

**Amber Tremblay initial comments Jan 5, 2010**

**CHAPTER EX: EXPROPRIATION**

**Definitions**

Expropriating Authority: an authority with power of expropriation under federal, territorial or Dehcho legislation of general application, the Dehcho Agreement, or an Act giving legal effect to the Dehcho Agreement.

**Comment [f1]:** NEW: Dehcho have included their ability to expropriate

**Ex.1.0 General Principles**

Ex.1.1 The Dehcho First Nations, Canada and the Government of the Northwest Territories<sup>1</sup>:

**Comment [f2]:** New

- a) agree that the Dehcho Agreement will recognize that the Dehcho Government, the Government of Canada and the Government of the Northwest Territories will have the power to expropriate portions of Dehcho Ndehe, Crown land, Commissioner's Land and privately held fee simple lands, as set out herein;
- b) acknowledge the interest of the parties in maintaining the size and integrity of Dehcho Ndehe;
- c) will make all reasonable efforts<sup>2</sup> to reach agreement regarding expropriated lands; and,
- d) agree that expropriation of Dehcho Ndehe, Crown land or Commissioner's Land will occur only as necessary for a Public Purpose.<sup>3</sup>

**Comment [f3]:** New section

**Comment [f4]:** New

Ex.1.2 Canada or the GNWT, prior to making a decision to expropriate any part of Dehcho Ndehe, shall:

<sup>1</sup> Canada suggests the following wording for 1.1:

“Canada and the GNWT acknowledge:

- a) the interest of the Dehcho Government in maintaining the quantum and integrity of the Dehcho Ndehe;
- b) that as a general principle they will attempt to acquire lands for public purposes through agreement with the Dehcho Government; and
- c) that expropriation of Dehcho Ndehe will be avoided as a general principle, but if expropriation is necessary, the minimum interest required will be taken.”

<sup>2</sup> Canada and DFN appear to agree on the intent of 1.1 (b), Canada's suggested wording includes “as a general principle they will attempt to acquire lands... through agreement.”

<sup>3</sup> Canada's suggested wording: “will be avoided unless the lands are necessary...”

- a) ensure that lands other than Dehcho Ndehe are used, if other lands are available for the purpose for which the Dehcho Ndehe lands are intended to be expropriated; and
- b) make best efforts to acquire the Dehcho Ndehe lands through a negotiated land transfer agreement with the Dehcho Government, rather than by expropriation.

Ex.1.3 The Dehcho Government, prior to making a decision to expropriate any Crown land, private fee simple land or Commissioner’s land, shall:

- a) ensure that the lands to be expropriated are necessary for a public purpose; and
- b) make best efforts to acquire the lands through a negotiated land transfer agreement with the land owner rather than by expropriation.

Comment [f5]: New

#### Ex.2.0 Expropriation

The Dehcho Agreement will provide that,

Ex.2.1 any person or authorized representative of any person, who has power of expropriation under legislation (Expropriating Authority), will exercise that power of expropriation in accordance with applicable laws, subject to the Dehcho Agreement and implementing legislation.<sup>4</sup>

Comment [f6]: Previous draft said “may”

Comment [f7]: Previous draft “in accordance with laws of general application as qualified by the Dehcho Agreement”

Ex.2.2 The size of Dehcho Ndehe, as of the effective date, inclusive of surface and subsurface lands, will be maintained and will not be reduced through expropriation or other means, but may be enlarged.<sup>5</sup>

Ex.2.3 Any federal or territorial expropriation legislation coming into force after the date of ratification of the Dehcho Agreement shall, insofar as it applies to Dehcho Ndehe, conform to this Agreement and provide for the following minimum procedures:

Comment [f8]: New

- a) notice of intention to expropriate served on the Dehcho Government;
- b) an opportunity for the Dehcho Government to object to the expropriation on the basis that the expropriation is not necessary for a public purpose, or that the expropriating authority has not complied with the expropriation legislation, and an opportunity to be heard on that objection, including public hearings; and
- c) the determination of compensation by negotiation or mediation or, failing that, by reference to arbitration, as set out in chapter DR xx.<sup>6</sup>

<sup>4</sup> 2.1 is consistent with 12.4.1 of Nunavik Inuit Land Claims Agreement (NILCA), except for the “and implementing legislation”. The provision, however, is not found in NWT agreements.

<sup>5</sup> This is a core principle for DFN. In Canada’s tabled expropriation chapter, Dehcho Ndehe could be reduced through expropriation, as ‘replacement lands’, ‘money’, or a combination of both, are compensation options. Needs main table discussion.

Ex.2.4 Any Dehcho Government expropriation legislation coming into force after the date of ratification of the Dehcho Agreement shall, insofar as it applies to Crown land or Commissioner’s land, conform to this Agreement and provide for the following minimum procedures:

- a) notice of intention to expropriate served on the Government of Canada or the GNWT, as the case may be;
- b) an opportunity for the affected Government to object to the expropriation on the basis that the expropriating authority has not complied with the expropriation legislation, and an opportunity to be heard on that objection, including public hearings; and
- c) the determination of compensation by negotiation or mediation or, failing that, by reference to arbitration, as set out in chapter DR xx.

Comment [f9]: New

Ex.2.5 Compensation for lands expropriated from Dehcho Ndehe will be an exchange of lands, and will include an exchange of lands plus a cash component where the exchanged lands are of lesser market value or of lesser Traditional Value to the Dehcho Government or Dehcho Citizens than the expropriated lands.<sup>7</sup>

Comment [f10]: New; Traditional Value has been capitalized

Ex.2.6 Where a federal or territorial expropriating authority offers exchanged lands the subsurface of which is held by Canada or the GNWT, Canada or the GNWT, as the case may be, shall offer both the surface and the subsurface to the Dehcho Government.<sup>8</sup>

Comment [f11]: It is the previous language that is consistent with Tlicho 20.4.1, not this language (see footnote). The previous draft said “where the expropriating authority offers exchanged lands and the subsurface of which is held by government, government shall provide the subsurface”

Ex.2.7 Where determined by the Dehcho Government, lands acquired by the Dehcho Government in exchange for expropriated lands will, whenever possible, be contiguous with Dehcho Ndehe.<sup>9</sup>

Comment [f12]: New

Ex.2.8 Dehcho Ndehe and interests in Dehcho Ndehe may be expropriated for public purposes in accordance with this Agreement, legislation, and under the following conditions:

- a) The relevant federal or territorial Minister has reached agreement with the Dehcho Government for the expropriation of the lands, or

Comment [f13]: New

<sup>6</sup> This entire section is consistent with 12.4.4 of the NILCA except for b) “including public hearings”. The provision, however, is not found in other NWT agreements.

<sup>7</sup> As noted above, compensation for DFN must include the same quantum of lands, but may include lands plus money where lands are of lesser value. There is a fundamental disagreement on this core issue, as Canada has suggested that either lands or money can be compensation for expropriated lands.

<sup>8</sup> Consistent with Tlicho 20.4.1.

<sup>9</sup> Consistent with Tlicho 20.4.1, although Canada notes that “it is important to note that this clause was acceptable in Tlicho because they selected one contiguous block of land, equal surface and subsurface. Also, the language in Tlicho is that the expropriating authority shall offer available lands that are adjacent to Tlicho lands. Key words here being ‘offer’ and ‘available’. Dehcho’s 2.6 does not have either of those, therefore limiting the possibility of finding suitable replacement lands.”

failing agreement between the parties, agreement has been reached or a decision made in accordance with chapter DR xx;<sup>10</sup> and

- b) compensation is provided to the Dehcho Government in the form of exchanged lands, or in exchanged lands plus a cash component, as agreed to by Canada or the GNWT, as the case may be, and the Dehcho Government.<sup>11</sup>

**Comment [f14]:** Previous draft read "agreement has been reached in accordance with mediation/arbitration set out in \_"

**Comment [f15]:** Note: the Dehcho have completely removed the previous b) which read "the Governor in Council consents to the expropriation".

Ex.2.9 Crown land, Commissioner's Land and privately held fee simple lands, and interests in Crown land, Commissioner's Land and privately held fee simple lands, may be expropriated by the Dehcho Government for public purposes in accordance with this Agreement and Dehcho Government legislation. In such cases expropriation may occur after the Dehcho Government has reached agreement with the Government of Canada, the GNWT or the private landowner, as the case may be, for the expropriation of the lands, or failing agreement between the parties, agreement or has been reached or a decision made in accordance with chapter DR xx.

**Comment [f16]:** New

Ex.2.10 Where an expropriation authority expropriates Dehcho Ndehe and the exchanged lands are acceptable to the Dehcho Government, the authority shall acquire and offer as partial or full compensation for the expropriation of Dehcho Ndehe exchange lands in the Dehcho Settlement Area.<sup>12</sup>

Ex.2.11 Where an expropriation authority expropriates Dehcho Ndehe, if no exchange lands are available in the Dehcho Settlement Area, exchange lands shall be in the Dehcho First Nations' asserted traditional territory, as shown in Appendix A of the Dehcho First Nations Framework Agreement, and these lands will become Dehcho Ndehe, and be subject to the Dehcho Agreement.<sup>13</sup>

**Comment [f17]:** New

Ex.2.12 Expropriated lands shall only include the minimum interest required for the intended purpose of expropriation.<sup>14</sup>

<sup>10</sup> Canada says: "An agreement is not required in order for the Minister to expropriate. The Minister and the Dehcho Government will first attempt to come to a land exchange/transfer agreement and then if that fails, the parties will reach an agreement on compensation. If an agreement cannot be reached on compensation, the parties will go to Dispute Resolution."

<sup>11</sup> Same issue as above regarding the size and integrity of Dehcho Ndehe and compensation.

<sup>12</sup> Same language in federal draft tabled February 2008.

<sup>13</sup> This is not something Canada can agree to for two reasons. First, the Dehcho's asserted traditional territory, as identified in Appendix A of the Framework Agreement, falls into jurisdictions outside of the NWT and this agreement will only address DFN assertions in the NWT. Secondly, the assertions identified in the map overlap into other Aboriginal groups' settled areas, Sahtu for example, and again Canada cannot guarantee that lands in another Aboriginal group's settled area will be available as exchange lands. The federal position is to say that exchange lands will be provided in the Dehcho's settlement area. The Dehcho's settlement area will be defined as the area in which the Final Agreement will apply, which does not include areas outside of the NWT or areas that overlap with other Aboriginal groups.

<sup>14</sup> Consistent with Tlicho 20.1.1 and other agreements.

Ex.2.13 The total value of compensation, whether exchanged lands or exchanged lands<sup>15</sup> and a cash component, for an expropriated interest in Dehcho Ndehe will be determined by taking into account the following factors:

- a) the market value of the expropriated interest at the time the notice of expropriation is made;<sup>16</sup>
- b) the replacement value of any improvement to Dehcho Ndehe in which an interest has been expropriated;
- c) any expenses or losses resulting from a disturbance directly attributable to the expropriation;
- d) any reduction in the value of any interest in the Dehcho Ndehe that is not expropriated which results from the expropriation;
- e) any adverse effect on any cultural or other special value of Dehcho Ndehe in which an interest has been expropriated;<sup>17</sup>
- f) the value of any special economic advantage arising out of or incidental to the occupation or use of Dehcho Ndehe by Dehcho Citizens or the Dehcho Government, to the extent that the value is not otherwise compensated for.

**Comment [f18]:** Previous draft read "the market value of the expropriated interest or the Dehcho Ndehe in which an interest has been expropriated at the time the notice of expropriation is made"

**Comment [f19]:** Previous draft read "directly relates"

**Comment [f20]:** Previous draft "any adverse effect on any cultural or other special value of Dehcho Ndehe in which an interest has been expropriated to the Dehcho First Nations, provided that the cultural or other special value is only applied to an interest in Dehcho Ndehe recognized in the Dehcho Agreement"

**Comment [f21]:** New: Dehcho Citizens added

2.14 Where lands or an interest in Dehcho Ndehe which have been expropriated are, in the opinion of the expropriating authority, no longer required:

- a) the Dehcho Government will have first right of refusal to re-acquire the expropriated lands;
- b) they may not be alienated to any party other than the Dehcho Government, where such lands are wholly surrounded by Dehcho Ndehe, without the consent of the Dehcho Government;<sup>18</sup>
- c) the expropriating authority may not dispose of those lands for a price less than the price offered to the Dehcho Government;<sup>19</sup> and
- d) subject to \_\_, the Dehcho Government may offer to return exchanged lands for expropriated lands, or may offer a

<sup>15</sup> Same issue raised previously. Canada's position is that compensation will be exchanged lands or exchanged lands and a cash component or a cash component.

<sup>16</sup> Same as in fed draft tabled Feb. 2008 except "at the time notice of expropriation is made" added.

<sup>17</sup> Requires discussion. Canada suggests "recognized in law and held by the Dehcho First Nations, and provided that there will be no increase in the total value of compensation on account of any Section 35 Rights stemming from the Constitution Act, 1982".

<sup>18</sup> Concept introduced by DFN to help maintain the original integrity of Dehcho Ndehe. Canada cannot agree to this provision as this allows for a veto for the DFN.

<sup>19</sup> Consistent with Tlicho 20.4.11 and other agreements.

- combination of exchanged lands and a cash component for expropriated lands;<sup>20</sup>
- e) the price for the Dehcho Government to re-acquire expropriated lands shall take into account:<sup>21</sup>
- i) degradation to the economic or cultural value or utility of the lands to Dehcho Citizens or the Dehcho Government arising from the expropriation;
  - ii) outstanding liability to restore or reclaim the integrity of the lands to pre-expropriation conditions;
  - iii) an annual \_\_\_ % cap on the increase in monetary value from the time of expropriation;
  - iv) lands offered by the Dehcho Government to the expropriating authority in exchange for the return of expropriated lands.
- 2.15 Where an expropriating authority expropriates a fee simple interest in Dehcho Ndehe, those lands will no longer be Dehcho Ndehe.<sup>22</sup>
- 2.16 Where the Dehcho Government expropriates Crown land, Commissioner's Land and privately held fee simple lands, those lands will become part of Dehcho Ndehe.
- 2.16 Where an expropriating authority expropriates less than a fee simple interest in Dehcho Ndehe,
- a) those lands will remain Dehcho Ndehe;
  - b) those lands remain subject to Dehcho Government laws, except to the extent those laws are inconsistent with the use of the lands for the purpose of expropriation;<sup>23</sup> and
  - c) the Dehcho Government or any person authorized by the Dehcho Government may continue to use the lands unless that use is inconsistent with the purpose of expropriation.<sup>24</sup>

Comment [f22]: New

<sup>20</sup> Ibid.

<sup>21</sup> Canada sees a number of problems of listing the considerations in 2.14 e), primarily because it is the Expropriating Authority who will determine the price for the reacquisition of the lands. Also, how would the parties determine an appropriate annual % increase? What would this be based on? What if the value of land takes a FALL in monetary value? Would the Dehcho be expected to accept less as a result?

<sup>22</sup> Consistent with Tlicho 20.4.11 and other agreements.

<sup>23</sup> Preferred federal language to replace "for the purpose of expropriation" with "federal or territorial public purposes as determined by the Federal or Territorial Expropriating Authority".

<sup>24</sup> Similar language is found in Lheidli T'enneh s.125 c) but "as determined by the Expropriating Authority" would need to be added. The provision, however, is not found in NWT agreements.

### **3.0 Emergencies**

3.1 Nothing in the Agreement will affect or limit the application to Dehcho Ndehe of the *Emergencies Act (Canada)* or any successor legislation.

### **4.0 Conflict**

4.1 In the event of an inconsistency or conflict between this Chapter and federal or territorial laws of general application, this Agreement is paramount to the extent of the conflict.

### **Canada also proposes adding the following text:**

#### **5.0 Replacement (or exchange) Lands**

5.1 Land is not available to be provided as replacement land if it is

- a) subject to a lease or an agreement for sale unless the Federal or Territorial Expropriation Authority and the person holding that interest consent;
- b) occupied or used by the Federal or Territorial Expropriation Authority, a Dehcho Community Government, or required for such future occupation or use;
- c) part of a public road;
- d) within 31 metres of a boundary of the Dehcho Settlement Area; or
- e) for any other reason considered unavailable by an arbitrator under the Dispute Resolution chapter

#### **6.0 Public Roads**

6.1 Any Legislation, a Federal or Territorial Expropriating Authority may expropriate Dehcho Ndehe in accordance 1.1 for use as a public road or public road allowance without compensation to the Dehcho Government

6.2 No lands expropriated under 6.1 may be used for any purpose other than a public road or public road allowance without the payment of compensation.

6.3 Any dispute between a Federal or Territorial Expropriating Authority and the Dehcho Government as to the location of a public road for which Dehcho Ndehe are to be expropriated under 6.1 may be referred by a Party for resolution in accordance with the Dispute Resolution chapter.

- 6.4 Where any lands expropriated under 6.1 or conveyed without compensation to Government for a public road are no longer needed for a public road, Government will grant back to the Dehcho Government the fee simple interest in those lands and those lands become Dehcho Ndehe.
- 6.5 The amount of land expropriated under 6.1 or conveyed without compensation to Government for a public road and not granted back to the Dehcho Government will not exceed, at any time, X square kilometres.