure or form or title on the Indian land. Reserve status, under which option the crown held title for the benefit of beneficiary band members, might prevent the dispossession that seemed imminent in Alaska where the natives had accepted the corporate or private ownership model in their claims settlement a dozen years before. However crown ownership limited aboriginal control and jurisdiction over tribal lands. Federal policy requiring extinguishment of any remaining aboriginal claims as a condition of settlement presented another obstacle. Few could define Aboriginal Title precisely, but the Yukon Chiefs demanded respect for their ancient interest in the region. Aboriginal elders believed extinguishing aboriginal title was synonymous with extinguishing aboriginal culture. They had rejected a previous settlement on this point and would not budge.

We resolved all these questions in an agreement that recognized first nation ownership on 41,000 square kilometres of land, to be allocated among the individual fourteen First Nations in accord with the principles of balanced selections and protection for existing third party interests. On much of the land Indians would hold subsurface rights as well as surface title. The Federal Government dropped insistence on "extinguishment" and allowed aboriginal title on settlement land.

This major shift in policy marked the first time the Federal Government had not sought and obtained a complete extinguishment of all aboriginal title. The solution came from a consensus task force formed by the three parties to pursue innovative ways to accommodate the interest of the Federal and Territorial Governments in achieving certain title to lands and resources in the territory and the First Nations interest in retaining aboriginal title.

Secrecy

Whether one is negotiating a collective agreement or a nuclear weapons reductions, the usual advice is to do your talking behind closed doors. Public discussion invites posturing and hurts compromise. However with something as complex and consequential as land claims negotiations public demands for information have to be met or suspicion and distrust and perhaps rejection will greet the results. The 1984 Land Claims agreement was rejected in part because much of it was negotiated by lawyers at high-rise hotels in Ottawa and Vancouver. Both native and non-native Yukoners were skeptical about the deal.

> ***Yukon Government polling showed that while there was general support for Aboriginal self government, the support dropped the more specific the power mentioned. Public understanding of what may be at stake in other provinces will assist the negotiators there enormously.***

When negotiations resumed in 1985, all parties agreed to hold the talks in the affected communities. In addition, negotiators devoted special attention to information needs of interests such as the municipalities and sports hunting groups. Municipalities were invited to attend the caucuses of territorial government negotiators where they received briefings and advised those at the table of their concerns. If the First Nations agreed, municipalities within their traditional area could send observers to the negotiations. At all stages, territorial negotiators made special efforts to keep the local governments and special interest groups informed.

Finally at crucial stages, Agreements in Principle or Model self government Agreements for example, the minister responsible for claims negotiations gave public briefings in the communities. The territorial government made every effort to secure public support for the agreements as they were negotiated. Between, 1989 when the AIP was concluded and 1992 when the self government model was complete, there were over 100 question and answer sessions around the Yukon.

Self Government

The average citizen might not appreciate all the nuances in the discussions about treaties, sovereignty and inherent right versus delegated responsibility but the national debate about Aboriginal self government made it plain that most aboriginal groups want powers that were awarded to the provinces when the Canadian Constitution was written in 1867. Although the Federal Government has responsibility for native peoples, it cannot by itself grant Indian bands provincial type powers, except north of the sixtieth parallel. Even in the territories, it was never a simple matter because over the years the territorial governments had acquired through devolution many of the administrative functions of provinces. To protect the territorial interest, members of the Yukon legislature pressed hard for a seat at the claims negotiating table. Perhaps because they trusted the Federal Government no more than non-natives, aboriginal negotiators agreed to a third party at the talks.

Protracted negotiated eventually forged some practical arrangements, a form of power sharing the exact like of which Canada has not seen before. Under the Yukon model self government agreements First Nations have three types of powers. First, they may write their own constitutions and remove their band from the dictates of the *Indian Act*. Second, they have jurisdiction over all their lands, including the usual powers of local governments to zone, plan and make bylaws. Third, they may deliver provincial type services such as health, child-care, educational or training programs to their citizens wherever they live in the Yukon.

Flexibility is a key feature of the model agreement. If a first nation wishes to continue to receive a service from some other government it can do so until it is ready to take it over. Questions about public safety that troubled some Premiers at Charlottetown, the Yukon negotiators addressed by requiring the authorities at hand to act immediately and leave any jurisdictional questions to be sorted out later. For example, if a non-native child resident on Indian land required protection from an abusive parent, the First Nation would take the child into temporary care until a territorial government social worker arrived. The same would apply in the case of an aboriginal child at risk in the city of Whitehorse.

Financing

Who should pay for self government? The Federal Government wanted provinces, territories, and First Nations to share the burden. The provinces argued that it was federal responsibility, and perhaps also the First Nations. Aboriginal groups believed the constitution made it a federal duty. We sorted through all this by agreeing that the Federal Government would finance self government by providing First Nations enough money to deliver services to their citizens up to the standard enjoyed by the general public plus sufficient funds for the Yukon to help implement self government without lowering the standard of its services to the same public. The territorial government will contribute to self government any savings it realizes through First Nations taking over responsibility for services the territory now provides. All the money will flow through implementation funding contracts reached through some tough bargaining. First Nations enjoy taxation powers that may in future choose to follow them to enhance the quality of services to their citizens.

On southern reservations Indians are exempt from taxation. With passage of the claims legislation under which the Federal Government buys out this exemption, Yukon Indians will begin to pay taxes off all kinds. This provision was necessary for several reasons, not the least the need to achieve tax fairness in future between Indian and non-Indian businesses operating side by side.

Entrenchment

The one outstanding issue in respect to the Yukon settlement is constitutional protection or entrenchment. The land claims agreement is in essence a modern treaty and as such will appended to constitution according to the provisions of Section 35. Although the claims treaty obliges the Federal Government to negotiate self government agreements themselves will not be protected. Both the First Nations and the territorial government lobbied to have the self government accords covered as if they were parts of the treaties but the Federal Government agreed to entrenchment only by way of a constitutional amendment. Since the failure of the Charlottetown Accord this remains unfinished business.

Yukon based negotiators wanted only to find local solutions at land claims negotiating table. They never really wanted to create national precedents in our claims and self government negotiations. The Federal Government may have had other ideas.◆