

**Preparing for the Day After Treaty:
The Nisga'a Experience
November 14 - 16, 2007**

Thomas Berger, Q.C., Berger & Company

My history with the Nisga'a goes back to the 60's. Back in the early 60's I had represented two young men in Nanaimo – Clifford White and David Bob – who were charged with hunting out of season under the *Game Act*. I went to see them. They were in prison. They couldn't pay their fine. I went to see their relatives and others at the reserve in Nanaimo, and they talked about a treaty. And in fact, we discovered that we had treaties on Vancouver Island that had been made by Governor Douglas, the first governor, when he opened up settlement on lower Vancouver Island and made treaties in the 1850's with the Indian's along the east coast of the island. He had a form, a one page form that constituted the Treaty. And when he got to Nanaimo he had run out of forms. The forms came from the colonial office in London and they usually read – and they used them all over the world, in New Zealand, and in Africa and in Canada -- and they said, for blank many blankets, we agree to surrender all our land but it is agreed we will keep our village sites and that we will have the right to hunt and fish as formerly.

So the archivists in Victoria took me to see these treaties. Well, there were thirteen treaties, but the one at Nanaimo just had the 'x' marks of 159 Indian men of various Nanaimo tribes. Then we found a dispatch from Governor Douglas to London saying, I've made treaties with everybody but I ran out of these forms when I got to Nanaimo, so I just had everybody put their x mark on a blank piece of paper. But, he said, I want you know that I did make them the usual promises. So we went all the way to the Supreme Court of Canada in 1965 and the Supreme Court of Canada said, that's a treaty, and those rights of hunting and fishing as formerly are as enforceable today as they were in 1850's.

Those treaties that had slept for 100 years had now been revived, and they are cited in court often now and some very important rights have been developed based on those treaties. Well anyway, that led, I think, it led Frank Calder and James Gosnell and William McKay and the other leaders of the Nisga'a to come in to see me at my office in Vancouver. I was a young lawyer, hadn't

been practising very long, had very few clients. I had a little office not much bigger than a couple of these tables pushed together. I remember the rent was \$120 dollars a month, and my mother was my secretary.

So these very important folks, these statesmen, came into see me and I thought what on earth must they think, but they said, “You’re the guy that won that *White and Bob case*. I said, “Yes.” They said, “Well, we want you to take our case; we want to sue the Government of BC to affirm that our aboriginal title has never been extinguished.”

I look back on that meeting in our office. We didn’t even have enough chairs for everybody to sit down. And, I think of the line of statesman that the Nisga’a have had over the years, right until the present day, and one of the great honours they’ve bestowed on me over the years was that I was made an honorary member of the Nisga’a people with the name Haidam cloweet [ph].

I should say that though these were very serious folks, these Nisga’a statesman. One of them, the leader at the time, Frank Calder, had a kind of playful attitude. He called everybody ‘pardner’. I don’t know whether you remember that. He was not very tall. He lived until he was 89 and only died a couple of years ago, but he remained active.

I remember just before he died he came in to see me in Vancouver and I said, “Well what are you doing now, Frank? And he said, “I’m a consultant, here’s my card.” I looked at it and it said consultant and I’d heard a lot about this line of business and I thought – I said, “Well Frank what does this mean, consultant?” He said, “Well pardner, it means that if you want to know what the weather’s going to be like tomorrow it’s going to cost you.”

So, let me tell you that when we took on the Nisga’a case, Frank Calder and I were invited to go to various First Nations meetings around the province. I remember one at Seabird Island, just about all the coastal peoples were represented, and they said, “Don’t go ahead with this case, you’ll lose and then nobody will ever listen to us, we’ll be dead, that will be the end of it.” But the Nisga’a said no, it didn’t matter that everybody on the coast was against them we’re going to go ahead with it and they did. And in 1973, of course, the Supreme Court of Canada affirmed the concept of aboriginal title in Canadian law. That led to the negotiations that went on for many years

culminating in the Nisga'a treaty of 2000.

Well, I had nothing to do with those negotiations. Jim Aldridge was the legal advisor to the Nisga'a throughout that period, because after I argued the *Nisga'a case* in 1973, in 1971 – the judgment didn't come down until 1973 – I was appointed to the bench, so I was out of action for quite a few years. But as a judge I was asked to conduct the McKenzie Valley Pipeline Inquiry and you know, your conference, I looked over the agenda and I said to Jim Aldridge, I said, "This is the story of my life." When we went to the McKenzie Valley in the mid-70's we held hearings and eventually I wrote a report in which I recommended that land claims should be settled before a pipeline was built in the McKenzie Valley. And that report I completed in 1977, which is thirty years ago, and some of you who may remember those days will recall that I visited every community, every village, every town in the McKenzie Valley and the Western Arctic. About 1,000 Aboriginal people spoke to the hearings that I held and we heard about 300 experts at the main hearings in Yellowknife. My report came out in 1977 and it was followed by the Government of Canada. They said, yes, we're not going to build that pipeline and they said, yes, we're going to settle those land claims and they sat down with the Inuvialuit and the Dene peoples and over the last 30 years they have worked out a series of treaties.

Well I should tell you that two years ago, I went down the McKenzie River again with David Suzuki and the *Nature of Things* on a three-week trip to some of those villages I had been to 30 years ago. And we wound up camping for four days at the Arctic National Wildlife Range in the vicinity of the calving grounds of the porcupine caribou herd. But what I found was that these Dene and Inuvialuit folks like me may be getting old but they don't recall precisely what happened 30 years ago. Because we stayed in those communities each of them for two, three, four days until everyone had had their say. This time when I went to some of those communities some of the old timers would say yes, we remember you Judge Berger. And they even showed me the place where we'd held the hearings and we had some good chats, and then somebody would come along about 35 years old and say, "Yeah, I remember those hearings and I spoke to you then." Well I refrained from saying, "If you did you must have been a very eloquent five-year old." And I do recall at Fort Good Hope 30 years ago some children carrying banners that said no pipeline, Berger. Perhaps it was some

of them who claimed that.

Anyway, what was interesting was that when I was there two years ago it was clear that under the Land Claims Agreements, hundreds of thousands of hectares of land had been set aside – both the surface and subsurface resources for the Inuvialuit, the Gwich'in, the Sahtu, and the -- I'm leaving somebody out here. But there are a series of land claims agreements there, and the Dehcho, I think, are not so far from completing their land claims agreements. And when I looked at those land claims agreements, I thought this is marvellous because they had not only protected their land base, their hunting, fishing, trapping rights but they had protected the environment.

The Inuvialuit and the Gwich'in, together had established, under their land claims agreements, two national parks in the Northern Yukon, Ivvavik and Vuntut which protect the range of the porcupine caribou herd and the staging grounds of 500,000 snow geese that migrate there each year. These were documents of historic significance.

Could I also say that in the measures taken to protect, for all time, those hunting, fishing, and trapping rights, it is sometimes said by opponents of these treaties that these are race-based documents, race-based rights. Well they're not, and don't let anybody ever tell you that they are. They are rights based on the single fact that when the European's came here this land was occupied by Aboriginal people with political communities of their own, their own religions, their own economy, their own culture, their own way of life, their own civilization and it is because those political communities are still in our midst that we are bound to make treaties with them that offer them a fair and distinct and contemporary place in the life of Canada, nothing to do with race.

I mean nobody can blame the Aboriginal people for the fact that when the Europeans came the Aboriginal people were more or less all of one race. You can't then impose a regime on them and when they say look we want to assert our own rights, they say no, no, no you're all, you're all one race, this is-- we're racially blind here, we can't have that. And I urge you never to listen to that. This is because you are the current day representatives of political communities that go back hundreds and hundreds of years. And that's why under International Law and under the law that we've developed in Canada, we're bound to make these treaties.

Now, lurking behind this issue of treaty making and land and access to resources, was always the issue of self-government, because if you acknowledge that Aboriginal people have the right to land and resources and to develop those resources and to access those resources and the right to their own culture and their own language and their own history, then you get to the question, well then, they have to govern themselves under the umbrella of the Canadian Constitution. And, that's why those treaties all contain measures for a self-measure of self-government – the Nisga'a Treaty does as well.

But self-government was opposed by some very important figures in this province and across the country. And Joe Gosnell will remember that when the Nisga'a treaty was signed in 2000 the then leader of the opposition in BC, Gordon Campbell, brought a lawsuit to set aside the self-government provisions of the Treaty as unconstitutional, and the Nisga'a brought me out of the bull pen to argue that case, and we were successful. The Supreme Court of BC held that, no, these provisions for Aboriginal self-government and the Nisga'a Treaty, and by implication in the other treaties, are entirely within the Constitution of Canada, that they cannot be attacked as unconstitutional. And, the interesting thing of course, is that Mr. Campbell, having lost the case, was then as a kind of consolation prize elected Premier. And after a year of thinking about the issue, as you know, as is well known and to his great credit, he changed his mind, and he abandoned the stand he had taken for quite a long time in opposition. He had opposed the Nisga'a Treaty vehemently in the Provincial House and he has sought to establish a new relationship.

I only mention our experience with Mr. Campbell because it shows that reasonable people once they understand the issue can be persuaded, that it's essential to the peace and harmony and fairness of Canadian life to adopt it.

Now could I just say that everything I've done is not in the ancient past. In 2005 and 2006 I was in Nunavut because the Government of Nunavut and NTI and the Minister of Indian Affairs agreed that I should conciliate issues arising under their Land Claims Agreement. As you know they signed a land claims agreement in 1993, and in 1999 under that Land Claims Agreement the Government of Nunavut was established. And I had to deal with a number of things, but I just want

to say a word about the dispute in Nunavut under article 23. Article 23 provided that in the Government of Nunavut, when it was established, 85% of the jobs should go to the Inuit, and that was because the Inuit are 85% of the population of Nunavut. It was what's called an equity clause usually used to preserve the rights of minorities, but here to preserve the rights of a majority. And it wasn't just any job or jobs, it provided that the Inuit should receive their proportionate share of jobs in the new Government of Nunavut over all occupational and grade levels.

Now, that meant that throughout the government in all levels there should be 85% Inuit. And the Government of Nunavut, I don't know how many employees it has today, but last year I think it was 3,200; the population of Nunavut is 30,000, so you can see that that government payroll is a key engine of economic life in Nunavut. And last year the percentage of Inuit employed in that government was about 45%, this is after seven years since the establishment of that government.

Now the reason is, and nobody argues about this, that there weren't enough qualified Inuit to assume those jobs - that's the difficulty. And I just want to tell you why, it must be obvious, but it's because in the executive and management and professional and technical areas and often in the trades areas of employment in the Government of Nunavut there aren't enough qualified Inuit. And that has to do with the manner in which they have been educated because in the high schools in Nunavut only 25% of the kids graduate, 75% dropout.

Now in British Columbia, if you want the other side of this coin, 80% of the kids graduate from high school, 20% dropout. And, at the same time the over crowded state of housing in Nunavut, and the housing in Nunavut is more overcrowded than in any other Aboriginal group in Canada. There was a piece in the paper yesterday morning that the waiting list for social housing in Nunavut consists of a thousand families and that all over the three northern territories there are about a thousand homeless women and a thousand homeless children.

Now given the populations in those areas this is remarkable, it's staggering. And those over crowded housing, and they're usually over heated because we've never mastered any form of northern architecture, even though we have this vast northern interlard, make the Inuit uniquely susceptible to chronic otitis media. And teachers, people in the education department, told me that one-

half to one-third of the children going to school in Nunavut have chronic otitis media. And that means they're hearing impaired, and that means teachers have to use microphones and they have to amplify the sound in all the schools.

Now this also has something to do with the dropout rate. And of course, when you keep that figure in your mind about the dropout rate it leads you to the question of social pathology, family violence, use of drugs, the levels of crime and the rate of teenage suicide, all of these things in very large measure are the result of those unconscionable dropout rates. And, let me just tell you briefly what I decided in my report. I wrote a report in March 2006 for the Minister and the people of the Government of Nunavut and for Nunavut Tunngavik Inc. They were the people who asked me to do this, and it covered a lot of subjects, but may I just say a word about this subject because it was the most important I dealt with.

These children, something like 75% of them, speak Inuktitut in the home and when they go to school for the first four years they are taught in Inuktitut, and then in about grade five they switch to English. Well, Inuktitut's a written language and it means they acquire some proficiency in their own language between grades one and five, but then they switch to English, and it's like starting all over in a new language. And it means that as they move on towards grade 12 they realize, because they didn't have the first four years in English, and then they drop their own language, they realize many of them that they're not going to make it. Now 25% of them do, a magnificent achievement considering the way the odds are stacked against them. But those 75% don't make it, they just can't handle it. They know they're starting four years behind all of the non-Inuit contemporaries and they dropout.

I don't want to pretend that I comprehended this issue in it's entirety but I consulted the people in Nunavut, the best people I could find at Indian Affairs, experts at the University of Toronto, and I recommended that they have a bilingual program of education, Inuktitut and English from grade one through to grade 12. And I said that this should be the first priority of the Federal Government because we have to produce in Nunavut, and I'm telling you this at some length because I wouldn't be surprised if some these same lessons pertain to other Aboriginal communities in the

country, but I just want to say that we need to do this because the north is opening up with global warming. They talk about the northwest passage opening up, a sheet of ice the size of Ontario disappeared between '05 and '06, there is going to be industrial development in Nunavut, and we want to see that those Inuit kids come out of high school where they are suited to, they take post-secondary education and they take their place as administrators, as managers, as technical people in their own government. And they take their place in the private sector, as miners, as mariners, and geologists and engineers.

In my view, it's something that all of the land claims and the self-government measures have to be based on. That is, it seems to me the next stage in all of this, you had to get those land claims agreements, you had to get those self-government agreements in order to preserve the land, to preserve the culture of the Nisga'a and the people of the Mackenzie Valley and the people in Nunavut and to preserve political autonomy. But the next steps have to be, in my view, the emphasis – I know the emphasis now on education and employment – but it has to be a tremendous emphasis because we have to educate. It's something all Canadians have to realize, the next generation of First Nations people and Dene and Inuit in this country. It means that in Nunavut, the Inuit whose occupation of the Arctic is the basis for the assertion by Canada of Arctic sovereignty, but it means that they can be full partners in the opening up of the north. It means that all over this country to the extent that the land claims agreements and the governments of the First Nations are inhabited by Aboriginal people, they will truly make them their own and will be jumping off space for ensuring that as the next generation matures they will be able to take their places in the employment opportunities that are offered.

I just want to close by saying that I haven't quite worked all of this out myself, but I've had the opportunity since the early 60's of thinking about these issues and of being of some help to the organizations represented by the people in this room. And standing back now at an age when I'm even older than Joe Gosnell, I can see the future. Who would've thought 40 years ago that we would have treaties, modern treaties covering half the land mass of Canada? Who would have thought we would have a Treaty Commission in BC that was encouraging the development of treaties

all over the province when until 1990 every government of the colony of BC and of the Province of BC fought the whole thing tooth and nail? Who would have thought we would have had a Government of Nunavut, with authority over one-fifth of the Canadian land mass? Who would have thought we would have had all those treaties in the McKenzie Valley? When I went to the McKenzie Valley in 1974 to start my work, the idea of Aboriginal title had hardly surfaced. And as the commissioner at the time told me it was a dirty word.

We've made a lot of progress, we really have, and you folks have achieved it. I am simply saying you know the issue better than I do, but I am saying that the next big push, and it's going to take a generation or more, will have to be with the emphasis on education and employment. I thank you for asking me here, it's so nice to see so many old friends.