

January 20, 2017

Dehcho Process MSR Report to Premier McLeod and Minister Bennett

Overview:

Over the period August 2016 to mid-January 2017, I visited all but one of the Dehcho First Nation communities that are still party to the Dehcho Process negotiations¹. I met separately with the Fort Providence Metis and jointly with the Metis and DFN communities in Fort Simpson. At their request, I also met with the Katl'odeeche First Nation in their community just outside Hay River. In addition, I attended two sessions with the DFN and Metis leadership.

Some community meetings were well attended. At others, the attendance was sparse. Moreover, it was clear that those who did attend did not always have a firm grasp or detailed knowledge of the issues, much less of the state of play in the negotiations. In most communities, attendees raised some issues that are not directly germane to the negotiations and, as a general rule, community elders tended to dominate the discussions even when there were younger people in attendance (which was not always the case).

The discussion with the Katl'odeeche Chief and elders focused on their take on the history of the file. The bottom line of their message was that they were prepared to return to the fold in the negotiating process if they could retain their status as a reserve and be granted self-government. I was subsequently advised that if the KFN retained their status as a reserve, it would make it impossible for them to be part of the Dehcho First Nation negotiation because, *inter alia* there would then be two categories of people.

While there were certainly some common themes that emerged, there were also differences of emphasis among the communities, particularly with respect to the desire to see development projects undertaken.

¹ Weather prevented my getting to Wrigley but a sizeable delegation subsequently came to Fort Simpson to meet with me.

I will set out in this report the main themes that emerged in the discussions and drawing on that, I will make some observations and draw some conclusions.

Main Themes:

A) Land Issues: Preservation of the land (including the water) is a central preoccupation for all the communities. The elders were the most vocal in explaining what the Dehcho perceive as their relationship to the land and the importance of protecting it. That said, there were many who clearly think that it is possible to approach development and use of the land in a responsible manner and there were several who stressed the urgency of providing job opportunities for the younger generation. In their words, young people need and expect job opportunities and it is the duty of leaders to provide for prosperity now and in the future.

A few focused specifically on the question of resource royalties and the need to ensure that DFN communities share equally in any development that does occur in the region.

Despite repeated attempts by the Grand Chief to draw out communities' views on the issue, there was almost no discussion of the specific question of quantum at the community meetings. It was however raised at my first meeting with the Dehcho leadership where the number in play was still 80,000 square kilometers. At a few community meetings the Grand Chief referred to the "Tlichó formula" and in the Fort Simpson meeting, he implied a quantum of 50,400 sq. kms, which he arrived at by multiplying what he asserted was the per capita quantum for the Tlichó (14 sq. kms.) by what he asserted was the Dehcho coalition population (3600); no one (other than the press) picked up on it or commented on it.

In one community (Fort Providence) a great deal of emphasis was placed on the role and rights of the harvesters. It was argued that it would be important to ensure the future of their way of life.

B) Related Land Issues: Related to comments about the importance of the land and the water were concerns about the Protected Areas Strategy (PAS) and Edehzhie. A few people expressed

dismay that progress towards a PAS seems to have stalled while others referred to the central importance of Edehzhie and the fact that the boundaries had been curtailed.

Another related issue was land ownership....many speakers insisted on the position that the land belongs to the Dehcho and that governments have nothing to give/offer them. Some made it clear that they would not compromise on land ownership. Several people (notably but not exclusively in West Point) also expressed dismay that they were being taxed on property that they consider belongs to them.

- C) Treaty Concerns: The relationship between the DFN communities and the Crown and the related issue of the status of the existing treaty was another common theme in the discussions. Here again, it was the elders who, for the most part, insisted that the negotiations should lead to an agreement that builds on or extends Treaty 11 rather than replaces it. In almost every community, there were lots of complaints aired about current GNWT policies or actions and past Government of Canada "treacheries" but the specific insistence that the negotiation on land quantum should be between the First Nation and the Government of Canada seemed to be a preoccupation mainly of some of the leadership. The Grand Chief made this point in introducing me at almost every meeting, but it wasn't picked up by very many of the community speakers. That said, some insisted that they would never compromise on the issue of Treaty 11.
- D) Governance: Only a few individuals addressed this issue. One person argued for a public government "similar to Nunavut" but other comments were short on specifics. Those who did speak to the issue stressed the importance they attached to it but they seemed unclear about how it would or should work. Not surprisingly, Metis speakers were anxious that any governance model that is chosen should embrace minority rights and inclusion.

As I understand it, discussions at the Main Table on governance are not far advanced. It is difficult to say therefore whether the "Tlicho model" would be acceptable or whether the leadership and communities have different aspirations.

At the final meeting with the leadership, I raised the issue of governance and asked specifically what they understood by a

public government. No one picked up on my question.

A few individuals referred to the DRMA describing it as the body that is supposed to help the Dehcho Dene govern their lands and resources and insisted that it should be the ultimate governing body. It is perhaps worth noting that the Katl'odeeche First Nation expect that they would be part of the lands and resources management regime for the region even as a whole if they are not part of the coalition that enters into a land claim agreement.

- E) Pace of the negotiations: There were many concerns expressed about the length of time the negotiations are taking. The fault was laid mainly at the door of Government but one Chief allowed that the Dehcho leadership was "not always working together" and suggested that, on occasion, the leadership found itself "in the position of being too harsh". Another former Chief made a very emotional plea for a conclusion to the negotiations so that his community could continue to build on what their forefathers had established and yet another person said that the negotiations were tying up resources needed to address serious community problems.
- F) Draft Interim Land Use Plan: There appeared to be wide-spread support for the emerging Land Use Plan. There is still a need for in-depth community briefings on the main elements of the Plan (and I believe that these are in train) but generally speaking, community members appeared to be receptive to it.
- G) Financial Settlement: There was no useful feedback on this issue in the community discussions or with the leadership. I did ask specifically whether the Dehcho First Nation had an amount in mind. I did not get a response in specific terms but was told that if the other elements of a draft agreement were sorted out, it would not be difficult to agree on a number.
- H) Other Issues: There were other issues raised by community speakers that are not directly related to the negotiations (except possibly to the extent that they may bear on the wider issue of governance). These included: residential schools and the need for increased funding for healing, inadequate community budgets, mental health issues, Dehcho Dene representation at senior levels of government and government agencies, tax issues, the Truth and Reconciliation Commission, the historical role of the Catholic Church in the region, the difficulty in capturing the true nature of

the relationship of the Dene to the land in the English language, inadequate funding to cover the administrative costs of delivering services to the communities on behalf of various governments and the pernicious effects of the availability of welfare to people who do not need it (particularly the youth).

Comments/Observations:

1. It was clear that most people in the various communities had limited knowledge of the draft agreement and its main issues. This may be because people lost their focus on the issues during what was a break in meaningful Main Table discussions during the various elections in 2015 and before that, as a result of the “misunderstanding” over the bilateral GNWT/DFN negotiation. In any event, there were quite a few complaints from community members about the lack of information on the negotiations as well as on other issues. One person in Fort Simpson talked about apathy in the Dehcho communities and the need for educated Dehcho members to join the negotiating team. But whatever the reason(s), there will certainly have to be a major information initiative launched to ensure that community members who will vote on a draft agreement are in a position to do so. If they do not know or understand the main elements of a draft agreement, the temptation may be to vote against it. In this regard, the question of funding was raised and it was suggested that adequate resources would be needed for a major campaign involving monthly meetings of the leadership and frequent briefings in the communities to deal, *inter alia*, with land selection.
2. Perhaps not surprisingly, it was clear that DFN positions are crafted by the leadership and presented to the membership as something they should support. It is a top down process. Hence on the issue of land quantum, for example, community members had no independent thoughts on what it should be (other than it should be “enough”). At several meetings, the Grand Chief referred to the Tlicho formula (which in his view yields a DFN quantum of 50,400 sq kms). Nor did they express detailed views on governance. If a compromise on land quantum and land selection can be reached at the Main Table, it seems likely that

- community members could be persuaded to accept it. The same goes for governance issues if the Grand Chief and the leadership assert that the interests of the Dehcho communities are protected.
3. There is a clear difference in priorities from community to community. Some are deeply traditional, concerned mainly about conservation of the land and water and preservation of their way of life, while others are anxious to take advantage of the resources available to them. To some extent, these priorities are reflected/shaped by the individual Chiefs. That said, if the Grand Chief has what he considers to be the right package, it is likely that, with the support of a few of the leaders, he will be able to sell it.
 4. The influence of the elders in the communities is paramount. Indeed, at my second meeting with the leadership, it was pointed out that a conscious decision had been taken at the beginning of the process to allow for a DFN position that is "elder-centric". For the most part, the main aim of the elders is to conserve the land and preserve the past and what they perceive as "rights" they acquired in earlier days. To sell a package to the elders in the communities, the leadership will have to convince them that there are sufficient safeguards for the integrity of the land (and water). The Draft Interim Land Use Plan will go a long way to achieving this, but it will also be important to reassure them on the subject of Edehzhie. An action plan for designing and implementing the PAS would probably also be helpful, as would an early transition to National Park status for the Nahanni Park.
 5. One of the elements of the Dehcho Process that has perhaps complicated the ability of the Parties to move forward is the DFN insistence on a negotiating process that is open to all. This has made it difficult to explore possibilities before either side felt the need to adopt hard positions. It is for consideration whether it would be wise to meet privately with the Grand Chief (alone or with a couple of the Chiefs) to give him some idea of the parameters of a package that the Premier and Minister of INAC would be prepared to recommend to their Cabinet colleagues. It would have to be made clear that it would not be possible to alter the package once it has been agreed by the Cabinets in both governments. It would also have to be stressed that the elements of the package are linked and that it would not be possible to

“cherry pick” items in the package and certainly not after it has been approved.

If the Grand Chief indicates that the package is one that he can take to his membership and/or if he argues for additional elements in the package that can be accommodated, it could go a long way to advancing the negotiations towards a successful conclusion. If however he balks at the approach or at individual elements of a package, decisions could then be made about whether to proceed with specific elements such as the Draft Interim Land Use Plan in advance of or even without an eventual AIP.

If a private meeting were to be offered to the Grand Chief, I think it will be important to remind him of his own request at the outset of the MSR exercise that the Parties should avoid any public rejection of each other’s positions.

6. It is important to bear in mind certain realities regarding the DFN ability to meet the exigencies of a rigorous negotiating time-line. I gather that the Grand Chief intends to continue in his role as DFN chief negotiator. This could be a huge job if an accelerated negotiating schedule is set and it is unclear if it would be manageable with all his other responsibilities. Moreover, for all practical purposes, the DFN now has only one outside advisor (i.e. their lawyer....whose advice that the DFN does not need to deal with the GNWT on land issues has, in my view, been extremely disruptive). I did not see any evidence that qualified members of the DFN were interested or available to support the Grand Chief at the negotiating table, but perhaps there is more going on behind the scenes than I was made aware of.

Elements of a possible package on outstanding issues:

I think it will be important to present any new offer to the DFN as a package of elements. The Grand Chief may argue that he needs something to take to the leadership that indicates that the GNWT and the Federal Government are ready to move. (This could be advance implementation of the Draft Interim Land Use Plan and agreement to protect the surface and sub-surface of Edehzhie.)

It is my view however that concessions such as these would best be offered in the context of a package that would ensure the achievement

of an AIP within the life of the current Federal and Territorial governments (and possibly within the mandate of the current Grand Chief).

Based on meetings with the leadership and the communities, a successful package would probably have to include:

- An adequate offer on quantum.... This would probably have to be more than 40,000sq kms and possibly closer to 45,000. I am basing this number on somewhat inconclusive discussions about the issue and lack of any specific feedback from the communities. Given that I did not have a mandate to negotiate this or any other element of a draft agreement, it was difficult to nail down a precise number. That said, I did indicate that the number the DFN arrives at by applying "The Tlicho formula" (50,400 surface and sub-surface) was probably too high.

It will be important to bear in mind that the DFN would undoubtedly see a move from 80,000 to 50,400 as a significant "new offer" from them. It will also be important to bear in mind that the Grand Chief needs to have "an adequate" quantum of surface and sub-surface land rather than surface land with a generalized interest provision. I was told that the Dehcho need a chunk of land that is theirs outright. If there is scope for swapping some sub-surface quantum and/or dollars for additional surface quantum (as was the case with the Tlicho), it will be after what the leadership consider to be a certain basic nucleus of surface and sub-surface land is assured. On the other hand, if the Grand Chief is able to put a large quantum number before his colleagues, he may be able to justify the fact that some portion of it is surface only. In this regard, I wonder whether a possible solution might be an offer of 40,000 to 45,000 sq kms of surface and sub-surface with the option to swap some portion of the sub-surface lands (and/or money from the financial offer) to achieve a larger quantum. *It is interesting to recall that at an earlier stage, then chief negotiator for the DFN put forward a figure of 42,063 of surface and sub-surface land.*

If a decision is taken to put another offer on quantum into play, I would strongly suggest working out in advance a range of possible formulas for dealing with quantum. One of the remarks that came up frequently in my discussions was how offended many were by the perception that the GNWT had taken a position

in the bilateral negotiation that their offer was a “take it or leave it”.

- An acceptable sharing of resource royalties/income... In this regard, the point was made many times that the DFN cannot accept that they would be limited to conservation lands (which the DFN perceives to be the GNWT position). The Dehcho are mindful of the fact that a Dehcho government will have to provide some services to its communities and this will require some income. I did take the liberty of observing that it was probably not reasonable to expect that none of the lands selected by the Dehcho would be conservation lands since the GNWT would also have to fund some services to the region. At my first meeting with the leadership, then Dehcho Chief Negotiator volunteered this need to share as “fact of life”.
- An agreed draft interim land use plan...As noted above, this is and is seen to be a powerful tool in reassuring the elders and the more conservative elements of the DFN. In this regard, some have been pushing for approval and implementation of the draft plan in advance of the completion of an AIP, as a demonstration of good will on the part of governments.
I would advise against implementation of an Interim Land Use Plan before an AIP unless it becomes clear that an AIP is not achievable in the near future. An agreed LUP is an important incentive to approve the rest of a package if it is part of that package.
- Edehzhie...It is difficult to exaggerate the symbolic importance of Edehzhie. If it were possible to extend the current offer to include the protection of the sub-surface as well as the surface territory, it would strengthen the DFN leadership’s hand in dealing with conservative elements of the communities. Once again however, I would recommend that such an offer be linked to a package of measures designed to achieve an AIP. Similarly, full National Park status for Nahanni before an AIP is also something that would be perceived as a goodwill gesture from the Government of Canada but it should probably also remain as part of a larger package.
- Governance...As noted above, there were not a lot of references to governance in my discussions in the communities and as I understand it, this is a subject that has not been carried very far in the Main Table discussions. I imagine however that this would be

an important element of any package so it will be important to get some clear views from the DFN before considering any revised offer(s). As noted above, I did ask the leadership on January 10 if they had any thoughts on the question of governance that they could convey to me. In particular, I asked what "public governance" means to them and how it would change the situation that pertains now. No one offered any comments. After the leadership meeting, I impressed on the Grand Chief the need to address this issue at the Main Table very soon. He agreed and suggested that a special session devoted to this issue, along the lines of the session planned at the end of January on the issue of the DRMA, could be set up.

There were a few references to the DRMA in my discussions but they were at a level of generality that made it difficult to draw any real conclusions. If any new package endorsed by the federal and territorial governments is put on the table, it will be important to include something on this issue. It is to be hoped that the in-depth Main Table discussion on the DRMA/MVRMA scheduled for the end of January will provide some clarification on this issue.

- Financial Settlement.... There was no useful feedback on this issue in any of my discussions at the community level or at the meetings with the leadership. I did raise it but my query was dismissed with the argument that if we get the other elements of the negotiation settled, the financial settlement will take care of itself. It will nevertheless be important to include something on a financial settlement in any package that is considered, if only to provide scope for a negotiation on land quantum.

Conclusion:

If the federal and territorial governments are willing and able to consider new offers, I got the very clear impression that there is a readiness to negotiate. Moreover, there is openness on the part of many in the communities to bring these negotiations to a close. Any new offer should ideally be presented as a package and should include the elements described above.

Consideration should be given to how a new package would be most effectively presented to the Grand Chief.