In-SHUCK-ch Final Agreement: Is This What We Wanted?

Kerry Coast, The St'át'imc Runner Newspaper

July 2007

The In-SHUCk-ch treaty office and the negotiations team claim many things for the In-SHUCK-ch Final Agreement. However, Draft 13 of the treaty raises serious questions about the validity of these claims.

Presentations, newsletters, brochures and interviews made by treaty employees make grand statements: a treaty "gives" rights; the Lillooet River communities will have more control over their traditional territories; economic development hinges on treaty; self-determination will be realized by treaty; there will be "certainty" but no "extinguishment;" all Social Services currently provided by Canada or BC will continue, and there will be "treaty rights on top."

A BC treaty might be an improvement, if you start from the same page as the BC government, and take for granted many of Canada's genocidal policies as law, which they are not. You would have to completely overlook the fact that aboriginal title exists now, and a great deal of rights flow from that title. Those existing aboriginal title and rights, which are the reason for the current treaty process, would no longer be enjoyed by In-SHUCK-ch Nation post-treaty. Only the rights which are identified in the treaty, no more or less, and no title to the land, only fee-simple title of 14,577 hectares, with underlying ownership by BC. But what of the other promise a BC treaty might hold?

In response to a request for a copy of the Agreement in principle, the Lower St'lát'limx Tribal Council provided The Runner with a copy of Draft 13 of the In-SHUCK-ch Final Agreement, dated April 30, 2007. It is worthwhile comparing the treaty employees' claims to the provisions of the Final Agreement.

Control Over Traditional Territory

The In-SHUCK-ch have used treaty money to produce some important works. One of these is the Land Stewardship Plan, which has begun, over the last two years, to document traditional land use and potential land use. How this information will be used is another question.

The Land Stewardship Plan states, "The In-SHUCK-ch people will be involved in all external land use planning processes that affect the In-SHUCK-ch territory. We will take an active role in such planning processes in order to protect In-SHUCK-ch interests and maximize benefits from the resources." If In-SHUCK-ch ratifies a Final Agreement, their "Interests" will be dramatically reduced when they agree that their title, wherever it may have existed, is modified to fee simple title of the Treaty Settlement Lands, alone.

Compare the plan's future to Líl'Wat's land and resources department. They handle a lot of referrals. Their department costs $2 million a year to run, and many areas have not developed to become fully effective yet.

The Chief Commissioner of the BC Treaty Commission, the Honourable Steven Point, made a presentation at the April 2007 General Meeting in Skátin. In his speech he said the people will have, "more control over what happens in your traditional territory" with a treaty.

In Draft 13 of the Final Agreement, "The Minister retains authority for managing and conserving Wildlife and Wildlife habitat." The same goes for birds, fish, water, etc. There are no notes of objection by In-SHUCK-ch in the side bars of the draft.

Draft 13 states, "Where a public management planning process is established (on the traditional territory)… In-SHUCK-ch Nation [I.N.] may participate ..on the same basis as other participants." This level of participation is generally called "third party interests," and it amounts to nothing more than being consulted. Only, without aboriginal rights and title to the traditional territory, only treaty rights, their interests need not be accommodated, or compensated, unless an infringement of a specific treaty right can be proven in court.

In many articles in the Ucwalmicw newsletter, produced by the Deroche treaty office, the role of In-SHUCK-ch on traditional territory is made to seem like a joint management effort, or that IN will be consulted as to developments. The Land Stewardship document continuously refers to the map of the entire In-SHUCK-ch Statement of Intent area (traditional territory). It doesn't show one map delineating the Treaty Settlement Lands, as if this is the area In-SHUCK-ch will manage post-treaty. That idea is not supported by Draft 13.

For instance, as regards the Environmental Assessment Process on "In-SHUCK-ch Nation Area," meaning the traditional territory mapped in the Statement of Intent to negotiate a treaty, In-SHUCK-ch "may participate in the review." They may appear before a review panel, specifically to projects which may have an adverse effect on their treaty lands. There is no reference to veto power, a majority vote in decision making, only that in some cases an In-SHUCK-ch member may sit on an advisory board. This sort of advisory role is already being taken by many First Nations, outside the treaty process.

It's important to remember the treaty protects only the rights that are actually described, point for point, in the treaty. For example, there are 38 paragraphs describing rights to harvest wild birds. The traditional land uses will have to be extremely carefully documented, and dramatic revisions to this version of the Final Agreement will have to happen to protect the traditional way of life.

The "Fish Focus Group" has been meeting since last year to document fishing practices. Are we rushing things a bit? Nothing that isn't in the Final Agreement will be protected. People have lived away from the Lillooet River for a long time. Non-native consultants have been hired to draft measures in almost every aspect of planning, from governance to fisheries to land use planning. Negotiators are attempting to fulfill a Treaty Related Measure by

establishing some of this historical information. To contrast the time frame and scale of work, consider that Líl'wat Fisheries have been working with DFO since 1992 to collect enough information and trained workers to manage its fishery. Líl'wat fisheries will be the first to admit it is only beginning to behold the full scope of its responsibilities, which, incidentally, run down to at least Tenas Narrows in what would be In-SHUCK-ch's Treaty Lands.

In response to questions about traditional territory posed in the Ucwalmicw newsletter, the negotiations team says, "they would have to work around In-SHUCK-ch's Statement of Intent claim." At least 3/4s of the In-SHUCK-ch SOI is overlapped by the Katzie, Tsleil-Watuth, and Stolo SOIs, and by the map of Líl'wat traditional territory. Draft 13 states: "If a superior court of a Province, or the Federal Court of Canada, or the Supreme Court of Canada finally determines that a provision of this Agreement adversely affects the aboriginal or treaty rights of another aboriginal group, that provision will not operate to the extent of the adverse effect and the Parties will make best efforts to remedy or replace the provision."

Certainty Is Extinguishment

Through the BC treaty process, Canada seeks "certainty" through the "Modified Rights Model." This model was invented in 1973 and is better known as the Comprehensive Land Claims Policy. The model requires that, to conclude agreements such as a BC treaty, that the First Nation in question will abandon all rights for all time other than those that are defined exhaustively in the words of the Final Agreement. This is certainty.

The In-SHUCK-ch Final Agreement, Draft 13, states: "… the aboriginal rights, including the aboriginal title, of In-SHUCK-ch Nation, as they existed anywhere in Canada before the Effective Date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement." This is an identical phrase from the Nisga'a Final Agreement, and, 'continues as modified …in this agreement,' means that no right which is not named and described in the document is no longer a right, and all title to land is surrendered, with the acceptance of fee simple title, registered with BC, in its place. The treaty states that In-SHUCK-ch may dispose of any of its lands by sale. This is the same type of title anyone can buy.

The treaty document states, "There are no “Lands reserved for the Indians” within the meaning of the Constitution Act, 1867 for In-SHUCK-ch Nation, and there are no “reserves” as defined in the Indian Act for the use and benefit of In-SHUCK-ch Nation and, for greater certainty, In-SHUCK-ch Nation Lands are not “Lands reserved for the Indians” within the meaning of the Constitution Act, 1867, and are not “reserves” as defined in the Indian Act." At the side of this section there is a note that In-SHUCK-ch will 'provide alternate clause regarding a positive definition of land;' a change of wording, but not actually a change of meaning, because this extinguishment of land title is the key goal of treaties in BC.

One may reasonably wonder why the reference to the Constitution Act of 1867? There is a Constitution Act of 1982, after all. The answer lies in the jumble of Acts which constitutes the country of Canada: the 1867 Act is a part of the 1982 Act. The thread of legal entitlement of

"Indians" runs deep in Canadian constitutional law, and the treaty must be sure to cut it at the root. The reference exposes the deep vein of Indian title which Canada has never bought or won in war. It exposes the fact that Indian Title has never, nor could ever have been, extinguished. Until now, with these "land claims," as treaties are also called, and agreements to "modify" that title.

The United Nations certainly isn't buying the name change approach. The UN's Committee for the Elimination of Racial Discrimination reported in 2002 that, "…the committee is concerned that the new modification model does not differ significantly from the extinguishment approach." The people east of the Rockies aren't fooled by the name change either, and, according to Dan Smith, Chief Negotiator from Cape Mudge, "The ones with Numbered Treaties are very concerned about what we're doing here. We don't want to agree to any kind of modification of our rights. We want co-management with jurisdiction in our traditional territory." He is part of the First Nations Unity Protocol, all the treaty negotiators, except In-SHUCK-ch, joined together to press for changes to 6 key provisions, including extinguishment, or, "modification."

In-SHUCK-ch's lawyer, Rob Reiter, has been advising the people on law, at least to some members directly by e-mail. He wrote to Bertha Purcell in response to Hereditary Chief Clarke Smith's questions, sent by e-mail but never printed in the Ucwalmicw newsletter. Mrs. Purcell had asked for further clarification on the answers to the questions. This question, by Clark Smith, and answer, Rob Reiter, is as follows from the e-mail: "They [IN] promote freedom from the Indian Act and accept Fee Simple Land that is in final will be owned by the Province of BC. All underline (*'underlying'?) ownership to treaty settlement lands will be the BC Government. We are sure that the… members are not aware of this." (Reiter's response:) "Mr. Smith is mis-directed and uninformed as to the law. The Supreme Court of Canada has held that regardless of treaties the Crown has underlying title and jurisdiction over lands that have not been formally surrendered to the Crown."

Compare Reiter's advice to the BC Treaty Commission's own promotional material. "When the early Europeans first began to settle in the eastern part of North America, Britain recognized that those people who were already living here had title to land: the Royal Proclamation of 1763 declared that only the British Crown could acquire lands from First Nations, and only by treaty.…Supreme Court of Canada's Calder decision in 1973. …Six of the seven judges confirmed that aboriginal title is "a legal right derived from the Indians' historic… possession of the tribal lands" and that it existed whether governments recognized it or not." - Why Treaties? BC Treaty Commission, 2004 The fact of aboriginal title, without underlying Crown title, is the very reason for BC treaty making today.

In the same e-mail that Mrs Purcell sent out seeking clarification on Smith's comments, there is the following exchange on the meaning of extinguishment of title. Smith's comment: "One group who is willing to surrender all and accept Extinguishment is the In-SHUCK-ch Nation, who are only scamming their members." Reiter's response to that was, "Again Mr. Smith is wrong. Canada and BC is on record as publicly rejecting extinguishment for a modification model of certainty." Reiter is referring to the window dressing that BC came up with to get

away from the word extinguishment, without changing the meaning of releasing title to the lands forever. They now use the word "modified rights," and "certainty," but if you look up "certainty" on the BC Treaty Commission's website Glossary, it says, "See Extinguishment." "Modified" means reduced from what they are now to just the rights listed in the treaty.

This Extinguishment problem is another of the six key reasons the Unity Protocol was formed.

"This Agreement constitutes the full and final settlement in respect of aboriginal rights, including aboriginal title, in Canada of In-SHUCK-ch Nation."

Title is not listed in the "Definitions" of the In-SHUCK-ch Final Agreement, and nowhere in the document is the Lillooet River communities' aboriginal title mentioned.

"Self determination" is touted as a reason for an In-SHUCK-ch treaty. Gerard Peters, Chief negotiator for In-SHUCK-ch, has said in many ways, "treaty won't define us, we'll define treaty." (Twenty Years in Review, December 2006, Eppa, Gerard Peters.) He is quoted in an interview by Michelle Vanderpol in The Observer, "He sees treaty as “not an end in itself”, but as a tool used by the In-SHUCK-ch Nation to support its purpose which “broadly stated, is somewhat represented by its interim government’s broad mandate to define, protect and exercise the Nation’s title and rights which flow from this title.”" There is no definition of "Title" in the Final Agreement. All land title is surrendered in this "full and final settlement." In the Chilliwack Progress, Peters is quoted again on the issue of self-determination: "Peters says BC’s insistence on a delegated government is one of the “roadblocks that hinder conclusion of final treaties” in the province." - March, 2006. The AIP was signed in spite of no shift on this matter, and there is no reflection of self-governance in Draft 13.

In-SHUCK-ch governance is circumscribed in Chapter 18 of Draft 13, where there will be: democratically elected councils every five years. What will happen to Skátin’s traditional system? I.N. financial administration and conflict of interest standards will be to Canada's liking; there are definitions of which sorts of laws of In-SHUCK-ch will be of no force or effect; "conditions under which In-SHUCK-ch Nation may dispose of land…" are described. The chapter goes so far as to define responsibilities of officers of the post-treaty government. To get an idea of the level of these discussions, the regional district will be reviewing the treaty as it pertains to In-SHUCK-ch obligations to local and regional governments.

The treaty enforces "full and fair consideration" of non-natives issues. It instructs the date of the first election after effective date of treaty. The Supreme Court of BC will have jurisdiction to hear appeals against In-SHUCK-ch.

Provincial peace officers may enter treaty lands to enforce provincial laws. In-SHUCK-ch will "provide reasonable notice of entry onto Crown land." In many cases of law making powers, such as disposition on In-SHUCK-ch Lands for forest practices, "a federal or provincial law prevails to the extent of a conflict with In-SHUCK-ch law…" Forestry tenures are granted under provincial laws. The people "may trade and barter with other aboriginals."

Unless federal and provincial law permit specific sales. This includes sale of water. Enforcement agreements for enforcing In-SHUCK-ch law regarding wildlife are "not part of this agreement," therefore not a treaty right, therefore nothing. In-SHUCK-ch must issue documentation to all who harvest anything on traditional territory, and provide an annual plan for all types of harvesting to Canada and BC in a "timely" manner. They would have no power to make laws regarding intellectual property.

The BC government retains right of way on any Crown roads, which includes the highway that runs through the territory, and many others. IN-SHUCK-ch may not unreasonably restrict traffic on these roads, or on waterways. In-SHUCK-ch may make laws in respect of land management, as long as the laws are equal to or higher than provincial standards. The Agreement clarifies that any federal or provincial law will apply to In-SHUCK-ch citizens. It specifies that "the powers of In-SHUCK-ch First Nation Government to make laws… does not include: a) criminal law, b) criminal procedure, …. In-SHUCK-ch takes responsibility for flooding prevention measures, maintenance and repair of INFN roads, and one third of wildfire control measures taken by BC. "Expropriation authority" remains with the province.

"The Parties acknowledge that self-government and governance for the In-SHUCK-ch Nation will be achieved through the exercise of the Section 35 rights of In-SHUCK-ch Nation as set out in this Agreement."

What do they have exclusive power over? Marriages, child care, education K-12, emergency preparedness, liquor control, authorization of aboriginal healers, public works, buildings and structures, business regulation, traffic parking and highways, administering fines comparable to Canadian standards, and some various procedural choices.

Any other aspirations In-SHUCK-ch may have for governance, such as any activities to take place in Ucwalmicwts, will be narrowly viewed by the provincial authors of municipal style of transfer payments.

Finance.

"The idea of a stand alone government with no purse strings attached was met with feelings of pride." Sylvester Sam wrote this in his report on the "Skatin November Regional Gathering" in the Ucwalmicw newsletter, December 2006. Each treaty that is signed in BC provides for arrangements of fiscal transfers from the province, to be renegotiated every 8 years, in this case. In an undated brochure titled, "Why Make Treaties," produced by In-SHUCK-ch Council, some questions and answers are provided. Question 3 asks: "What will treaty do to my services from Canada/BC?" Answer 3 states: "Health, education, social services, old age pension and EI benefits will remain and In-SHUCK-ch will get treaty rights on top of these rights." Judging by Draft 13 of the Final Agreement: " In-SHUCK-ch Nation will pay for services delivered by the Fraser Valley Regional District.." "there will be a cost-recovery mechanism in place in the event that In-SHUCK-ch Nation defaults on any payments" "post-treaty, IN will contribute in the same manner as other property taxpayers in the regions towards the costs of health care, regional policing and other like services"

In the Ucwalmicw newsletter, one of the Q&A pages stated, "Taxes won't go to BC or Canada." It is clear from Draft 13 that they will, just as they will with every other treaty in BC to reach Final Agreement.

It has been suggested that the people will, "attach themselves to the wage economy," and that "the service industry will keep it humming" (the economy). In Gerard Peters' presentation to the community-to-community meeting with the Fraser Valley Regional District, he stated In-SHUCK-ch's recognition that "there is only one economy." Without a decent road, and there is no reference to improving the road in the treaty, or phone lines or hydro connections, how will the people along the river join that economy? There is no business plan. Who will pay the cost of getting transmission lines from a functioning Douglas IPP to the other communities? BC has estimated it will cost $275 million to build a road from Deroche to Port Douglas. It is reported that Chilliwack leaders are interested in the benefits of a "Sasquatch Highway," for infrastructure development, resource extraction and community development.

There is talk of tourism being the long-term economy of the nation. With $21 million to start with, no road or phones or hydro, it is hard to imagine this being viable. A study was commissioned to evaluate the privately-held property at the Skookumchuck Hotsprings, Tsek, and it found the site to have questionable economic potential, owing to the condition of the road. Canada has since bought the property for them, at $1.7 million, which will be deducted from an In-SHUCK-ch Final Agreement payment as part of the deal.

According to the Ucwalmicw newsletter, the negotiations team has been pursuing economic development funding for years. Business plan, economic initiatives, have been stated goals of the negotiations, but have so far failed to materialize. Will an extra financial package along those lines be offered by BC or Canada as an incentive to sign?

Due Process

Several people have tried to obtain copies of the Agreement in Principle, with no results. This newspaper has been promised a copy for over a year and hasn't seen it yet. Bound by an Openness Protocol signed with BC and Canada in 2002, In-SHUCK-ch must produce this document for anyone who wants it, yet very few In-SHUCK-ch members seem to have seen it. In one case, an IN member sent 6 registered letters, at different times, asking for it, and still hasn't got it. In other cases, people were told by treaty staff to get it from the BC Treaty Commission website. The Agreement in Principle has never been posted on that site.

54 people were present at a General Meeting to ratify the AIP in April 2006. Most of them would only have received an AIP "package" provided by the treaty office, with a short summary of issues being covered. In the June 2006,Ucwalmicw, the article “April INGA and AiP Update,” by Jessica Sullivan reported on that meeting, in part: “The motion to accept the Agreement in Principle Approval Process Resolution was carried with a vote of 51 in favour, 2 in opposition and 1 abstention… ….the Agreement in Principle presentation by Rob Reiter (was) on the agenda, but had to be omitted due to time constraints.”
At the October 2006 General Meeting in Mission, where the AIP was signed by the Chiefs

and BC, people spoke, one after another for an hour, saying, "we don't understand this," and the whole room applauded and stomped the floor when they finished. The Ucwalmicw newsletter reported this speech making and table thumping session as "The signing of the AiP was preceded by morning discussions and a rousing display of singing, dancing and drumming." - December '06. The Agreement in Principle still has not been signed by Canada, because their claims department "is so backed up," according to their negotiator.

In an interview with this newspaper in December, Peters answered a few questions: "What is it about signing a treaty that's good for the people? I don't know. No, I won't know until I've negotiated a treaty. What I'm all about is to see if it's possible for us to agree with BC and Canada. …Virtually everything that's not satisfactory in the AIP are issues you engage and fully negotiate. …80% of treaties will be pretty much the same. Because there's only a set standard of matters that can be addressed within a treaty. ..The Lheidli T'enneh agreement falls far short of what I would like to see in my negotiations with BC and Canada."

"If the Lheidli T'enneh ratify that agreement, you're going to have a lot of trouble changing things. BC wouldn't fix it if it isn't broken. Yeah, I agree with that entirely. I want a review of the mandate, and that's what I've been talking to other treaty negotiators about."

Has something changed since then? The First Nations Unity Protocol Agreement has been struck between every other treaty table except In-SHUCK-ch. The mandate hasn't changed, and Draft 13 looks a whole lot like what the Lheidli T'enneh turned down.

About the same time, in the interview printed in The Observer: "Peters expects, "it is possible to complete Final Agreement negotiations in calendar 2007 to the point where I could recommend it to my leadership. …The message here," he says, "is that simply because we've reached this degree of conclusion in the BC Treaty Commission process, that we must finish it. Everything depends on whether the mandates that my counterparts carry can be adjusted to allow us to fully engage in negotiating critical aspects of treaty. These issues were relayed to Minister de Jong in September." Peters began negotiating in Stage 5 of the BC treaty process, negotiating a Final Agreement, immediately after the AIP was ratified at the end of April. It's now fourteen months later and none of those "critical aspects" appear in Draft 13. Why is it that "we must finish it," if it is going to contradict everything the In-SHUCK-ch Council, and now Nation, was mandated to do, meaning, in Peters' words, "to define, protect and exercise the Nation's title and rights…"? The result of a BC treaty appears to be relinquishing title and choosing a handful of rights out of the territory

A meeting of 54 people ratified the Agreement in Principle, just a few more than were present in May of 2005 to declare the birth of the In-SHUCK-ch Nation. One member describes the treaty employees' hurry up attitude as, "If we wait for everybody, we'll never get done." In this comparison, who would be "we," and who would be "everyone"? In-SHUCK-ch claims a membership of over 900. 50% + 1 of eligible voters will ratify the Final Agreement, which is still expected to be completed by about the end of this year. How many of those people will be eligible voters? Depends on the Enrolment Committee, seven people to be appointed by In-SHUCK-ch Nation government who will make the rules.