

A Summary of Questions from the three meetings on Alternatives to Treaty

- Monday, June 27, 2011 Vancouver
- Tuesday, June 28, 2011 Victoria
- Thursday July 7, 2011 Alert Bay

This document brings together all the questions asked by band members about the treaty and alternatives to treaty process over three days of meetings. Questions have been organized under the specific sections of the presentation, and are labeled according to what meeting they were asked at – *Vancouver, Victoria, or Alert Bay.* (Complete minutes for all three meetings can be found on the 'Namgis web site.) This document was developed as a tool for members to be able to more easily review questions, responses and comments from all three meetings. I hope it is useful,
Best regards, Sue Staniforth.

Facilitator: Sue Staniforth
Meeting Chair: Mike Rodger
Presenters: Robert Freedman and Eric Woodhouse,
Janes Freedman Kyle Law Corporation

Treaty and Alternatives to Treaty Presentation Eric Woodhouse
There are 4 available options to Treaty:

1. The Status Quo (Indian Act)

Question: The 'Namgis band members are seen as "wards of the Crown". Does that mean we don't own anything? (Vancouver)

The European notion is that the Crown holds the lands in trustee ship for you – the reserve lands you have some ownership of. The lands in your territory have not been recognized in a court of law.

Different world views. The First Nations' world view is that you own the land and have always been stewards of the land. The European view is that the Crown has occupied the lands and has the legal ownership and possession. The negotiations are trying to reconcile these perspectives.

Band financial affairs are largely governed by I.N.A.C. programs and priorities – giving the federal government some control over your lives and how you spend allocated money.

Question: What about Block Funding as another option? This could give us more control over how we spend the money. (Vancouver)

Staying with the Indian Act doesn't mean necessarily that things will stay as they are. There are other options such as Block funding, the act could evolve as well.

The Section 87 Tax Exemption gets a lot of discussion. Those who can benefit from this exemption are fairly limited due to the economic situation on most reserves, plus the courts are restricting limiting its application. Under the Indian Act, the Band Council has limited law-making authority, but all laws are still subject to approval by the federal government.

Question: I hear that the National AFN is looking at scrapping the Indian Act in three to five years. We should keep our eyes on that, see what that means for us. (Alert Bay)
We can keep our fingers crossed that there will be some positive institutional changes that will benefit First nations – however this is not the first time that there have been attempts to amend the Indian Act or to replace it, and I think it will take some time yet to move to an agreement in principle and then the next level of negotiation to a final agreement. I agree we need to monitor this process and evaluate it from time to time.

Question: I have a niece who is registered Nisg'a and her status card was taken away – is that what is going to happen to us, we'll all get taxed, and become not Indians anymore? (Alert Bay)

Part of the purpose of the Treaty for most bands is to get out from under the Indian Act, and so post treaty, you would not be governed by the Indian Act, you would have your own laws and constitution, and your community leaders would be responsible to you.

Question: What about prescriptions? Will we have to pay for them? I have had to pay for some of them myself. (Alert Bay)

The fiscal arrangements will be handled by your government under Treaty and they will also decide what services you will provide to your members, and what arrangements you'll make with existing institutions, such as school boards and hospitals and prescriptions. The intention is that you'd enjoy the same benefits under Treaty that you now enjoy, to be able to enhance and better tailor the programs to meet your communities' needs.

Question: It seems we have to give up too many things for Treaty – the bock funding is going to decrease – and our needs will increase. And what about our settlement ands, the province and the union's role in setting up reserves – this is in the Constitution, our reserves are too small, the government stole land from us, how will we be compensated for that? (Alert Bay)

Based on your past experience you'd be able to predict your community needs over some time and then you'd negotiate sufficient financial resources to meet those needs. Like any negotiations they are never perfect, there are always compromises, but at the end of the day you would be more involved with the financial resources and you'd have far more control over how they can be spent. thing about staying with the Indian Act is that it's familiar: "the devil you know". Your administrators have been able to work with it to attract funding and programs. A treaty would shift the governing authority from the federal government to your own new 'Namgis government. This new fiduciary duty would go to the 'Namgis government, giving you greater control over your lives, your community and resources, and how you spend your money.

Question: What will treaty mean for off-reserve members getting funding? Funding for post secondary, bus passes for students, support? (Victoria)

Some of that funding like post-secondary funding is for people both on and off reserve. Off-reserve members don't get the same funding support – Indian Affairs says that the provincial government has some responsibility for providing services to you. Many First Nations do negotiate for specific funding for off-reserve members.

Question: All my kids and grandkids live off reserve. We pay \$16 million now for programs and services on-reserve. After treaty, are we going to be paying double that to cover the off-reserve members? There are over 900 members living off-reserve: will Treaty mean that we'll be paying to cover off-reserve members as well as the money for on-reserve members? (Victoria)

The fiscal arrangements are based on who is registered as a 'Namgis member – all members will vote on a treaty and all can receive benefits. These are political decisions that are to be made by Council: but since there are so many off-reserve members, you will have considerable clout. Your government under Treaty will also decide what services you will provide to your members, and what arrangements you'll make with existing institutions, such as school boards and hospitals. First we negotiate the program, then we negotiate who we'll provide that service for on and off reserve members. Block funding will be calculated on the programs and services 'Namgis will deliver.

2. 'Namgis /Canada Bilateral Initiatives

Bilateral initiatives can be agreed upon between a band and the federal government, but they are not constitutionally protected; they may be amended or terminated by successive governments or legislation.

Question: There are some current initiatives that Shawn Atleo has been promoting that increase industry's partnership with Bands, through doing joint ventures with Bands directly and by-passing government- such as around the oil and gas industry. (Victoria)

There is a major conference in Niagara Falls right now and Chief Bill Cranmer is speaking on economic developments in the territory. Industry has been more ready to cut deals with First Nations as they see it in their business interests. These have mostly occurred in the northeast part of the province, and there have been formal processes set out to consult directly with First Nations around their obligations around resource extraction. The province has been dragged a long kicking and screaming to these deals. The 'Namgis already have something similar in place with the forest industry.

Question: I am just trying to understand all of this – this doesn't mean a lot to me, so if you are going to really outline what the options are, it would be great to see examples of what these would look like for our people. This doesn't have to happen today, but some examples, like what the Six Nations are doing, or what a band on the mainland is doing – I am trying to understand what all that means, what would it mean for us, for our daily lives and choices? (Alert Bay)

As you move along in the Treaty negotiation process I think there will be lots of examples and time to talk about what each of these things will mean for the 'Namgis. None of these options frankly have any dramatic potential to really change your lives, as they are changeable at any time by the Crown. On the other hand, they are valuable initiatives for many communities.

3. 'Namgis/ Province of British Columbia Bilateral Initiatives

In the last few years there have been some of these established with BC. They are very politically driven – if the province wants something from you, for example, the oil and gas reserves in the north east region of BC, they'll talk to you about it – they want to get First Nations on board to get at these resources.

Question: If you don't go to treaty after making an ITA, do they take everything back? (Vancouver)

It is based on a pre-settlement of a treaty – and it is hard to know at this time. However, accepting an ITA does take away some of your leverage.

Question: The Union of BC Indian Chiefs put forward a framework of dealing with governments nation to nation. How does this impact the treaty process? (Vancouver)

Both levels of government would say that they deal with First Nations as nations now, so am unsure how this would affect the agreements. In the pre-ambule they don't use the term treaty but they use "Final Agreement".

'Namgis have agreed to use the terms Treaty, Nation and traditional territory. We need to ensure that your rights throughout the territory remain your rights – land and resource decision-making need to be established in the Treaty. Some First Nations take the "lock, stock and barrel" approach, as they take the view that they have sole ownership and right to control their territory, to the exclusion of the Crown. Treaty settlements necessarily involve shared ownership and jurisdiction. There are limitations going into this process. One of the reasons co-management is such a big issue for you, is if the government is going to recognize your territory as being less than the traditional territory you are claiming, there needs to be strategies and tools in place to have an effective say in how those lands are managed and developed.

Question: We hear a lot about land but what about land and sea? Our biggest asset is the ocean – what about rights to it? (Vancouver)

When we use the word land in treaty talks we are including marine areas as well. We are talking about marine areas and resources as well. This also includes fresh water, sales of water and hydro power. The governments are willing to ensure that water reservations for community and hydro, and they have agreed to a co-management agreement with water. We also have one with parks.

A challenge we are facing at the table is around the request that 'Namgis has the right to water flowing through its lands to be unaffected in quality, quantity or flow by any act or omission of government. We are holding that line.

We also want to have access to marine and land areas where 'Namgis have traditionally hunted and fished and travelled to trade.

Question: The Haida now have a lot of control over their territories – how do these agreements work for them? (Victoria)

The agreements are based on their territories – the Haida have been in consultation with the federal government. The Haida are consulted on all land use decisions in their territory so they have effective land use control. They get stumpage and revenue sharing from activities as well. These reconciliation agreements are with the provincial government, and deal mainly with resource extraction.

The Musqueam agreement deals with land issues in an urban area, the Haida deals with forest license issues. The Central Coast agreement saw First Nations and environmental groups banding together to protect a large area of the coast. 'Namgis do this right now for parks, we are about to get for water, and we have an agreement around forest policy, plus we are consulted on all land uses and referrals in the territory.

A problem with these pre-Treaty initiatives is that the federal government is only prepared to deal with your reserve lands, not your traditional territory. The province has started to formalize their obligations to consult and accommodate through these agreements.

Question: When we go to Treaty, would we have the right to go back to another band, after it is legal? (Alert Bay)

That's up to the individual. What we have said to our membership is that there will be no loss of rights to anybody, we won't diminish our rights to go to Treaty. The comfort that we all should have is that we will not sign an agreement until all those questions are answered.

Question: I am trying to wrap my head around this – what are the chances of putting something together in layman's terms, something with pictures and language that we can access. Part of the problem is that we have only 40 or 50 people here, if we had a package that tracked the treaty process that people could go and pick up and understand it so far would be really useful. (Alert Bay)

As you move towards an agreement in principle there will be more communications packages, there will be more meetings where people can ask specific treaty questions and also one-on-one opportunities for people who might not feel comfortable speaking in a group.

Right now things are changing quickly and we are continuing to do work on information packages that will help spell out the options, what will things look like under Treaty and under the Indian Act.

This meeting however is about alternatives to treaty, this is something that people have asked for, so this meeting is not about treaty tonight.

Question: Is it true that I can sell my house on reserve after treaty – or my kids could sell it after I die, to anyone? (Alert Bay)

That will be something that will be covered by your constitution. It might be possible – it might not. Most First Nations would have a concern about selling and outside the community but ultimately it is up to you to decide.

(Note: this response speaks to post treaty: currently the Indian Act governs disposition of lands, and limits an individual's ability to transfer their residence on reserve, by will, or otherwise.)

4. Litigation as an Alternative to Treaty

Presentation by Robert C. Freedman

I. Proving Aboriginal Title

To establish aboriginal title over an area of land, the claimant must prove that the group had *exclusive occupation* of the land prior to the assertion of Crown sovereignty or shared exclusive possession. [Delgamuukw]. This means historical occupancy – dwelling places, seasonal uses of the land. Showing active use of your territory. This is a major element to prove.

Question: Can you please clarify the differences between rights and title? (Alert Bay)
Title means if you look at your territory, it means your ability to manage and use everything in that area.

Rights are more restricted, either to specific parts of your territory, or focused on one specific thing, like fishing rights.

Question: What happens if you turn the tables on the government, and say, you have got to prove it too? Why are we proving our rights to you? (Vancouver)

Without First Nations having jurisdiction and control over lands, these are the rules that are imposed. Between spending millions of dollars on litigation versus treaty – I would choose treaty provided that the issues you want to discuss are on the table for discussion – but my job is not to sell you on one or the other, it is to present what I've seen over the years.

Question: Does the Canadian government pay no heed to our laws, potlatch law? (Vancouver)

The courts now look at potlatching and other evidence of aboriginal laws, customs and traditions. However, even when proving rights and title, the terms must be understandable in the white courts according to the Supreme Court of Canada

Question: The laws are not fair – Forestry companies have now become real estate agents; the BC Liberals changed all the laws to let this happen without consulting anyone – First Nations or not. The companies have taken millions of dollars of wealth out of our forests with no consultation or control - and now the land we are fighting for is triple or quadruple the price. (Vancouver)

This is the same situation that many First Nations find themselves in. This more than anything makes the case for treaty – this is the only way to have control over settlement lands – as you are the boss. The issue is not one of “fairness” but of the best way to gain more control of your lands.

Question: I was reading that two other Nuu-chah-nulth bands have already negotiated with DFO for 30% of the commercial catch this year. They were not part of the court case – they are expecting a good return in the Somass River this – so they'll be able to take a good percentage of that. If these two bands can do it without being part of the court case, why can't we get an allocation for commercial catch up here? (Alert Bay)

In the Canadian court system, all First Nations have different customs and histories – the courts see them as all different. So – unless you win a case in court, the rights will not apply to you. The Ahousaht case will not directly apply to anyone other than the five First Nations who went to court.

A lot of evidence went into that case from other First Nations trade relations. However there is no rule that says if someone else wins a case, you also win. In the Sparrow case, the Musqueam won the right to fish salmon for ceremonial purposes. The federal government looked at that and they came to the obvious conclusion that since other aboriginal people fish salmon for those reasons, they won't make everyone go to court to win that right. It really depends on what species it is and what the issue is as to whether or not you would benefit from victories in court by other First Nations.

An important point in these cases is about leverage. So if the *Nuu-chah-nulth* survive all the negotiations and court cases, they should have a stronger ability to get their rights recognized “on the ground” or “in the water”. At the same time, there has never been a situation where the courts will say – DFO shouldn't be managing the fishery. They may say they do it badly or they should do it differently, but the view is that DFO should manage it.

It comes down to how much fish you can take and what limits are put on you – you will have that fight whether you are in the Treaty process or not in treaty.

II. Proving Aboriginal Rights

Question: What about the Constitutional rights - The Canadian Constitution keeps evolving – does it have any bearing on this case? There is also a right for the environment – in the new Chilean constitution. (Vancouver)

One principle in Canadian constitutional law says that it keeps evolving – but that has no bearing on this case – as until the Crown has a chance to justify why it has acted so badly, the decision is frozen.

To change the Constitution in Canada requires the vote of 7 provinces.... however, your own constitution could contain these details: put it in the 'Namgis constitution that the environment has inherent rights, that it is the sustainer of your heritage and culture.

Question: What's happening to the Nuu-chah-nulth-aht First Nations who won the Ahousaht case? (Vancouver)

Ditidaht and Pacheedaht – what I have heard - the rumour out there is that 2 of the 5 nations are close to being bankrupt based on all the money spent on the case. I can't confirm that as I don't know. Even if you win with litigation, courts will award what is called “costs”: in plain English, you would think that if you spent \$7 million you would get back \$7 million. What you win back is a small fraction of what you paid – the courts very rarely compensate you if you do win.

Question: What about going to court over our rights and our laws? Can't we use some of these cases to back up our own cases? This feels like fear-mongering to me - Do court cases that are won back east get applied to BC now? (Victoria)

I am trying to present some of the problems based on my experience. Some people see going to court as an easy alternative. There are some times when

going to court is the way to go – when you have no other options, such as when there are consultation situations where the government acts so badly that you have no choice. An aboriginal title case is different. A title case may not answer anything about governance. Court cases deal with narrow questions and the government tries to make them as narrow as possible. Cases in court don't deal with the broad spectrum of issues that are dealt with in treaty.

You asked about other cases: Some cases do set a precedent. When Sparrow applied for the Musqueam people, the government said that any First Nation in Canada who has ever relied on salmon would win a similar case, so not every nation had to go and litigate that.

In a case like Gladstone – herring spawn on kelp – commercial sale – that hasn't applied across the board.

What have the courts done?

Despite the existence of Aboriginal title as a constitutional principle, no court has declared that a First Nation has aboriginal title.

The Delgamuukw case was sent back for a second trial; over \$14 million dollars were spent by the First Nations.

Question: Where did the \$14 million come from – was that First Nations money? (Vancouver)

Yes it mostly was the FN money – there are provisions in the Canadian legal system for “advance cost orders” which means in rare circumstances you can apply to a court in advance and say that this case is so important nationally that the other side should be paying. My colleague won one of those for a Treaty 3 constitution case, but they are difficult to get.

Question: Do the courts have a clear definition of our rights? There seems to be no recognition of our Big House laws in our territory. I see that as undermining our rights. (Vancouver)

There is some case law since 1992 where they fleshed out those kinds of questions – from the white legal perspective I could quote you some definitions from past cases, but if you look at it from your perspective, I'd say no they don't. The closer the courts can come to some white way of looking at your rights, that's about as concrete as you get.

E.g. to a white person, the right to hunt is defined as taking a certain number of animals in a specific region. To a First Nations person, they may see this right more broadly; to include accessing the land, the right to pass down teaching about the animals and hunting techniques, the right of the community in sharing and consuming the animals, etc. The courts aren't there yet in Canada.

The court processes are all based on white, legal perspectives, which can differ from First Nations perspectives and definitions: the Big House laws may not be recognized at all or in the way you want them to be.

The most power in the Canadian system to shape your own destiny in my view is through the Treaty process – its not just because of your constitution – its also because of the power you'll have on your treaty settlement lands. The closest you

are going to get to your way of managing yourselves and others is through the powers of the treaty. I am not saying that to pretend that its perfect – its not – it's a negotiation – but there are no limitations within reason that you can bring to the table – while in a court case you are talking about very narrow sorts of things.

Question: What about the Gladstone case? We were mentioned in that case - how does it affect us with bartering? The canoes came down loaded with roe and they came back loaded with grease. (Victoria)

On any case that involves barter rights, once a court has made certain findings, and you were also mentioned in the Ahousaht case, it makes it easier on certain points for you to make your case. If one court has said you were involved in trade, it's pretty hard for them to say no, we were wrong, no you weren't.

The Gladstone case; in 1996, the Hesquiaht nation won the right from the Supreme Court of Canada to trade herring roe on kelp for money or other goods. Now – in 2011 they are still fighting DFO to this day to determine how much they can take. So – a reality is that even when the highest court in the land grants a right, courts like negotiation. So, even if you win a rights case, you can still be in negotiation with the very governments you're negotiating with. It did help in the treaty process also, as there are negotiations about buying retired licenses now that didn't exist before, so it had some direct and indirect effects.

Question: What about the Boldt decision case in the U.S? Was that a stronger case with better background as they seemed to get a better settlement? Is that ever used as evidence or precedent in Canada? (Victoria)

The first cases I ever worked on, we argued Bolt often, because we said that if a First Nation proved rights it has to mean something, and percentages of different runs made sense in terms of what our clients were telling us. The Canadian courts have rejected all of that, not for any principal reasons but because it is too hard, it is too scary. Boldt should have been the solution..... it has been argued over and over.

All of the aboriginal rights cases from around the world were argued in the Delgamuukw, when it was being decided. Since Sparrow and Delgamuukw, when the courts imposed this test for proof, infringement and justification, the argument changed. Before this, First Nations had had less trouble in Canada proving their rights. The Canadian court system has built in all these tests and controls. In the U.S., once you have proven a right, the only question is how does it get implemented and managed, like in the Boldt case. In Canada, you don't stop with " you have proved the right" – an infringement can be justified. It is a very Canadian way of doing business. In the U.S. they don't like governments doing anything if they can help it, while in Canada there is this assumption that DFO knows better than anyone else and the courts are very reluctant to say that someone other than DFO should be managing.

Question: The result of some of these cases like the Sparrow case – they are selling fish and we are not – even though they may have lost a lot, they also won some things.

We are in the millions now – will we get more out of the Treaty process than going to court? (Victoria)

I look at treaty as a huge consultation / negotiation over a bunch of issues. Of the issues that are critical to you nation, is the government engaged in negotiation with you? If they are dealing with you, you'll never get everything you want in Treaty, but in order to get everything dealt with through litigation, you would have to run a number of court cases dealing with each one.

A title case will not deal with the issue of governance either.

If you had a Treaty now, you would know exactly what you were getting and what the rules were. Court cases do not deal with big questions of jurisdiction, of rights. It is a different process.

On things like consultation where there are issues that go to court, because of consultation law, forestry companies now have to talk to you, whereas a decade ago they didn't. The cases that moved the bar forward for First Nations were narrow cases based on specifics.

Question: Ten million dollars is a huge amount of money – that seems a bit far-fetched, and who has that kind of money to spend? (Alert Bay)

I wish I was making this up – these are hard facts. For a title case, that is what it is costing people.

Question: Where are the younger generation who will be dealing with this stuff 50 years down the road? There are only a few of us here from the community – where is everyone? (Alert Bay)

Treaty meetings have been happening for a while now, on a monthly basis, we have been holding them on specific topics like education and forestry and governance. So questions can be asked and we are not jumping around between all these topics. They will continue in the fall.

Question: We talk about good faith in negotiations in treaty, but it seems to me we are the only ones negotiating in good faith, being bound by that. We have spent thousands of dollars on the fishing chapter – as an example – and then this government can just come and take it away just like that, at no risk to them.

Where do we draw the line with negotiating in bad faith? Will they be paying back the funds that we borrowed because they are breaking the rules? (Alert Bay)

I agree with you 1000 % about the bad faith issue – they talk about “ the honour of the Crown” - it's nice to say it but it doesn't mean a whole lot. If it meant something, we'd be in a very different world with First Nations.

In terms of the money issue, there is something bizarre about a process where the one that has stolen your land and resources is charging you to negotiate to get it back. If you do decide to go to treaty, whatever loans you have taken out, the settlement gets increased so you can pay it back with money that isn't part of the treaty. In other words, your settlement gets increased magically by the amount you owe.

Summary and Discussion

Question: Can you talk about what happened with the Nanaimo First Nations? (Vancouver)

The Nanaimo band and claims have been moved up closer to the front of the line - out of over 1100 claims in Canada now, they are now at about 15. Based on the Douglas Treaty, which is an extinguishment treaty, the Nanaimo band has the right to fish, hunt on un-occupied lands and to their enclosed fields around their village sites. 62 acres of downtown Nanaimo was set aside a reserve, as was Departure Bay and around the old foundry. They are implementing the Douglas Treaty. The Douglas Treaty text is historic and has very little detail, but Canada is living up to its historic obligations with respect to that treaty.

Question: Why not let all other First Nations battle some more cases out in courts and then let their cases bring strength to what we are trying to do? We could then study the positive cases to bring forward alternatives? (Vancouver)

The government has a "litigator-negotiate" policy, and it varies from one nation to the next. If the other First Nations win, their findings might be able to be applied to your cases, but there is no guarantee of that. Bits and pieces of other court cases may help other First Nations, but they still must negotiate their own issues.

Question: What about making direct deals with industry? I work with another First Nation and we are not in the treaty process, we are working with industry and the private sector to create real jobs, we write up MOU's. We are not in Treaty but we are getting some of our rights recognized, and helping with economic development and jobs for our people as well. (Vancouver)

The 'Namgis has a referral and review process now – we get a notification on any activities that are to happen on our lands, and have been capitalizing on the opportunities that make sense, and taking decisions to Council for approval and partnership details.

E.g. Western Forest Products Tree Farm License 37 covers most of the 'Namgis territory. We now have 'Namgis monitoring what happens there, if there are any culturally modified trees. We are in negotiations with WFP for how we'll operate when 'Namgis gets the land.

Question: In some of your examples, the courts have stressed "negotiations" - has that turned into meaning anything? (Vancouver)

In the 1990's, treaty settlement lands were very few. Today, laws and consultations have given First Nations leverage, and negotiators now say that First Nations now cannot negotiate a treaty that gives them less rights and less leverage than the courts are giving them now. Reconciliation and co-management agreements are now on the table, so things are better than they were.

However, a terrible example of how these decisions can get overturned is the Mike Mitchell case from the 1990's in Quebec: The Mohawk argued that they had a right to trade certain goods across the Canada / US border. The First Nation case was won at the federal court and the court of appeal. However, the Chief

Justice at that time, Beverley MacLaughlin, decided that she would interpret their historical trade routes as being East – West trade rather than North-South.... So, even though the Mohawk people go across to New York and have for thousands of years, she decided that everyone else got it wrong and the evidence showed it was east-west trade. And so the case was thrown out. If the government gets too scared about the impacts of a potential First Nations win, they'll narrow the decisions or conjure up something to refute it.

Question: What about our rights to commercial fishing? If the Ahousaht fisheries case goes to the Supreme Court, will that benefit us and other First Nations? (Vancouver)

The government will say that only the First Nation directly involved will get those specific rights. However, if the Supreme Court upholds the case, it will make it somewhat easier to argue about broader types of rights. If the Ahousaht case is upheld in the Supreme Court, it could help everyone, as certain kinds of fish species might be included as was the case with the Sparrow decision – and so that would be important; however an unfettered right to fish will never be agreed to. The government does not want to grant an unfettered right to any First Nations to fish. It's a numbers game, not a species game. The courts will always say – “someone's got to manage the fish” – so probably DFO will always be involved.

One role that the 'Namgis might have in this case if it goes to the Supreme Court is by asking for “intervener status”. The Court has to give you permission to intervene. This would give you a chance to make comments and argument to make sure the best parts of your evidence are preserved, and to make sure that the court understands that the decisions the court make doesn't only affect the nations on the west coast – it also affects you.

Question: What about the Nisga'a treaty? They were given only 5% of the total territory they claimed. Is that the “going rate” of what the government is willing to give up? We have a tiny territory - if we only got 5%, where would we live? (Vancouver)

With a treaty, even if only 5% of a territory was claimed and won, you would have some say in what happened in the other 95%. Involvement in every land use decision that goes on. Anytime the government is going to make a decision, we'd be involved.

What about the rights and benefits of off-reserve band members. Like medical, education, business licenses? (Vancouver)

With a treaty, all recognized 'Namgis members would get the same rights – it is up to you how you determine this designation, but it would be part of your constitution, and all on and off-reserve members would vote on treaty. Block funding would go to the 'Namgis government directly, and you would be responsible for how it is spent. Some funding would still be directed by INAC.

What about capacity building and jobs? (Vancouver)

Capacity building funding would be secured before the treaty is signed. Again it would be your decision as to how you would spend the money allocated to you. The 'Namgis are better situated than many other FN as you have many resources

and skill sets in your community. Honey and Harry are both well regarded researchers in their fields.

Question: Is it worth going to court as an amalgamation of many different tribes in order to strengthen our case and help prove ancestry and continuous occupation? (Vancouver)
It might strengthen a case to do this but then you need to accept less of what you negotiate as you'll have to share the rights or title you might win with the other bands.

Request: *More involvement of our members is very important – I feel like the members' voice is not being heard. It's always the same few who come to meetings. There has been talk of holding an AGM for years now but we don't see one happening – can we have an AGM this year? (Vancouver)*

This is a council decision – there has been talk of council going to the community and hearing from people directly. Our Facebook page is also a way for members to provide input and have conversations about issues.

Concern: *We have a Constitutional Development committee but there has been a lot of turnover recently – this is a concern. (Vancouver)*

Eric is a resource person to that committee – agrees it needs a bit more structure.

Question: Has there been an inventory of the community? We need a measuring stick of all the needs for jobs but also all the skills that exist in our community members. (Vancouver)

Two years ago there was an inventory done of the entire community including skills assessment; we are also ahead of any land and resources opportunities on our territory before they happen.

Question: The money we will get from INAC will be reduced over time when we start to make our own money from our own projects, and we'll have to make up the difference. How can we make sure we won't go broke quickly? (Vancouver)

Fiscal arrangements are an important issue to do your homework on before you go into negotiations. Programs have to meet a certain criteria level to provide services to citizens. Once you have your "own source revenue" 'Namgis will contribute to programs as we can.

'Namgis needs to be able to say we can supplement programs and services to this amount. Right now our accountants do tax planning to structure corporations to avoid taxes in the future. There will be new implementation funding to help 'Namgis take over programs now being delivered by government. Some programs you may want to let the government continue to run for you – but you will decide this during the negotiations.

Question: If we wanted to get out of the Treaty negotiation process, is that an option? What would an exit strategy look like? (Vancouver)

There are various options – one would just be to "down tools" and adopt a watching brief. A disincentive to getting out of the treaty process would be that all the money spent would have to be paid back, and all the land that has been put on the table during negotiations would shift back to the old owners.

When Nanaimo walked away from the negotiating table, the City of Nanaimo bought all the land it could buy, so their original land claim deal is not doable now.

Question: What would happen if we left the treaty process - would the government ask us to pay back the money? (Alert Bay)

If you decided to walk out of treaty and the government decides to call in the loan – I think they would have a hard time collecting. The practical answer is that they probably would pull the money out of the services and funding allocated to the band.

Question: You said that no First Nations have ever won aboriginal title. Does that mean that no First Nations has ever won a Supreme Court decision? (Alert Bay)

No – there are many Supreme Court cases that have been won, just not on the issue of aboriginal title. Some Supreme Court cases have been won on aboriginal rights, and some consultation cases as well as Reserve-based cases and taxation cases

Question: The treaty process is very complicated and it is a huge deal for us. Tell us in plain words – what good is coming out of that treaty – what's good and what's bad? (Alert Bay)

This meeting is about treaty alternatives – there will be many other meetings to talk about treaty and chances to ask questions.

Announcement: (Vancouver)

The BC Assembly of First Nations has just produced a Governance Tool Kit. A hard copy of the tool kits will be made available on line on their web site:

<http://www.bcafn.ca/>

Request: *Can we get as a community a detailed list of what we will get by going to treaty and what we will be giving up? What will health, education, forestry, fishing rights look like? It needs to be in plain language so that we can all understand it.*

(Vancouver)

Request: *Please make the meeting minutes more accessible – we would like them on the web site, and also mailed out as hard copy to the older members. I am not on Facebook, my family has never received any minutes; my aunties don't have a computer.*

(Vancouver)

Question: Who paid those millions of dollars for the court cases? (Victoria)

The First Nations paid for their legal representation – they paid their own money, borrowed some of it, some nations had more than others.

Question: How much do these court cases usually cost? (Victoria)

Hard to say as it depends on how long a title case takes, but generally they range from between \$5 to \$10 million dollars. Most of the costs go to lawyers and researchers. Part of the costs are supporting your band members in testifying as well – one of the things you must be able to prove to the courts is to show a direct lineage and connection to your ancestors. This might seem very obvious, but the government has spent millions on lineage tests, church records and

genealogy records to disprove these claims. They will pick apart people's lineage person by person, to try and prove that you came from another band or reserve. The government knows that the more they can focus the issue on these technical details to divert you and bankrupt you – they will do it.

Question: Would it be better to take a court case of the Kwakwaka'wakw people rather than one band, because it is an amalgamation of all tribal groups? (Victoria)

A lot of time is spent on this question – what is the proper group to bring the case? And those are the kinds of considerations that are made. Recently the Songhees and Esquimalt people brought a case together as part of a larger linguistic group, because they were convinced that the only way to get around what the government was doing was to bring it together. If there is a court case you have to think very carefully about what the best group is to represent your rights. The flip side of this is the more expansive the group is, what is 'Namgis itself going to get out of the case? You'll share in the victory but then need to negotiate with your neighbours to get what you want.

Question: Who pays for these court cases – is it First Nations money? (Victoria)

Yes usually it is. In rare cases a First Nations can apply to a court in advance and say that this case is so important nationally that the other side should be paying, whether we win or lose. This is called applying for “advance cost orders” - they are difficult to get. My colleague won one of those cost orders for Treaty 3 in Ontario, but they are very rare.

Question: Has there been anything positive that has come out of these cases? (Victoria)

Because of consultation law, companies like forest companies now have to talk to you as a First Nation, before they do anything on your territory. These cases have moved things forward. If the Ahousaht decision is upheld, the government will have to look at all fisheries issues differently.

Question: Why would we spend millions of dollars as opposed to taking the benefits of other First Nations cases out in courts? (Victoria)

The government has a “litigator-negotiate” policy, and it varies from one nation to the next. If the other First Nations win, their findings might be able to be applied to your cases, but there is no guarantee of that. Bits and pieces of other court cases may help other First Nations, but they still must negotiate their own issues.

Question: It seems that for the outcomes, treaty is a better way to go. The costs are still huge - What about if we did nothing however? (Victoria)

The big difference in Treaty and litigation is that treaty is a huge consultation negotiation over many issues. What you need to ask yourself is “Out of the issues that are critical to you, is the government in negotiation now?” Are they dealing with you on these issues? You are never going to get everything you ask for. A treaty is not perfect – it is a negotiation, but there are no limitations to what you can bring to the table in Treaty.

Question: I am worried about putting trust in the government and in politicians. I have heard that even though a band might have a treaty negotiated, they are still battling the

government for delivery of the things they won in the treaty. Is there a way to put in the AIP a proviso, a time frame around when the government must deliver on its side of the bargain? (Victoria)

Question: There was a change in the Canadian Human Rights Charter last week. Does it have any bearing on any of this? How the courts treat us is based on racism. Is there any way we can bring in the Human Rights Charter to protect us? (Victoria)

The Act has opened up more ways for First Nations to use human rights arguments and legislation. However it cuts both ways....on the one hand there is more protection built in, on the other hand, it also opens up First Nations themselves to more kinds of claims. That can be good or bad but it will have a bearing on more people bringing up human rights claims. Some of these can change a lot of the traditional ways of doing things, some of the traditions may be protected in the Charter – but that is all open to question.

Question: In the UN Declaration of Aboriginal People – some of the rights that you are taking about are not in our treaty. What scares me about the human rights issue is that it will make us the same as white people – we are no different under the act. Under the ward-ship of the Canadian government we are protected, and one of those protections is the tax exemption. Human rights issues that are not being followed – under the treaty, we'll lose that. I think that this is part of the assimilation process that the government is using. The AFN of Canada have a resolution for all the Treaty tables to reject fee simple. You have many layers of ownership, but if you have aboriginal title, you have one owner and that's us. If we agree to fee simple we are going to become more assimilated. (Victoria)

In the negotiations, it is important to get the rights in the treaty solid first, and we have been successful in that – the right to go hunting in your territory, agreements with other First Nations to share resources. These are protected in Treaty. We have been negotiating commercial fisheries rights also, and the self government rights also. Fishing or hunting as you did in the past, they don't expect us to use a canoe or a spear, it is today's modern methods.

Question: What about family ties to other First Nations territories? If we have agreements with other First Nations? (Victoria)

These agreements will also be protected in the treaty – both written and verbal agreements.

Question: You have talked about the negative aspects of litigation - What are some negative things about Treaty? What should we be watching out for? (Victoria)

The language in your constitution and treaty should be as clear and precise as possible. If there is any way that something can be interpreted differently, it will be. The language you write today needs to be clearly understood in the future as well. For example, there have been changes in how the term "barter" is defined. There will be pages of definitions in your treaty.

All of the legal protection around obligation should be in the constitution. Don't trust the government – that is a good starting point!

Each sentence and clause that is of importance should be reviewed and really clarified – who has to do what, how and when it will happen. Think of all the things in the past where uncertainties have worked against you and ensure that

these are covered in the Treaty. Also – look at past Treaties and make sure the positive points and elements they have are included in yours.

Question: How long does this process generally take? I am old – will I see anything in my lifetime? (Victoria)

When the BC Treaty Commission began it had no idea that treaties would take this long. The 'Namgis treaty process began in 1994. It has taken governments a long time to settle on key issues, to provide a basis for settlement.

The early days were known as “the ghetto model” – take this, go off and don't bug us again. Now there is a realization that there needs to be more consultation and co-management, but this has happened only in the last few years.

Question: We all need as much information as possible to make an informed decision. This is a very stressful decision for us to consider. I have heard that the Nisga'a have had a lot of trouble with their treaty implementation. Can we get someone from the Nisga'a and someone from West Bank to come and speak to us and help us understand their challenges and experiences? (Victoria)

This is something to consider – a good idea.

Question: We need clear and specific answers to those questions. I still feel so lost on this whole Treaty thing. Is it possible to get a written summary of all these questions and all the main points in the Treaty? I looked on the web site – there is nothing on the web site about minutes. (Victoria)

Minutes will be taken of all the meetings, and posted or mailed out. Past minutes are on the Facebook page, we are working on the web site as well as a place to post minutes.

Suggestion: *How can we get more people out to these meetings? The young people – and even the elders? The Native Friendship Centre here provides transportation for elders when they have events – maybe this is something we need to look at for our meetings, pay cab fare for elders to attend. (Victoria)*

We did try one time to organize a bus up to Alert Bay for an AGM, but only four people showed up...

Question: In the treaty process, we are still negotiating with INAC, even after Treaty – we can't get away from them. How can we be sure that the funding we receive doesn't go down? What if they go against part of the treaty - what is our recourse? (Victoria)

There are provisions that if you get into disputes, there are resolutions that should kick in. There is no government that will guarantee that funding will not drop. However, if they breach the treaty, there are legal consequences and dispute resolution provisions also.

Question: It is not appealing at all to accept these huge legal risks in going to treaty or to court – it is also very scary. If we are setting new ground, how can we guarantee that the treaty provisions will be strong enough to hold up in court later on? Some other Nations have chosen to stay within the Indian Act, as they eventually want to negotiate Nation to Nation with Canada. If we choose to stay with the Act, is there leeway to make some change, like change the structure of our Council? (Victoria)

The Indian Act evolves very slowly. Right now, block funding gives First Nations more leeway to spend funds on their own priorities. Also, industry is now having to deal directly with First Nations, so these are positive changes. However, there are no certainties that more change will come and that it will be positive.

Question: In the negotiations we always see the words “ negotiating in good faith”. This is hopeful wording, yet I see nothing done about when the government does not negotiate in good faith. If BC refuses to come to the table, or takes things off the table, that is not good faith. Has anyone challenged this? (Victoria)

The government is responsible for the long time that this is all taking. We fought for four years to get a mandate to finish the negotiations, then they take things off the table. The Treaty Commission is recognizing this now. We need to use the existing system to our advantage.

Question: We know that the funding will go down with or without Treaty – should we overshoot to get closer to what we want? (Victoria)

Yes – however, when you settle for something, you need to ask yourselves, are you settling for more than what you had when you started? Are you settling for better?

Question: We have a small reserve as compared to many other bands – other bands were given more acres per person. Are there different rules that apply to us on the coast? (Victoria)

The theory on the prairies when the reserves were set up is that people were agricultural. Also the theory was that if you gave people larger reserves and forced people to stay on them, they wouldn't use other resources outside the territory. On the coast, the theory was that you didn't need large reserves because of the ocean and river resources. You would think then that these smaller reserves should go along with bigger fishing rights. This has been argued in the courts but has been ignored.

Here you can't use that bands go in the prairie treaties. The argument should be that since you got smaller reserves and limited fishing rights, you should get more now. However there is no place to argue this outside of the treaty process, and no other way to expand your land base.

What about capacity building and jobs? Educating our people is so important – I don't see any of our people doing our own negotiations or getting our businesses going or setting up ways to borrow money from each other. (Victoria)

There has been quite a bit of capacity building already. Capacity building funding would be secured before the treaty is signed. Again it would be your decision as to how you would spend the money allocated to you.

Question: The money we will get from INAC will be reduced over time when we start to make our own money from our own projects, and we'll have to make up the difference. How can we make sure we won't go broke quickly? (Victoria)

Fiscal arrangements are an important issue to do your homework on before you go into negotiations. Programs have to meet a certain criteria level to provide

services to citizens. Once you have your “own source revenue” ‘Namgis will contribute to programs as we can.

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Comment: *I have been to many meetings over the past ten years. We have limited funding and resources on our reserve – we have a small land base, we can’t lease our land to big companies like in Vancouver or Victoria. I don’t think the other alternatives to treaty that you have presented are the way to go for us. To me, when I look at treaty, I see all of our lands, active logging, squatters, and what is happening to it? We need to be ready, to manage our own health, housing and resources in our valley, and our watershed, which is the most important thing. We need to manage these things ourselves. In the past ten years this is what I have come to understand. I think we need to work together, we might not all agree but we need to be respectful of one another, but we need to work towards a common goal and with each other. (Alert Bay)*

You mentioned squatters out at Woss – the best way to assert and document your rights is to go out and use them – get out on the traditional lands – the better it is for asserting your rights down the road.

Question: *Thank you for coming and helping us understand this. Can you give us an update right now on where we are in the Treaty process? What is being negotiated, what sections are being negotiated?*

Another question I have and have had from the beginning of the treaty process is how are we addressing the social impacts of our history, our changes, and is there sections that really take that on? (Alert Bay)

A main thing we have been working on is communication issues – we are working hard at this. We are focused on getting to an agreement in principle. Some of our members have asked about what alternatives are out there and so we had these gentlemen present them tonight.

What I have heard tonight is the same thing that I have heard all over the country – that court cases just lead to more negotiations and expense and don’t really help the community.

I was just at a meeting in Niagara Falls about economic development in the territories. Elijah Harper was at one of our caucuses, he talked about court cases not being worth the paper they are printed on, as they are not protected by

legislation. The only legislation that I see that protects rights is the Nisg'a, which is protected under their constitution.

Comment: *Litigation seems crazy – it is the last resort and we should take it off the table. – we need to look at all the economic opportunities in our territory. I have spoken with business people in Tofino and Victoria and they want to come and build here – we have this pristine wilderness with so many resources. In Tofino, they are building a \$30 million dollar lodge with the Ahousadht people, they did not put up a dime but they are partners in the development and they'll be working there as well. We should be doing this in our valley – we have so many lakes and valleys – inviting people in to build resorts. The provincial government did an economic study of our valley – they know the economic benefits that are here. That's why they want 80% of our and – we should have at least a 50 – 50 partnership. Revenue sharing, co-management, be partners with everyone in the valley with us in control. (Alert Bay)*

Comment: *The social issues are huge and need to be talked about – there was a stabbing in our community last night – this needs to be talked about and dealt with. We need to deal with this and move forward as a people, stop re-hashing the same old stuff at every meeting. The social issues are killing our people. But it is not just the chief in council – it is all of us – we are all adults, we have families, how are we helping? We need to consider ways to all help. Get people out on the territory, fishing our salmon, out on the land – as families – we are doing a ceremonial fisheries in the next few weeks, everyone should come out. (Alert Bay)*

Comment: *We've got to get on with this, everyone needs to be part of this, we all need to take responsibility for this whole treaty process, we have talked about going door-to-door – explaining to families what treaty is and what it will mean to us all. Otherwise – we will keep coming back to this – a few of the same people at the meetings all the time with no real movement forward. If we said no to treaty tomorrow – which would probably be the case, then where are we as a people? Where would we be? I think we need to take this smaller and go door to door – face to face with people, that will be the only way to reach everyone.*

Facebook – I see that as the biggest, blackest mark on our people today, it's a place where people can complain and criticize others and they can't even defend themselves because it's not face to face. Technology like that is the worst thing for our people. We need to celebrate all the good things we have, the Atw'akwas, the boardwalks, our heritage. Those are the things I want to celebrate, not just trying to find something wrong all the time. I say this with the utmost respect, and thank you all for being here tonight. (Alert Bay)