

Preparing for the Day After Treaty
Effective Negotiating: Developing Relationships
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Presentation 1: Gary Yabsley

Good morning. There are several things I guess I can say. I was the lead negotiator for the Maa-nulth, the five Maa-nulth communities. I ratified the Maa-nulth Treaty about two or three weeks ago. They had been originally a part of the Nuu-chah-nulth Tribal Council, there were thirteen originally. This is the end product of about thirteen years of negotiations. I only became the lead negotiator two years ago, when the late George Watts passed away and there was just an immense vacuum in your world at that time so I got thrust into this world I had been legal counsel up until that point.

I think what I'd like to do is just take the time I've got and try to articulate as best I can what I've actually learned in the last few years, and trying to relate it the topic of this panel which is, Relationship Development. I would say to begin with, it is my assumption that this discussion and people participating in the treaty process, so are doing so with one objective which is to get to treaty. If that is not the objective I would strongly recommend that you don't do treaties and you certainly don't borrow money and consume people's time if you're not trying to get there, then don't do it. You owe it to yourselves and you owe it to

communities not to do it.

Having said that, one observation I could make, is that actually getting there depends to a great extent on the actual ability to develop relationships in the process. We can talk about the substance of treaties, we can talk about legal theory, we can talk about history, but you're not going to get there if you don't develop fundamentally sound relationships with the people that you are dealing with.

I would also suggest that those relationships have to be relatively healthy. If you are in the process where the relationships with the parties on the other side are just acrimonious or they become personalized in a negative way, it won't be healthy and I don't think you'll get there.

I'd ask you to consider another thing, and this is unique in part to my own situation with Maa-nulth, when we talk about relationships, I think there's probably two sets of relationships that you need to comprehend and you need to understand you've got to develop. One is those relationships you've got with governments, the negotiators on the other side, and the other sort of relationships are the internal relationships with the people you're dealing with.

In the Maa-nulth situation it was even more complicated because in fact I had five communities. The Maa-nulth Treaty is really five treaties rolled into one. And the the politics and the management of the administrative reality of advancing a treaty is extremely complex and if you don't have fundamentally sound relationships with the people you're

working with on the inside, you've got a tremendous problem.

So maybe I'll take those two propositions as separate. In relation to developing healthy relationships with government, I think what I'll do is I'll give you, in a nutshell, the things I've learned. They may not be applicable to you in your situations or you may simply suggest that I'm out of my head, wouldn't be the first time that somebody's suggested that, but here goes.

First of all, it is my belief that it is critical for First Nations participating in this process to understand what the process is all about. You do yourself a disservice and you do your communities a disservice if you develop expectations of what this process can do, when in fact it cannot do that structurally. If you think that the people at the table for the other side are able to deliver things that are simply beyond their ability or the ability of their governments to deliver, you are deluding yourself, and you will simply get frustrated.

So, understand the reality of the process you are in. For instance, understand that this process is part and parcel of the committee and constitutional context. Governments aren't going to come to this table with propositions that are outside the bounds of the legal reality of those governments, they can't do it. So if you don't understand that and expect them to do something that they can't do, you will be frustrated.

Secondly, it is my view that treaty negotiations

should be distinguished for what they are, and the nature of the process. I believe treaty negotiations are negotiations about a social contract. I do not believe these are like labour negotiations. In so far as the negotiations of a social contract they should be the less adversarial than negotiations you would have in a labour agreement for a number of reasons that I can get into later.

Thirdly, I think it's critical, when I say understand the process, it's critical to understand who the players are. And in that regard you will sit there and you will look at chief negotiators for the federal and provincial government, you will negotiate with them, but in fact you are not negotiating with them exclusively, you are negotiating with the Federal Department of Finance, you are negotiating with the Department of Fisheries and Oceans, you are negotiating with Provincial Ministry of the Attorney General there are other players who are not at that table that you do not see and who have in many cases the ability to trump what the negotiator for the government is saying. Understand that because you will be looking at that negotiator and he will not be able to deliver on many things, he will have to go back and get instructions from the respective departments. If you think otherwise you will be frustrated.

Understand that, government systems have built-in time lines and they don't fit First Nation time lines. That is particularly the case with the Federal Government. And one particular issue when you require multiple letters of

approval in Ottawa, and it may take significant amounts of time to get those approvals. That is just the system you're dealing with.

So, again if you think that you will get a quicker turn around than you are getting, in part your expectations will not fit their reality.

Another point, understand your own objectives and work to become increasingly precise about what you mean by those objectives. And again, I'll give you an example. One fundamental objective is self-government. Self-government is a vague, broad, swooping proposition that lacks clarity and definition, and I often hear the term sovereignty thrown out there in the same way. If you are not able to define and be precise as to what you mean and make that definition fit the reality of the Canadian Constitutional context that I talked about earlier, you will be frustrated. You have got to increasingly refine your level of precision when you're taking positions at the table, because the other side is going to push you to do exactly that. And unless you want to just sit there with your mouth open, you're going to have to be able to respond to those.

And let me get back to another observation here which I said earlier: I think that this is a negotiation about a social contract. I believe that at the end of the day all of the parties in this negotiation have very similar objectives. They may not be quantitatively the same and they may not have the same understanding how they get there, but at the end of

the day you have to assume the governments are there to get to a treaty. And, I think, that given the Maa-nulth context, we constantly have to re-iterate that proposition for everybody. That at the end of the day we are all trying to get there. That is an additional implication for First Nations, and that's because probably in the negotiation process for First Nations to say they got to get there, ultimately we've got to get ratification at the community level.

So governments say well, when are we going to get there, our response in many, many cases is we're going to get there that way and we're telling you that if you go that way you will not get ratification at the community level so we've wasted 13 years of our time. And it forced governments to rethink the process by which they get there because otherwise we won't get it ratified.

The next thing I want to suggest is, it's my experience in this and I'm pretty adamant about this, we have to work to develop and maintain personal trust with one another at the table, if you do not trust the people on the other side you will not get there. It's that simple. You have to have a level of confidence and surety that when they tell you something there not lying, and when they tell you they will deliver something, they've got the capacity to deliver. You have to be cognizant and consciously work at maintaining trust.

From the Maa-nulth perspective and from my perspective that meant several things, if you give your personal commitment at the table, first of all, be clear as to

what it is your committing to, put it on the record, state it in clear terms and make sure that the other side understands what it is you've committed to. Once you've made the commitment deliver on it, that's your word. You then have the right to expect that from the other side and if in either direction it does not work, your negotiations won't work, the trust breaks down.

Now there's the other point I think, in my own personal approach and everybody has different views on this. I strongly believe in treating those people that represent governments with respect. I do not believe you can go into these negotiations and personalize it or personally or verbally assault other people or attach to them personal motives and initiatives that are not warranted. This should not and cannot become a question of personalities.

I told you about one other proposition which is that, I don't believe it's in anybody's best interest to become preachy. This in fact is not a moral play. This is a negotiation about constructing future relationships and the moment either side brings in morality then the other side has the right to say well, we're morally superior, and you get into a debate that cannot be won.

Another point, if you take a position on any issue, fish, land, governments whatever it is, be prepared to explain the reasons for the position. Don't take a position for the sake of having a position. Be prepared to explain to the other side why you've got that position and why it's relevant

to both ratification and to the long term advantages of the community.

I'll give you an example on that, in the treaty process the provincial government, five or six years ago, came to the table and said, governance isn't going to be in the treaty, we're going to do governance by way of a self-government agreement and we said no, no way, we don't believe in that. The ultimate propositions came down to if you take governance out of the treaty and governance is not a Section 35 right, we're not giving you legal certainty, we're not giving you one of those things that you say you need to make the treaty work. It took two and a half years to persuade the provincial government to take the self-government agreement off the table and put governance back into the treaty. I believe they did so at the end of the day because logic dictated that the only place you could put self-government was in the treaty.

I would encourage everybody at the table, and on all tables to recognize the skills of an impartial and an independent chairperson. Have somebody there that keeps the table from deviating into name calling or some of the more negative aspects and in this case we used Peter Colenbrander, he did an amazing job of saying, this is a civilized process and we're going to keep it that way.

When governments have positions on an issue, request those positions in writing, in advance and be prepared to do the same when they ask you what your positions are. When you've got them in writing it's easier to talk to them when

you've got them at the table.

Presenter 2: Daryn Leas

Thank you. I'd like to talk a little bit this morning about experience in Yukon of negotiations, as well as implementation.

Just by a little bit of background, the Yukon First Nations are fourteen, eleven of them are self-governing. Our negotiations commenced formally in 1973. Of course Calder happened in 1973, but we also met with the Prime Minister and the Minister of Indian Affairs in 1973 and requested that land claim negotiations commence in the Yukon, and they did.

Those negotiations, you know, lurched ahead and then stalled out, and then lurched ahead and eventually we reached an agreement principle in 1984. That was rejected. We went back to the table a couple of years later and finalized the Umbrella Final Agreement. In 1993 it was signed off.

The Umbrella Final Agreement is a territory-wide document that applies to First Nations. It sets out the parameters for the negotiation of land claim and self-government agreements. UFA was negotiated through a single entity, Council of Yukon Indians, on behalf of all Yukon First Nations people, along with the territorial government and the Government of Canada. It's interesting to look back to negotiations in the 1970's and 1980's and see a very diverse group come together under the Council of Yukon Indians and negotiate this agreement. We're talking about, as I said, 14

different communities, a handful of different cultural and language groups that comprise Tagish, Tlingit, Southern Tutchone, Northern Tutchone, Han and Gwitch'in people, Kaska, Upper Tanana, so it's a very diverse group. We're all Athabaskan people aside from the Tlingit people, but very distinctive communities. Nonetheless, people were able to work together for this objective of realizing the treaty, to ensure that we had political and economic autonomy, that social conditions were rectified.

In 1993 when the UFA was signed off we had four of our fourteen First Nations also signed off their agreements. Subsequent to that, seven other First Nations have finalized their agreements, and I was involved in the negotiation of three of those First Nation final and self-government agreements. The first was the Tr'ondek Hwech'in, my own First Nation in 1998, then the Ta'an Kwach'an Council final and self-government agreements in 2002, and the chief for Ta'an has joined us and I acknowledge her and subsequent to that, Carcross/Tagish, more recently in 2005.

One thing that we've learned is that once the negotiations are concluded for the treaty the negotiation process continues because that's really what implementation is all about in many, many ways. Under our agreements we have a series of other arrangements that we have to negotiate, new relationships we have to establish, administration of justice provisions, program and service transfer agreements so we're delivering, administering and managing specific programs, no

longer DIAND. Obviously we have to negotiate fiscal arrangements through our financial transfer agreements. We have to negotiate tax arrangements and of course, from some of the people like, Richard Nerysoo and some of our technicians have been involved in implementation reviews nine or five or ten years after the agreements have been finalized. Those unto themselves become negotiation processes and in addition to that there's the ongoing implementation of the agreement, land dispositions, approval of different permits, testing out and implementing the new provisions of the agreement to ensure that we have substantial input. So, it just seems to continue on.

And it really emphasizes to us, and I'll get back to this point later, the need to establish, following up what Gary was saying an honourable, respectful negotiation table. They're difficult issues, they're complex, they're multi-party, it's a long time, people get tired of dealing with it. But the relationship that you establish with others, particularly with government, during those negotiations is going to carry over to your implementation. And it's very important that those relationships are strong, constructive, respectful, can withstand the stress of contentious discussion.

And probably that, from my experience, is one of the most difficult aspects of implementation. Because if you go through years, if not decades in some cases, of adversarial negotiations and then the next day you are working with the same people, you know, to implement it, and you're relying on them to continue to push their systems to ensure your deal is

implemented, it can be challenging.

I want to talk a little bit about two types of relationships, and Gary touched on both, the internal relationships within First Nations during negotiations, as well as the external relationships with First Nations, governments and other entities. As I said and we all know this, the issues that are dealt with at the treaty table are complex, they're diverse. We do everything from self-government to tax, to land issues, to resource development. They're difficult and contentious, if they weren't we would have dealt with them a hundred years ago, they're tough issues. They're emotional issues for a lot of us because they touch the core of who we are, they affect our identity, and it's not easy to -- I understand we have to rationalize to other governments but sometimes it's difficult to do that. And often other governments are not trying to be disrespectful, they're trying to understand and those discussions, as I said, can be difficult. They're multi-party negotiations, which also makes it difficult and they're protracted. It takes a long time, people get frustrated because the longer it is, the more expensive it becomes for our First Nations, because we're of course borrowing money and paying interest and all those sorts of things.

During the course of the negotiations, obviously relationships are going to be strained, they're going to be tested, they're going to be broken, they're going to be renewed, and in some cases, new relationships are going to be

established, because that essentially is what a treaty is all about. As Gary said, it's establishing new relationships with other governments, with the residents of Canada.

One of the things I have seen in Yukon is a certain amount of frustration within our own First Nations, following the ratification of the agreements. Some First Nations citizens have high, high expectations which they should have, and they expect that the results and the benefits of those treaties should be immediate and forthcoming, and it takes some time. There has been, in my view, substantial improvement in self-government communities in the Yukon in the twelve years or ten years that those agreements have been implemented, but it's slow in coming. It takes time to change, you know, there's a paradigm shift that's happening and it takes time for that to take place.

How do you establish good relationships? We know that, it's obviously hard work. It's all about perseverance, patience, understanding and respect and having a real commitment to have a constructive working relationship. And we have to remember it's a two-way street, for us as well as for government.

I just want to talk a little bit about internal relationships because I found those probably more challenging during the negotiations that I found a relationship with government. I kind of knew where government was going to come from, I knew what their approach would be. I found it challenging internally, and it shouldn't be a surprise in

hindsight, but it was work that we, you know, we dealt with as we came along.

Of course, if you want a treaty that's going to have any sense of ownership of your community or within your community, if you want to have any sort of treaty that has a chance for ratification, it has to involve citizens.

Grassroots people have to be involved. It can't be negotiated by elites in your community in isolation, it can't be negotiated by lawyers or consultants that aren't part of your community, you know, it has to be grassroots people involved. And not just sitting at the back of the room, but part of your caucus, engaged directly in the negotiations.

So what we've done in the communities I've been involved in, we've went out and invited people, not just put a sign up and said, hey, if your interested in treaty negotiation issues come in and be involved. We've actually, in some cases went out and actively recruited people and said, we need your input, we need your perspective. In some cases those people didn't support the treaty process but their point of view was valid anyways.

So, we tried to have a caucus which was inclusive, on the understanding that nobody had a veto, you know, we wanted to hear everybody's point of view. But we had this objective that Gary spoke to, that there was an agreement that we were going to try to get the best deal we could under the mandates that were there and push the mandates, if we could and at the end of the day take that best deal that we could do

and give it back to our citizens for them to review and make a decision about ratification.

So we weren't interested in having caucus discussion as to whether or not we're going to treaty or not, but how do we have the best or how do we get the best treaty possible that can meet the best interests of this community. And that took a lot of time, and some of the communities I was involved in, strong personalities with extremely strong points of view. And it takes time; you have to invest in it, time wise.

And the last community that I was involved with, Carcross/Tagish we worked with our caucus probably, you know, in a concentrated fashion for eighteen months before we really got engaged with government, and that was good, we needed to do that. It took a lot of time and in the end it benefited the process and it benefited the agreement that we negotiated.

I found in our discussions in caucus were probably -- well they were, they were tougher than the discussions we had with government because, if you're going to put a position out there, as Gary said, you have to provide some rationalization for it. But when you're in a caucus, if somebody puts a position forward, you have to challenge it, you have to push people to really think it through and identify what the underlying interests were.

And I remember one of our caucus sessions, people will get frustrated and they would say, "God, Daryn, your worse than YTG," the territorial government. But you have

to do that, you have to really push, not challenge people, but to really push things so that when we're at the table we can really articulate it and identify what the issues are.

Our negotiations teams, I found were very focused, we were prepared to make a decision, which is difficult in a lot of cases, and you can't underestimate that, but in the end that led to, as I said, a better deal and it led to a ratification process which was successful.

One of the last agreements I was involved in went through two ratification processes because their thresholds were extremely high. They needed 60 per cent of all their citizens over the age of 18 to vote 'yes'. Not 50 per cent, but 60 per cent of everybody on the list, not just people that cast ballots. So you know we needed to get out there and ensure people understood the agreement. And it helped a lot in the second ratification vote that people who were involved in our caucus started speaking authoritatively to the community at meetings about their agreement. And because the first time around was a reliance on lawyers themselves to explain it and it didn't go so well because it wasn't my deal, it wasn't my deal. So the second time around I went to Europe for six weeks and said, see you later, don't bother me, it's your deal, you guys got to stand up in your community and tell people about it. And it passed, it made the difference because if that capacity wasn't there in the caucus and in the community the deal wouldn't have, wouldn't have been ratified in my view.

Also on the implementation side we're seeing an

aggregation of efforts. There's a real need for First Nation groups to come together, formally or informally to start dealing with implementation issues. We've had some discussions throughout this conference about the National Land Claims Coalition, we've talked - I know my clients have talked - with the Nisga'a about working together on certain issues. It's an absolute. We need to work together on the implementation side. Because that's how we worked to get the agreement in the first place is by coming together, dealing with mandate issues that were national or territorial.

In the 1970's and 1980's we worked in the Yukon with groups across Canada and without doing that, we wouldn't have got the deal we were able to achieve. So on the implementation side we're starting to see that again, even though we have individual agreements, people are coming back together.

Now that's challenging for people because people say, "Hey, look we negotiated for 20 years for self-government, we're not going to delegate it or water that down by working with others." But the reality is, you have to do it. Because the issues that we're dealing with in the Yukon are the same as the Gwitch'in and the Nisga'a on financial issues, on review matters and we have to come together.

On the external relationships, Gary spoke a lot of this, about your relationships with government, and I concur with that. One thing I will point out - what we found is that external relationships also include establishing good

relationships with municipalities and the general public. That will help the implementation as well as the negotiation process. We used industry and public groups to help deal with mandate issues by putting pressure on government. And that takes a lot of time, sometimes that's frustrating, it's hard work, but the more support you get for treaties and the more support you have in the broader public for treaty implementation, the greater benefit we're going to have.

In the Yukon initially there was heavy, heavy resistance to treaty negotiations in the 1970's. Today people see the value, I think, most people do. And that just comes through hard work of education, education will enlighten most, but not all. But, you know, 80 per cent of the population is better than 20 per cent, making the effort makes a real difference.

Now I'll just close off by talking about some other stuff, but maybe some questions will arise on that. But just to re-emphasize that how you conduct yourself and carry out the negotiations is a real reflection in your community. And, if you can carry it out with honour and respect, even though they're tough issues, governments are going to support and I think work that much harder for you internally. You're going to develop those relationships, and that's going to benefit you in the long run on implementation.

I've seen it time and time again, from my experience in the Yukon. And again it's not easy work, its difficult work, particularly after an adversarial process, to

set that aside and say, let's now really work together as a team, which we probably were doing during the negotiations anyways. But it's worth it and it's going to help you.

Thank you very much. I look forward to your questions, because I know there's a lot of, a lot of experience in the room, so I look forward to discussion

Presentation 3: John Bainbridge

What I would like to do is just give you the benefit of hindsight that we have gained from six years of ongoing negotiations to update Nunavut's implementation plan.

When it started in 2001 -- Nunavut has a number of advantages or apparent advantages that are not clearly available to any other groups. In the first place, there's one treaty and it covers one people within the bands of a single jurisdiction. So there's a certain simplicity to it. It has a fairly high national profile, most of the country's aware of Nunavut and more or less how it came about. It also has some international recognition.

Those two things together give Nunavut access to some fairly high levels of government, so, that throughout the negotiation we had meetings with the Minister of DIAND, we had regular meetings with the deputy minister and we also gained access to the Prime Minister's office and the Privy Council office.

The other advantage that we had was that NTI is very well resourced and could enter this negotiation and stay

in it for the long haul. So although it started in 2001 it has not yet finished, it's now in litigation. Despite all of these advantages that Nunavut had, we started off the negotiation with some very low level officials and it was clear from the start that movement was going to be extremely difficult.

When we approached the negotiation we looked at the existing implementation contract and went through all of the assumptions that had been made back in 1993, when the treaty was first signed. Those costing assumptions that were made back then were no more than that, they were assumptions they were best guesses of what implementing the claim would cost. When we went through it with the benefit of ten years of experience, we came up with some radically different figures, nevertheless the Federal Government came into the negotiation determined only to increase the funding by three to four percent to cover what they figured were inflationary increases. We came to the table with a ten fold increase as our basic demand and significant other demands.

So right off the bat we were miles apart. The Federal Government was extremely cagey about when it was going to get its mandate. It did not want to discuss with us the content of its mandate and when it finally got its mandate it was simply was no basis for a successful negotiation.

So right off the bat we were confronted with a Federal Government that was very powerful, held apparently all the cards; and our first significant challenge was to come up with a strategy for readdressing the balance. And the

principal thing that we did, the most important thing was to broaden the base or the scope of the negotiation, we realized we would make very little movement at the table that we had to go outside of the table and bring pressure down on the table from various outside powers.

So, in doing that the first thing that we felt was essential to do was to re-examine our negotiating proposals and fully understand them and reword them in a way that would simplify them and make them saleable to other organizations, to other departments, to the public, to other NGO's, to anybody that we felt could form an opinion that might be influential on the Federal Government. So it was essential to make sure it was simple, but we also realized we had to present the proposal in a way that the government would be the winner in a successful negotiation. This was -- could not be coming to the table with a list of grievances, it had to be, if we can succeed here the Canadian Government will benefit in a number of ways.

And the second thing, in order to do this, we brought in outside help. Price Waterhouse Coopers was the main one; we got them to various economic impact studies for us. That was an extremely useful thing. These people were extremely expert in the area of costing things out, and understanding what implementation might cost. And they came up with reports for us that gave us insights into implementation that we had completely missed those. And they were extremely valuable when it came to our communication strategy with the

media, we were able to point to solid organizations like Price Waterhouse Coopers and say, this is what they say, and their opinions carried weight.

The second important thing that we did was to attempt to work outside of the negotiation table with the Department of Indian Affairs to get them to revise their mandate or reconsider the mandate. That was a long, ongoing process that lasted more than three years. The third point we felt was important was to train the negotiating team in how to negotiate. There is nothing inherent in someone being a lawyer or a politician that gives them some peculiar talents to negotiate, it's a learned skill. And what NTI did was send several members of the team to the Kennedy School of Administration at Harvard University to take the course on strategic public sector negotiations. And I cannot emphasize how useful that was.

Another thing we did was when we realized, when we had our first few meetings with the federal negotiator and realized how difficult this was going to be, we made an assumption that probably, it's going to end in an impasse. And in that case we -- when the negotiations broke down, we wanted to be in possession of the moral high ground.

In other words if anyone's going to walk from the table, it was not going to be us, it was going to be the Federal Government, so that we would always be able to place them in the wrong. This is in fact what happened. We then engaged in a serious media strategy, we got the Auditor General

of Canada involved, we gave an access to information request demanding information through that process from the Federal Government. That didn't get us anything -- answers, straight answers to our questions but it did enormously irritate the federal bureaucracy and it gave us some insight into a whole lot of other issues that we didn't even ask questions about.

Finally, through relationships we'd cultivated in the Federal Government, and we found an awful lot of sympathy within the Federal Government, especially in other federal departments, we were able to get access to the Prime Minister's office and meet with some of the Prime Minister's aides and more importantly, we got into the Privy Council office at the time when Martin was Prime Minister and he set up a special aboriginal affairs committee in the PMO. This was extremely useful too.

Finally because Nunavut had some international recognition we went overseas to various international meetings, like Commonwealth Institute Policy meeting in London. We went to Guana. We tried to build some relationships with other aboriginal groups in other countries where Canadian companies were engaged in forestry and generally causing harm to aboriginal people overseas.

Every time we did that somebody from DFIA or external affairs would be at the meeting taking notes, and it was clear to us that this was another route to get a message back to the Federal Government. And very quickly we also got involved in mediation with Thomas Berger as the mediator. This

was immensely useful. There is no substitute for a sound objective third party coming in and giving their opinion, especially if it carries a lot of weight, such as his did.

Finally, there was litigation, we are in litigation right now; we used litigation and the threat of it for several years, constantly ratcheting up the tension on that. It caused a good deal of worry within various departments. It was a useful tool, but the one thing I think that may not be useful is if it actually ends -- gets into court. As a strategy for putting pressure on, it has some merit, but to actually go into court and leave it up to a judge to make a decision may not be terribly useful.