Gitxsan Treaty Office

April 24, 2007

INTRODUCTION

In 1996, Ground hog day, after two years of negotiations the Province discontinued negotiations with the Gitxsan hereditary system – citing the parties are too far apart. As a result, the Gitxsan have spent enormous amounts of funds and resources to close the gap.

In 1997 the Supreme Court of Canada made a favorable ruling in *Delgamuukw et. al. v. The Queen* that amongst other things aboriginal rights and title cannot be extinguished by a Provincial Government and that S. 35 of the constitution requires reconciliation of the prior existence of aboriginal societies with the assertion of crown sovereignty.

The Gitxsan closed the gap further in 2002, with the BC Supreme Court ruling *Yal et. al. v. The Queen* where Tysoe, J. recognizing the Gitxsan hereditary system, found that the Gitxsan have a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights! As a result, the crown has a duty to consult and accommodate Gitxsan interests in this area if approving any activity.

The province crept beyond their treaty mandate in the following agreements-agreeing to Gitxsan rights on 32,000 sq. km. of territory:

(a) The *Interim Forest Agreement* signed June 1, 2003,
(b) *The Short Term Forest Agreement* signed August 4, 2006 (process of consultation and accommodation) and
(c) The *Long Term Forest Agreement* with negotiations in progress on joint decision making, co-management, and revenue sharing.

The federal government did as well in the fisheries agreement with the Gitxsan houses. However the treaty mandate is unchanged since 1994!

ISSUES

1. Can the Federal and Provincial mandates be expanded to negotiate beyond their perception and what may be determined later to be “Gitxsan Lands” (7200 sq, km.)? (Is this mandate flawed as a result of Gitxsan activity since 1996?)
2. Can the Gitxsan reduce it’s mandate is to negotiate less than the whole 32,000 sq. km. of hereditary lands-Simgiigyet, Gwalx ye’insxw and lax yip?
3. The Federal-Provincial cost-sharing agreement in the BCTC process is flawed as a result of lack of consultation and accommodation of Gitxsan interests. (Question: not totally provincial land so it is Gitxsan actually contributing lands not the province, Nisga’a fee simple).

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1. Can the Federal and Provincial mandates be expanded to negotiate beyond their perception and what may be determined later to be "Gitxsan Lands?" (Is this mandate flawed as a result of Gitxsan activity since 1996?)

The Provincial and Federal mandates are limited to negotiate only on what may be determined to be "Gitxsan lands" (7200 sq. km. existing reserves). The mandate of both governments is that before the Gitxsan can have a recognized government we must accept a constitution – similar to the band council with elections and only on "Gitxsan Lands" (7200 sq. km.)!

The Federal Mandate is very restrictive. We are informed that their mandate is like peeling an onion. As discussions move along the onion is peeled. All issues have to be referred to a department head for response. This is time consuming and ineffective as these departments have no policy regarding a hereditary system, or to accommodate interests of a hereditary system.

The Provincial Mandate is similar. They lack relevant policy, terms of reference and mandate to negotiate off reserve lands or what they might agree to be "Gitxsan lands." The province is restricted in terms of extinguishment and fail in their legal requirement to show better title than the Gitxsan. As a result, the Gitxsan proposed the following process:

1. The SCC in *Delgamuukw v. The Queen* determined that the Province has no authority to extinguish aboriginal land.

2. Since compensation is not on the table Houses (wilp) will not give up their lax yip, Gwalx ye'insxw and hereditary system.

3. The burden is on the Crown to show better title than the Gitxsan on "crown lands"-pre 1846! In the law of trespass the Province cannot show better title than the *prima facie* rights and title of the Gitxsan to the whole 32,000 sq. km. as recognized by the BCSC in the case of *Yal et. al. v. The Queen.*

4. In the negotiation process the crown intends to transfer some Crown Land to "Gitxsan Land" (expanding existing reserves). The Crown cannot give what they do not have absolute ownership.

2. Can the Gitxsan reduce it's mandate is to negotiate less than the whole 32,000 sq. km. of hereditary lands-Simgiigyet, Gwalx ye'insxw and lax yip?

Gitxsan Governance on Gitxsan Territory
The Constitution for our hereditary government is the Constitution of Canada. Gitxsan Governance is authorized and protected by s. 35 and 91(24) of the Canadian Constitution and operates according to Ayokim Gitxsan- applies to the lax yip (32,000 sq. km).

Since the province left the table in 1996, the Gitxsan closed the gap with the following facts recognized by the Supreme Court of Canada in *Delgamuukw v. The Queen*:

> (1) "…The fundamental premise of both the Gitxsan and the Wet'suwet'en people is that they are divided into clans and Houses…." (para 12, *Delgamuukw v. The Queen*)
>
> (2) "The most significant evidence of spiritual connection between the Houses and their territory is a feast hall. This is where the Gitxsan…tell and re-tell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose, but is also used for making important decisions…" (para 14, *Delgamuukw v. The Queen*)

Gitxsan Territory
Her Majesty the Queen in Right of the Province of British Columbia responded by agreeing to the following concession beyond their treaty mandate of "Gitxsan Lands:"

> The Government of British Columbia recognizes that the historic and contemporary use and stewardship of land and resources by the Gitxsan wilp are integral to the maintenance of Gitxsan society, governance and economy within the Traditional Territory." (Para 1.3 Short Term Forest Agreement, Aug 4/06)

3. The Federal-Provincial cost-sharing agreement in the BC Treaty Process is flawed as a result of lack of consultation and accommodation of Gitxsan interests.

This is also reflected in the cost sharing for treaty funds administered by BCTC. The feds contribute 80% of the funding as the province claims they will be contributing "crown land" upon any treaty settlement reached. <u>There was no consultation with the Gitxsan before this arrangement was made.</u> Apparently this affects the Crown's mandate and is a precondition to treaty negotiations agreed to by two parties without consulting the Gitxsan. BCTC loan is now affected by this outcome.

The Province has a duty to consult and seek workable accommodations of Gitxsan Aboriginal interests meaning aboriginal rights, including aboriginal title. (Yal/ STFA)

4. Conclusion

Gitxsan seek reconciliation of authorities that govern lands and resources, absolute ownership of and continued free access to water, and no less 50-50 revenue sharing of all resources on Gitxsan territory. As a result the Gitxsan have spent enormous amount of funds and resources to close the gap:

- ✓ Appeal to Supreme court in *Delgamuukw* 1997
- ✓ Bilateral Negotiations – 1998 – 2000

- ✓ Duty to consult- *Yal et al v. Queen*- 2002
- ✓ Negotiations – Interim Forest Agreement, Short Term Forest Agreement and Long Term Forest Agreement
- ✓ Aboriginal Fishing Strategy Agreement (federal-Gitxsan Housese)
- ✓ Current Development- Kemess North, Klappan, etc.,

The present mandates force the Gitxsan to reduce claim area to merely reserve lands. "Gitxsan Lands" assumes extinguishment of 92% of Gitxsan lax yip and legal decisions that closed the gap since 1996. (Lacks adjustment with progress made in the forest and fisheries agreements)

The constitution and governance proposed by both governments assumes extinguishment of the hereditary system, the ayookw and lax yip. This constitution would only apply to land selected by the governments and termed "Gitxsan Lands".

Negotiations by other First Nations are through their band councils and mostly restricted to programs administered under the *Indian Act.* For example, West Bank is highly successful with their tax breaks and as a result their negotiations are furthering the benefits on the reserve.

So there!

Gitxsan Treaty Team
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