

**'Namgis First Nations  
Options to Treaty Making  
Tuesday, June 28, 2011**

**Meeting Minutes**

**Victoria: Leonardo da Vinci Centre, 195 Bay Street**

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

5:00 PM Arrivals, Sign in, Dinner Served

6:00 PM Welcome / Greetings, Opening Prayer  
Review of Agenda and Meeting Guidelines  
Handout presentation summaries to all; Introduction of guest presenters

6:15 PM **Treaty and Alternatives to Treaty Presentation**  
Eric Woodhouse

Introduction to presentation:

**There are 4 available options to Treaty that I'll talk about:**

1. Staying with the Status Quo (remaining under the Indian Act)
2. 'Namgis/Canada Bilateral Initiatives: deals with the federal govt.
3. 'Namgis/Province of British Columbia Bilateral Initiatives: deals with the province.
4. Litigation - Litigation breaks down into two types:
  - a) Sectoral/ Strategic over a specific issue
  - b) Comprehensive Rights and Title Claim

**1. The Status Quo (Indian Act)**

Under the Indian Act, the 'Namgis reserve lands are owned by the Crown and kept in trusteeship for you. The Crown is the owner of the land and has ultimate legal authority. The 'Namgis band members are seen as "wards of the Crown". There are restrictions on the use and development of these lands, for example, getting mortgage financing, having tenure of lands.

Band financial affairs are largely governed by I.N.A.C. programs and priorities – the money you receive is limited in how and where it is spent, giving the federal government some control over your lives and how you spend allocated money.

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 Ministry of Indian Affairs.

The best thing about staying with the Indian Act is that it's familiar - your administrators have learned 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.

Staying with the status quo doesn't mean that things will always stay the same - currently there are some changes happening with the Indian Act - the status quo is being reversed to allow more local control over spending - so it is evolving to some extent.

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

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?*

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**

The second option to Treaty is making agreements between a band and the federal government. Something to consider here is that these agreements are not constitutionally protected; they may be amended or terminated by successive governments or legislation.

### ***a) Self government***

This includes some form of delegated authority through legislation that allows First Nations to take on certain authorities such as development control on their land, or creating tenures on the land. Two examples are the West Bank and Sechelt First Nations. There is some delegated authority from the Minister.

However, they are only limited to reserve lands. There is not a lot of desire in the federal government to develop special legislation for bands, and they can be changed or taken back at any time – it is not constitutionally protected. Under a treaty, this authority would be protected.

***b) First Nations Land Management Act***

This is an act of federal Parliament, and again, applies only to Reserve lands. Again, it is a form of delegated authority and allows a band to enact a First Nation Land Code to manage their own lands. The Code effectively replaces corresponding provisions in the Indian Act.

It can be coupled with First Nation administered property tax regime and Indian Act section 83 by-law, or the First Nation Fiscal and Statistical Management Act, meaning the band can take on these responsibilities.

*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.*

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.

**3. 'Namgis / Province of British Columbia Bilateral Initiatives**

The third option is making agreements between a First Nations and the province. In the last few years there have been some of these established in BC, and they are a mixed bag. They are very politically driven – if the province wants something from you, for example, oil and gas, they'll talk to you about it – they want to get First Nations on board to get at these resources.

***a) Strategic engagement agreements/ reconciliation agreements***

Musqueam, Haida, Central Coast and North East BC are precedents in BC. What many of them do is set out a formal process where the Crown meets its obligations to consult and accommodate. Sometimes its on a specific sector like forestry, and sometimes its more comprehensive and crosses a number of sectors. No two of them look exactly alike.

These agreements are also driven by political considerations, and it is hard to know how they will evolve. It is still early days – they came out of recent court cases when Gordon Campbell was Premier – it remains to be seen with the change in leadership what the Clark government does.

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

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.

#### ***b) Other sectoral agreements***

Incremental Treaty Agreements (ITA) are an early delivery of some treaty benefits in anticipation of a full treaty happening later; for example, getting access to some lands. There are not many of these. For example, a First Nation wanted to get access to a parcel of land that was available at the time. You need to be fairly well advanced in the Treaty process to negotiate one.

Theoretically you could negotiate anything that falls under a treaty with an ITA, however, they come at a high price: the band must agree to not contest any activities of the Crown by way of asserting their rights and title. So there is definitely a strong consideration flowing to government for this agreement.

The BC government has been talking to the 'Namgis about a potential ITA at AIP around the Tree Farm License 37 which encompasses most of your territory. Western Forest Products have been negotiating with us around their forest practices and they have agreed mostly to adopt our forest policies on their activity and using our planning tools - this a big step, as they didn't give us the time of day for a long time.

## **4. Litigation as an Alternative to Treaty**

### **Presentation by Robert C. Freedman**

The fourth option to discuss is litigation. My background is I come at this from two perspectives – I have worked with First Nations and litigation for 18 years, plus I am also one of the treaty negotiators for the Ditidaht and Pacheedaht First Nations, so I wear the treaty hat as well.

There are three things I want to talk about today:

- 1) What would it look like if you were to go to court to try and win aboriginal rights and title, and what the tests are that white legal system requires;
- 2) Some of the major litigation cases and what the First Nations have and have not won by spending millions of dollars in court; and

3) The Ahousaht case around water and fisheries, as you are a fishing people as well.

I also want to review whether this kind of litigation is a reasonable alternative to the treaty process. Litigation essentially means going to court and legally proving the rights you are claiming.

*Some Definitions in the Canadian Legal System* (versus the aboriginal perspective)

*Aboriginal title* is a right (exclusive or non-exclusive) to use lands for a variety of purposes including the carrying out of traditional activities, modern forms of those activities, and for economic purposes.

The big difference between aboriginal rights and title is that if a First Nation could ever get a court to say they had aboriginal title, it applies throughout your traditional territory. It contains both an economic aspect and a traditional use aspect.

*Aboriginal rights* are site-specific rights to carry on traditional activities or modern forms of those activities. Rights differ from title in the sense that rights are site-specific – you might be able to prove a right to hunt or fish in a specific area - whereas title can be practiced in broader areas of the Traditional Territory.

**There are three general steps if you go to court:**

First - the First Nation has to prove that they have the right they are claiming to the white legal system in court, usually to a crabby older white judge. The courts have set some tests around this.

Next, the second stage is called the “infringement stage” – in plain English, this means that after proving that they have a specific right, the First Nation has to prove that the government has infringed on that right. This is probably the easiest part of the case to prove – you well know all the things the government has done that have infringed on your rights.

So – the first two steps the First Nations have to do – the third one the government has to do.

The third stage - called the “justification stage - is the government tries to justify all the stuff they’ve done to you. For example, in the Delgamuukw case, there is a few ways that the government argued for justifying what they did – such as conservation for limiting fishing rights.

The government has to show that they properly consulted with you and that they gave priority to your rights over others. If they can show that they have consulted with you or given priority to your rights then the infringement may be seen as justified. There is more litigation around consultation right now than anything, because the government pretends that they consult but they don’t do a very good job.

## **I. Proving Aboriginal Title**

The main aspect of litigation to consider is that essentially your culture and traditions get put on trial, not the governments' bad behavior. Having band members, elders, youth, testify in court can be a brutal process, and it can get very nasty. The government is trying to tear down your rights, and usually you are presenting your case and your culture to an older white crabby judge who doesn't understand your culture and doesn't really care about it.

The other thing to understand is that even if you got a judge to grant you aboriginal title, that same court system can decide that certain uses of the land are contrary to aboriginal title, according to a judge who does not understand your title. It is another way of the courts saying that even if you can prove title, we are going to keep shrinking it to limit what you can actually do.

### **Establishing 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.

This really has 5 parts.

1. The First Nation must prove that it is a descendant of an organized society that is the right bearer. You must be able to show a direct lineage and connection to your ancestors.
2. The First Nation must prove that it occupied the land claimed as Aboriginal title land at the date of sovereignty [1846]. By "occupation", the courts mean "physical occupation," such as village sites.
3. The First Nation must prove that its occupation of the land was exclusive or shared exclusive in 1846. That is, the First Nation must prove that it *effectively controlled* the land and that the First Nation could have excluded any outsider from its lands if it had wanted to. It is also possible to have shared exclusive title. Non-exclusive occupation may establish aboriginal rights that fall "short of title".
4. If the First Nation is relying on current occupation of an area to prove that it has Aboriginal title, the First Nation must prove that it continually occupied the land between 1846 and today.
5. The title must be unextinguished. The Crown may argue that aboriginal title was extinguished prior to 1982. An example is non-continuous occupation or lack of use of lands.

### **Proving Aboriginal Title - Evidence**

Very specific and detailed evidence is needed to establish aboriginal title rather than aboriginal rights. In the Tsilhqot'in case, the First Nation spent millions of

dollars and gathered and presented evidence from archaeologists, anthropologists, hydrologists, wildlife ecologist, ethnobotanist, historical geographers, biologist, legal historians, historians, forester, economist, linguist, ecological community modeler, elders, and community members, among others. Plus putting chiefs and community members on the stand.

### **The Content of Aboriginal Title**

Despite the Tsilhqot'in, the Delgamuukw and the Ahousaht cases, NO group has yet established Aboriginal title in the courts, so its' meaning in practice is still somewhat speculative. So – no First Nation, despite years of trying and millions of dollars has yet gotten a court to agree they have title. The real reason isn't that the First Nation doesn't have the evidence, its that the courts are so scared of granting title that they find every way possible to get around it.

There are **2 limitations** on the content of Aboriginal title, *even if it is proven*:

1. Aboriginal title is subject to an ultimate limitation against using the land in a way that is irreconcilable with the nature of First Nation's attachment to the land. Who is deciding what is "irreconcilable? It is not the First Nation – it is white courts.

2. The scope of Aboriginal title also depends on how easily the Crown can justifiably infringe the title. The Supreme Court of Canada has indicated that the range of ways the *Crown can limit uses* of Aboriginal title lands is quite broad, including such objectives as the development of agriculture, forestry, mining, and hydroelectric power, and the general economic development of the interior of British Columbia. This is another way of the court saying that even if you could prove title, we'll shrink it as much as possible.

So, even if you get a declaration of title, someone else can limit it, such as the federal government. A declaration of title limits what you can do with the land, whereas with a treaty, you choose what you do with the lands and water in your territory.

## **II. Proving Aboriginal Rights**

To be an aboriginal right, what is being asserted must be a part of an identifiable practice, custom or tradition that was integral to the distinctive culture of the Aboriginal claimant at the date of contact with Europeans. [Vanderpeet]

This has 5 parts.

1. The First Nation must prove that it is a descendant of an organized society that is the right bearer. As noted above, this is regularly challenged by British Columbia and Canada.

2. The First Nation must prove that the ancestral practice, custom or tradition claimed as the right is integral to the distinctive culture of the group. This

requires the First Nation to prove that the practice is of “central significance” to its culture [Sappier]. Many claims for an aboriginal right to control resources have failed on this criteria. [Pamajewon]

3. The First Nation must prove that the practice, custom or tradition existed prior to contact with Europeans. For the Ahousaht on Vancouver Island, this was held to be 1793.
4. The First Nation must prove continuity between the present practice and the pre-contact practice. The practice can “logically evolve” over time, but “the activity must be essentially the same” as the pre-contact activity.
5. The right must be unextinguished.

### **The Content of Aboriginal Rights**

The content of the right depends on how it is characterized by the courts. The facts of each case will determine the nature and breadth of the right, making evidence of the pre-contact practice very important. [Sappier]  
How a court characterizes the Aboriginal right can result in a range of limitations, including quantity limitations (commercial rights) [Gladstone] and geographic limitations. [Mitchell v. MNR]

The content of the right also depends on whether the Crown has justifiably infringed the right. Determining whether an infringement is justified is complex and can require a second trial. This involves looking at whether government interference caused undue hardship, whether allocation of the resource accorded necessary priority, whether the interference minimally impaired the right, among other factors.

A terrible example of how these rights decisions can get overturned is the Mike Mitchell case from the 1990's in Quebec: The Mohawk Nation argued that they had a right to trade certain goods across the Canada / U.S. 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 actually east-west trade. And so she reversed the decision and the case was thrown out. Where something big is at stake, the government is afraid of any big changes, and so they'll narrow the decisions or find something to refute it.

### **Representative Aboriginal Rights Cases**

- In *Vanderpeet* and in *NTC Smokehouse*, the First Nations proved a limited right to fish for subsistence, social and ceremonial purposes, but failed to prove that they had a commercial right to fish.

- In *Côté*, the First Nation proved an aboriginal right to fish for food, social and ceremonial purposes within a specific area, but Court held that the Crown's use of controlled zones did not infringe the right.
- In *Sappier*, the First Nations proved they have a right "to harvest wood for domestic uses as a member of the aboriginal community" but not to harvest wood for other purposes.
- In *Lax Kw'alaams*, the First Nation proved it has a right to trade one species of fish, but it did not establish a right to trade fish generally.

First Nations have had some success in establishing some aboriginal rights to fish for food, social and ceremonial purposes. In many of these cases, the courts have ordered a new trial on infringement to allow the parties to negotiate the quantity and location issues. [e.g. Gladstone, Ahousaht]

To date, no aboriginal group has succeeded in proving full-scale commercial fishing rights. Where commercial rights are proven, they are species specific. [Gladstone,]

Some new cases regarding water rights are working their way through the Alberta courts, but there have been no decisions yet. While basic principles suggest that Aboriginal title to water exists, the British Columbia Supreme Court recently expressed doubt that Aboriginal title to submerged lands is legally tenable [Ahousaht].

The "occupation" (proof that they occupied the land claimed at the date of sovereignty: 1846) and "exclusivity" (proving that its occupation of the land was exclusive in 1846) branches of the test for Aboriginal title would make proving title to water difficult.

*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?*

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.

Other examples: The Sappier case won the right to use certain forest products for domestic use, not for commercial. The government takes the position that each case applies to the unique facts of the First Nation bringing the case.

The Huu-ay-aht case: They challenged forestry decisions on the early forest range agreements, using the argument that you can't apply a uniform formula across the province.

You never know whether a case will have wider appeal or not.

A nation from Ontario went to the Supreme Court of Canada for the general right to self-government, the courts said no – it's a specific right to govern in relation to something. Every First Nation in Canada now bears the burden of that case.

*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.*

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.

Also, the Gladstone case is another example; 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.

## **The Ahousaht Decision**

I'll talk about the Ahousaht case now, as there are questions coming up and it is an important case.

Five of 14 *Nuu-chah-nulth-aht* First Nations took an aboriginal fishing rights case to trial, as well as a title argument to court – title to water. There is a view out there that they have won an unfettered right to fish, but they haven't. They won from the court a right to harvest fisheries resources within 9 miles of shore, and to sell various quantities of fish. The courts said that the right is more than a right to barter but less than a right to sell fish commercially.

They also argued successfully that their rights had been infringed by the government, as the government did not take First Nations rights into consideration in their management decisions. These are two big things to win. That case went to the BC Court of Appeal, which upheld the first decision – they said the First Nation had won parts one and two, and now the government can try and justify these infringements – the third phase of the litigation process.

The court gave the government and the First Nations two years to work out a deal, and the Court of Appeal extended it.

So – as of now, they have no more fishing rights than you do.

They do have leverage at the negotiation table, but the Crown will argue about each species they bring to the table. The Crown will raise issues like conservation concerns for each fish species that is brought to the table. If they can't negotiate a solution, there will be this justification trial, costing more time and money, and it will probably become a court-imposed negotiation around how much of every species can the First Nations take and how much can the government manage.

However, here you have a court case that cost millions and millions of dollars, was years in the making, and one of the key questions that the First Nations wanted the court to decide on – the water title issue – got knocked off the table – frankly because it was too hard to go there for the Court.

*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?*

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.

In closing, I'll just say that these cases are hard to prove, they are very costly, and there are a lot of risks to them, and while there has been progress, and the legal situation is way better than it was decades ago, it is still an expensive and risky route to go. Whether you choose to go to court is based on – do you have any other options – if the government is pushing you into a corner on a specific narrow issue, sometimes litigation is the only way to go.

*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?*

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 FN were narrow cases based on specifics.

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

The Ditidaht and Pacheedaht - 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. Even if you win with litigation, courts will award what is called "costs": 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 even if you do win.

### **Claims of Aboriginal Rights in Water**

Water title is very hard to deal with: There is no precedent in Canada that addresses the existence of aboriginal title to water or submerged lands – as you can imagine, it is hard enough for the courts to deal with land claims – water is something they don't want to go near. The Ahousaht case comes the closest.

### **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 the first title case, and set out the rules that were to be used to prove title. This was good but it didn't help the very people who had spent so much money: over \$14 million dollars were spent by the First Nations. The other victory for everyone in this case was that the court rejected the argument that all the government rules over the decades since first contact extinguished aboriginal rights. It was a moral victory for the First Nations, a bit of a legal victory, but a very expensive process to not get what they came to court for. It was sent back for a second trial.

In the Tsilhqot'in case, after 300 days of trial, wonderful evidence, and years of preparation, millions of dollars were spent, and the courts went further than Delgamuukw and said they had proven title to some parts of their territory, but based on some technical arguments did not grant the title. The court provided extensive – but non-binding – reasons in order to facilitate negotiations. This is another way of saying that even if you have the right case, the courts can find ways of avoiding it.

*Question: Who paid those millions of dollars?*

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?*

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?*

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?*

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?*

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?*

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?*

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?*

*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?*

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.

*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 wardship 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.*

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?*

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?*

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?*

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.

### **Other Factors to Consider**

The Crown/Government puts your rights, culture, history and people on trial when you go to court. They will use any tactics they can to drag out cases and make your costs higher. White judges essentially will be deciding your rights and your culture in court.

Expense: Title cases can cost millions of dollars; rights cases hundreds of thousands to low millions of dollars, and in the end, be in no better position that you're in at Treaty, because courts like negotiations – so even if you win, they will do things like restrict the right for two years to work it out.

Litigation is extremely time-consuming – cases take years to bring to court, and with appeals can go on for a decade or more. The Crown/Government will use any tactics they can to drag out cases - they use court procedure and rules to fight at every step of the litigation process, raising costs higher.

A win in court does not require the Crown/ Government to reimburse all costs paid by the First Nation.

Judges are not experts in these issues: “courts have sufficient difficulty determining what happened a few months or years ago, never mind a few centuries ago” [Ahousaht]

The law is always changing in aboriginal rights and title cases, and can be a moving target. Decisions usually push for negotiation and on far more narrow issues than in treaty process.

Courts are reluctant to upset the status quo, and are reluctant to impose actual concrete solutions.

Litigation is adversarial and often has no meaningful outcome. Litigation is normally used where no alternatives exist, and can sometimes increase leverage for negotiations, but litigation makes the Crown less likely to be reasonable.

## **Summary and Discussion**

There are a limited number of options to treaty. Right now, the Treaty process has the most power in the Canadian system to shape your own destiny. It provides you with your own constitution and power on your lands.

### **Questions:**

*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?*

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.*

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.*

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?*

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?*

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?*

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?*

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?*

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.*

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?*

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 you 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.

***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.*

***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 so they never know what is happening.*

Meeting adjourned at 9:10 PM