

THE NISGA'A TREATY

EXPERIENCE

PRESENTATION TO

BC TREATY COMMISSION

TREATY SELF-GOVERNANCE FORUM

MARCH 10, 11 & 12, 2015

AT THE

COAST COAL HARBOUR HOTEL

VANCOUVER, B.C.

PRESENTED BY

EDMOND WRIGHT, NISGA'A NATION

“YOU AND I ARE THE TITLE AND THE RIGHTS ... IT IS OUR LAND. WE ARE THE LIVING TITLE.”

**SIMO'OGIT HLEEK, JAMES GOSNELL, PRESIDENT, NISGA'A NATION
APRIL 1988, 31ST ANNUAL NISGA'A NATION CONVENTION**

This presentation is an overview of some provisions of the Nisga'a Final Agreement that are frequently misinterpreted, not read, or not considered as part of modern treaty self-governance.

My last presentation to a BC Treaty Commission Conference was on March 14 & 15, 2002 – Speaking Truth to Power III – Self Government Options and Opportunities. The presentation I gave was subject matters such as jurisdictions, ownership of lands and resources, allocation of resources, relationship of laws, and finances, that can easily be related to self-governance.

NATURE OF AGREEMENT

The Nisga'a Final Agreement is a treaty and a land claims agreement within the meaning of Section 25 and 35 of the Constitution Act, 1982. The Agreement is binding on the Parties.

Terms such as “Nisga'a Traditional Territory”, “Nisga'a Aboriginal Title”, and Nisga'a Aboriginal Rights”, are no longer used in this Agreement because the lands and resources ownership and jurisdiction, fish & wildlife entitlements and allocations, and the Nisga'a Nation relationship with Canada and British Columbia, are perfected in provisions throughout the agreement.

CERTAINTY

“CERTAINTY” in the Treaty means nothing more than the assurance to the Parties that they can rely on the Treaty as setting out all of the rights of the Nisga'a Nation that are recognized and affirmed by Section 35 of the Constitution Act, 1982, and the limitations to those rights, to which the Parties have agreed.

EXTINGUISHMENT

The Nisga'a Nation along with many other first nations have rejected the historical approach of the British Crown, and later the Canadian Government, that Treaty making would be on the basis that Aboriginal Title and Aboriginal Rights must be “extinguished” by way of “surrender”. In Treaties in Canada, including some modern Land Claims Agreements, there has been a surrender of aboriginal title and aboriginal rights, and the granting back by the Crown of new Treaty rights to the first nation. All of the aboriginal rights and title are extinguished, and replaced by new rights created by the Treaty.

MODIFICATION OF ABORIGINAL RIGHTS AND TITLE

The Nisga'a Agreement in Principle provided that the Nisga'a Final Agreement would achieve certainty through a method other than extinguishment and surrender. It also provided that prior to the final Agreement, the Parties would negotiate the "Precise Legal Technique" required to achieve certainty.

The Nisga'a Treaty is the first Treaty or Land Claims Agreement in Canada that achieved certainty without requiring the aboriginal group to "Cede, Release and Surrender" any of their aboriginal rights.

The Nisga'a Final Agreement and settlement legislation has resulted in modifying Nisga'a aboriginal rights and aboriginal title, including characteristics and geographic extent, and continue as modified.

The aboriginal title of the Nisga'a Nation will be modified and continue as the estates in fee simple to those areas identified as Nisga'a Lands or Nisga'a Fee Simple Lands.

If, despite the Agreement and settlement legislation, the Nisga'a Nation has an aboriginal right, including aboriginal title, that is other than or different in attributes or geographic extent from Nisga'a section 35 rights set out in the Agreement, the Nisga'a Nation releases that right to Canada.

The Nisga'a Nation releases Canada and British Columbia and all persons from claims relating to or arising from violations of aboriginal rights, including aboriginal title, that the Nisga'a Nation ever had, now has or may have in the future.

CLAIMS OF OVERLAP BY NEIGHBORS

Nothing in this agreement affects, recognizes, or provides any right under Section 35 of the Constitution Act, 1982 for any aboriginal people other than the Nisga'a Nation. If a court determines that another aboriginal people does have aboriginal rights that are adversely affected by a provision of the Treaty, the provision will operate and have effect to the extent that it does not adversely affect those people's rights. However, if the provision cannot operate in a way that does not adversely affect these rights, the Nisga'a Nation, Canada and British Columbia will make best efforts to amend the Treaty to remedy or replace the provision.

Similarly, if Canada or British Columbia enters into a Treaty or a Land Claims Agreement with another First Nation, and the provisions of the other Agreement adversely affect Nisga'a rights set out in the Nisga'a Treaty, Canada or British Columbia, as the case may be, must provide the Nisga'a Nation with additional or replacement rights or other appropriate remedies. If after negotiations, the Parties are unable to reach agreement, the matter will be dealt with by litigations or arbitration under the Dispute Resolution Chapter.

NISGA'A LANDS

A parcel of Nisga'a Lands does not cease to be Nisga'a Lands as a result of any change in ownership of an estate or interest in that parcel.

If the Nisga'a Nation owns a parcel of crown Provincial fee simple land that is within the boundaries of Nisga'a Lands, the Nisga'a Nation may add that parcel of land to Nisga'a Lands by giving written notice to Canada and British Columbia. Also, if the Nisga'a Nation owns a parcel of crown Provincial fee simple land that is contiguous with Nisga'a Lands, the land may become Nisga'a Lands upon the consent of Canada and British Columbia.

Unless the Nisga'a Nation and British Columbia otherwise agree, British Columbia will continue the Nisga'a Memorial Lava Bed Park as a Class "A" Provincial Park or a provincial park with an equivalent classification.

ACCESS

Nisga'a Lisims Government will allow reasonable public access to and onto Nisga'a Public Lands for temporary non-commercial and recreational uses in accordance to Nisga'a Laws.

Public access for hunting and fishing on Nisga'a Public Lands will be in accordance with federal and provincial laws of general application, Nisga'a Annual Management Plans, and any Nisga'a Laws regulating public access.

ROADS AND RIGHTS OF WAY

The Nisga'a Nation or a Nisga'a Village, on request by British Columbia, will grant to British Columbia, or to a public utility, rights of way on Nisga'a Lands for public purposes, including provincial secondary roads or public utilities, in order to provide access or service to Nisga'a Lands or other lands.

As of effective date, British Columbia owns the Nisga'a Highway corridor to use as a public highway.

On the effective date, the Nisga'a Nation will grant to British Columbia, the rights of way for secondary provincial roads on Nisga'a Lands.

British Columbia will permit public utilities to use the Nisga'a Highway corridor and the secondary provincial road rights of way areas to install, operate, and maintain utility transmission and distribution works to the extent that in the reasonable judgement of British Columbia, those works will not interfere with the safe and prudent use of the existing road or existing public utility works.

Public utilities may, with the prior written approval of British Columbia, locate utility transmission and distribution works on Crown roads rights of way areas.

B.C. Hydro and Telus may, with the prior written approval of the Nisga'a Nation or a Nisga'a Village, locate distribution works on Nisga'a Lands to meet demands for service.

The Nisga'a Nation and each Nisga'a Village will not unreasonably withhold approval for B.C. Hydro or Telus to install new works on Nisga'a Lands and provide new service connections.

FISHERIES

Nisga'a fish entitlements are held by the Nisga'a Nation, and Nisga'a citizens have the right to harvest fish and aquatic plants in accordance with the Nisga'a Treaty. The Nisga'a Nation may not dispose of Nisga'a fish entitlements. Nisga'a Lisims Government may authorize persons other than Nisga'a citizens to harvest fish or aquatic plants in Nisga'a Fisheries, in accordance with the Nisga'a Final Agreement, the Harvest Agreement and the Nisga'a Annual Fishing Plan.

In every year in which it is necessary for conservation, the Minister will determine a minimum escapement level for one or more species of Nisga'a salmon. In any year, the amount of that species that the Nisga'a Nation is entitled to harvest will be determined in accordance with Schedule "A" of the Fisheries Chapter of the Treaty, and any adjustment for an overage or underage of a species of Nisga'a salmon in any year. In addition to the salmon which the Nisga'a are also entitled to, a Harvest Agreement with Canada and British Columbia under which the Nisga'a may harvest additional 13% of each year's adjusted total allowable catch of Nass Sockeye salmon and 15% of each year's adjustment total allowable catch of Nass pink salmon. The term of the Harvest Agreement is 25 years and is replaceable at the discretion of the Nisga'a Nation every 15 years for further 25 years.

Nisga'a citizens will continue to harvest Nisga'a fish entitlements to non-salmon species and aquatic plants for domestic purposes. The Treaty sets out the process required for the establishment of a Nisga'a fish allocation that will be the Nisga'a fish entitlement to non-salmon species or aquatic plants.

The Minister is responsible for the management of fisheries and fish habitat, however, the Nisga'a will also have important law-making authority and planning responsibilities.

The Joint Fisheries Management Committee (JFMC) has been established by the Nisga'a Nation, Canada and British Columbia to facilitate cooperative planning and conduct of Nisga'a Fisheries and enhancement initiatives in the Nass Area. Canada, British Columbia and the Nisga'a Nation each have two representatives on the JFMC.

The Nisga'a Nation and Canada established a trust known as the Lisims Fisheries Conservation Trust (the Trust). Canada contributed \$10 million and the Nisga'a Nation contributed \$3 million to the Trust.

Three Trustees are overseeing the Trust, one selected by Canada, one selected by the Nisga'a Nation and a third jointly selected by Canada and the Nisga'a Nation. The object of the Trust is to promote conservation and protection of Nass Area fish species, facilitate sustainable management of fisheries for Nass Area species and stocks, and promote and support Nisga'a participation in the stewardship of Nass Area fisheries for the benefit of all Canadians.

To enable the Nisga'a Nation to increase its capacity, in the form of commercial licenses, or vessels and commercial licenses, and to participate in the general commercial fishery in British Columbia, Canada and British Columbia each contributed \$5.75 million, for a total of \$11.5 million. As per the Treaty, the Nisga'a Nation was authorized to expend \$3 million for other Fisheries related activities. The Nisga'a Nation contributed \$3 million to the Lisims Fisheries Conservation Trust.

WILDLIFE

Nisga'a citizens have the rights to harvest wildlife throughout the Nass Wildlife Area. The Nass Wildlife Area encompasses 16,101 sq. km.

Wildlife entitlement is subject to measures that are necessary for conservation, and legislation enacted for the purpose of public health or public safety, and the communal nature of the Nisga'a harvest for domestic purposes. Nisga'a wildlife entitlements are held by the Nisga'a Nation and the Nation cannot dispose of Nisga'a Wildlife entitlements.

As of the effective date, the initial designated species include allocations to harvest moose, mountain goat, and grizzly bear, Nisga'a Lisims Government or British Columbia may request the Wildlife Committee to recommend whether a wildlife species should be or continue to be, a designated species.

Nisga'a citizens can harvest wildlife or migratory birds throughout Canada in accordance with federal and provincial laws, any agreements that are in accordance with laws of general application between the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation on the one hand, and other Aboriginal people on the other, or any arrangement between other aboriginal people and Canada or British Columbia.

A wildlife committee has been established to make recommendations and give advice, designation of species, harvest levels, annual management plans, as well as studies and other matters. It will facilitate sharing of information with other management and advisory groups.

The Wildlife Committee is made up of nine members, four members each appointed by British Columbia and the Nisga'a Nation, and Canada appoints one member.

Existing traplines will not be affected by the Nisga'a Treaty. Nisga'a Government will obtain traplines on Nisga'a Lands that become vacant.

ENVIRONMENTAL ASSESSMENT AND PROTECTION

With our Nisga'a aboriginal rights, and aboriginal title in the Nisga'a Traditional Territory being asserted rights and title prior to becoming perfected rights, title and jurisdictions in the Nisga'a Final Agreement, this chapter is an example of what gives the Nisga'a Nation a strong basis to address proposed developments that may have adverse environmental effects on Nisga'a Lands or other Nisga'a Treaty interests.

The definition of "consult" and "consultations" is contained within our Treaty, and goes beyond the common law definition of consult or consultation.

Canada or British Columbia will give notice of the project, consult the Nisga'a Nation about the environmental effects of the project and, if the project could have significant adverse environmental effects, give the Nisga'a Nation an opportunity to participate in any federal or provincial environmental assessment.

Nisga'a Lisims Government has developed the Nass Area Strategy that ensures that any potential resource development in the Nass Area would have the proponent treated in a consistent manner as other proponents when their proposed project development is reviewed by Nisga'a Lisims Government.

NISGA'A GOVERNMENT

The Nisga'a Nation and each Nisga'a Village are separate and distinct legal entities. The Nisga'a Nation acts through Nisga'a Lisims Government, and each Nisga'a Village acts through its Nisga'a Village Government, in exercising their rights, powers and privileges, and in carrying out their duties, functions and obligations.

Nisga'a citizens residing outside of the Nass area will participate in Nisga'a Lisims Government through the creation of Nisga'a Urban Locals. On the effective date, the three Nisga'a Urban Locals that will form part of the Nisga'a Government structure are the Greater Vancouver, Terrace and Prince Rupert/Port Edward Urban Locals.

The role of the Council of Elders is to provide guidance and interpretation to the Ayuuk to Nisga'a Government.

The establishment of Nisga'a Public Institutions originate from the Nisga'a Final Agreement and the Constitution of the Nisga'a Nation.

Since the effective date, we no longer have Nisga'a Bands, Band Offices or Indian Reserve Lands.

ADMINISTRATION OF JUSTICE

Nisga'a Lisims Government may decide to provide policing within Nisga'a Lands by making laws for a Nisga'a Police Board and a Nisga'a Police Service. Details for the establishment of a Nisga'a Police Board and a Nisga'a Police Service are set out in the Treaty.

Nisga'a Lisims Government may also decide to establish a Nisga'a Court, and the Lieutenant Governor in Council must approve the Nisga'a court structure, procedures, and method of selection of judges of the Nisga'a Court.

CONCLUSION

At the November 2004 orientation session of Wilp Si'ayuukhl Nisga'a (WSN), Nisga'a Lisims Government invited retired B.C. Court of Appeal Judge Josiah Wood to speak to WSN on their responsibilities and obligations of trust as elected members of our Nation. Judge Wood is now deceased.

Mr. Wood's grandfather was a member of the Senate of Canada, and in his grandfather's memoirs he quoted the following: "*Governing is nine tenth common sense, and one tenth law*".

In his talk, Mr. Wood stated: "*Each of you has a fiduciary like duty to act at all times in what you believe to be the best interest of your constituents and the Nisga'a Nation. In exercising the discretion which your constituents have vested in you, to decide the many issues that must be decided in this chamber over the next four years, each of you must exercise that discretion reasonably*".

For many of us, negotiating and ratifying a Treaty is our only route to move forward in the national economy and rid ourselves of the Indian Act and our small uneconomical Indian reserves. There are many First Nations that do not wish to get involved in treaty negotiations. We have all heard their reasons and respect their positions. There are also some First Nations that have economies that probably cannot be replaced with a Treaty, and this group should be commended for their successful development.

- Prepared by
Edmond Wright

